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CENTRAL REPORTER,

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VOLUME VII.

ALL CASES DETERMINED

IN THE

COURTS OF LAST RESORT,

AS FOLLOWS:

NEW YORK, COURT OF APPEALS.
NEW JERSEY, SUPREME COURT, COURT OF ERRORS AND APPEALS, COURT OF CHANCERY AND PREROGATIVE COURT.
PENNSYLVANIA, SUPREME COURT.
DELAWARE, SUPERIOR COURT, COURT OF ERRORS AND APPEALS AND COURT OF CHANCERY.
MARYLAND, COURT OF APPEALS.
DISTRICT OF COLUMBIA, SUPREME COURT.

WITH NOTES, REFERENCE AND CITATION TABLES, ETC.

EDMUND H. SMITH,
EDITOR.

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James Monaghan and Frederick M. Leonard, of the Pennsylvania Bar;

Franklin H. Mackey, Official Reporter of the Supreme Court of the District of Columbia;

Stephen K. Williams and Peter Kemper, Jr., of the Company's home office.

Charles G. Schoener, of the home office, has greatly assisted in making the index.

E H. S.

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VOLUME VII.

Composition of the Courts reported, during the period covered by this volume.

NEW YORK—Court of Appeals.

Chief Judge,
Hon. William C. Ruger.

Associate Judges.

Hon. Charles Andrews,
Hon. Charles A. Rapallo,
Hon. Robert Earl,
Hon. George F. Danforth,
Hon. Francis M. Finch,
Hon. Rufus W. Peckham.

NEW JERSEY.

Court of Errors and Appeals, Supreme Court, Court of Chancery, and Prerogative Court,

Chancellor,
Hon. Theodore Runyon.

Vice Chancellors,
Hon. Abraham V. Van Fleet, Hon. John T. Bird.

Chief Justice Supreme Court,
Hon. Mercer Beasley.

Associate Justices Supreme Court,

Hon. David A. Depue,
Hon. Edward W. Scudder,
Hon. Jonathan Dixon,
Hon. William J. Magie,
Hon. Bennett Van Syckel,
Hon. Manning M. Knapp,
Hon. Alfred Reed,
Hon. Joel Parker.

THE COURT OF ERRORS AND APPEALS is composed of The Chancellor, The Chief Justice and Associate Justices of the Supreme Court, and the following Judges Specially Appointed.

MARYLAND—Court of Appeals.

Chief Judge,
Hon. Richard Henry Alvey.

Associate Judges,

Hon. Levin T. H. Irving,
Hon. John M. Robinson,
Hon. George Yellott,
Hon. Oliver Miller,
Hon. John Ritchie,
Hon. Frederick Stone,
Hon. William Shepard Bryan.

DISTRICT OF COLUMBIA—Supreme Court.

Chief Justices,
Hon. David K. Cartter,§ Hon. Edward F. Bingham.‡

Associate Justices,

Hon. Arthur MacArthur,**
Hon. Walter S. Cox,
Hon. Alexander B. Hagner,
Hon. Charles P. James,
Hon. Martin V. Montgomery.††

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* Died March 1, 1887.
† Appointed March 26, 1887.
§ Died April 16, 1887.
‡ Appointed April 21, 1887.
** Resigned March, 1887.
†† Appointed April 1, 1887.

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CENTRAL REPORTER.

(Each case shows its date of decision.)

NEW YORK.

COURT OF APPEALS.

John HUTKOFF, *Respt.*,
v.
William J. DEMOREST *et al.*, *Appts.*
Emily R. CALDWELL *et al.*, *Respts.*,
v.
Franklin J. WALL, *Appt.*
Gotthelf GREINER, *Respt.*,
v.
Jettel H. HAMBURGER, *Appt.*

1. Section 22 of article 6 of the Constitution, giving the Legislature power to authorize **appeals from courts of record** to be taken **directly to the Court of Appeals,** was intended to embrace only courts of record which were established in cities at the time of the adoption of article 6, to wit, in December, 1869.
2. The **superior courts** established **in cities** were enumerated in the Constitution, and their power and jurisdiction made permanent; and no authority was given to establish additional ones, although the Legislature was authorized to establish inferior local courts.
3. Section 22 of article 6 of the Constitution, in speaking of courts of record established in cities, did not intend to include the **Marine Court of** the **City of New York.**

(Decided January 18, 1887.)

MOTIONS by appellants, for reargument of motions to dismiss appeals from judgments of the General Term of the City Court of New York. *Denied.*

The opinion on granting the original motion to dismiss the appeals is reported in 4 Central Reporter, 773.

The questions raised appear from the opinion.

Mr. **W. S. Rose** with *Mr.* **W. T. Birdsall,** for the motion.

Mr. **Henry Wehle** with *Mr.* **Charles Goldzier,** *contra.*

Rapallo, *J.*, delivered the opinion of the court:

On the argument of the motions to 'dismiss the appeals in these cases no reference was made to section 22 of article 6 of the Constitution; and a motion for a reargument is now made, upon the ground that the omission was owing to excusable inadvertence of counsel, and that the court was thereby misled.

Section 22 of article 6 provides that "The Legislature may authorize the judgments, decrees and decisions of any court of record of original civil jurisdiction, established in a city, to be removed for review, directly into the court of appeals."

This section not having been referred to on the argument was not noticed in the opinion then delivered. As it now appears to be relied upon by the counsel for the appellants, we have examined the question whether it affects the present case, and have come to the conclusion that it does not require us to change our decision.

It will be observed that section 22 applies only to courts of record, and, in our judgment, was intended to embrace only courts of record which were established in cities at the time of the adoption of article 6, viz.: in December, 1869.

There were at that time in existence, in addition to the Court of Common Pleas and Superior Court of the City of New York, several other local courts established in cities, viz.: the Superior Court of the City of Buffalo, the City Court of Brooklyn, which were courts of record; also the Marine Court of the City of New York, the Mayors' Courts of cities, the Recorders' Courts of cities, the District Courts of the City of New York, the Justices' Courts of cities, etc.

The Constitution evidently did not contemplate the establishment by the Legislature of other superior city courts. By section 19 of article 6 the Legislature was authorized to establish *inferior* local courts; but the superior courts established in cities were enumerated in the Constitution, and their powers and jurisdiction made permanent; but no authority was given to establish additional superior courts in cities; and in *Landers* v. *Staten Island R. R. Co.* 53 N. Y. 450, we held that the Legislature had no power to extend the jurisdiction of the City Court of Brooklyn, so as to deprive it of its local character.

Section 22 of article 6 was, in our judgment, intended to authorize appeals direct to the court of appeals from the courts of record in existence at the time of the adoption of the article, whose judgments were at that time reviewable, in the first instance, in the Supreme Court.

The Marine Court of the City of New York was a court of great importance, of ancient origin, and transacting a very large amount of business. Its jurisdiction had been from time to time increased so that although, except in special cases, it was originally limited to $50, it had by degrees grown so as to embrace cases involving $500; yet it was not a court of record, in the legal sense of the term, until 1872.

The power to review its judgments, in the first instance, was vested by law in the Court of Common Pleas; and, as was shown in the first opinion in this case, that power of review of the Court of Common Pleas was, by the Constitution, made permanent. By limiting the power of the Legislature to authorize appeals directly to this court, to appeals from judgments of courts of record, we think that it was the intention of section 22 of article 6 to exclude the Marine Court from its operation.

As there is some color for the claim that the Marine Court was a court of record before the passage of the Act of 1872, it is necessary, for the purpose of determining that question, to advert briefly to its history.

It is not necessary for the purposes of this case to go further back than the Revised Laws of 1813. Chapter 86 of those laws entitled "An Act to Reduce Several Laws Relating Particularly to the City of New York into One Act"(§ 105), authorized the person administering the government of this State, for the time being, by and with the advice and consent of the council of appointment, from time to time to appoint and commission three proper and discreet persons to be known by the name of Justices of the Justices' Court in and for the City and County of New York.

Section 106 enacted that said three justices, or any two of them, should hold a court in the manner therein prescribed, to be known as the Justices' Court of the City of New York. Jurisdiction was conferred upon such court to try and determine actions where the amount in controversy should exceed $25, and should not exceed $50; also all actions for seamen's wages, or by owners against seamen for breach of contracts for services, notwithstanding that the damages should exceed $50; also actions for marine assaults, although the damages should exceed $50; and for the purpose of determining all such actions the court was vested with all the power and authority of other courts of record in this State, and was declared to be a court of record.

By section 107 such court was declared to be a court of record, and authorized to have a seal, and a clerk to be appointed by the justices.

By section 110 the clerk was required to cause to be entered or registered in proper books a docket of all summonses, warrants, precepts, executions and process issued, and of the returns thereto, and proper entries of all acts, orders dismissing decrees, judgments, adjournments and proceedings of said court, and also the substance of the plaintiff's charge or demand, and of the defendant's plea. The forms of proceeding were prescribed in subsequent sections, and were similar to those in Justices' Courts.

By chapter 71 of the Laws of 1819 the court was reorganized, and its name was changed to "The Marine Court of the City of New York."

By chapter 149 of the Laws of 1817 the jurisdiction of the court was increased to cases involving $100.

By chapter 389 of the Laws of 1852 it was further increased to $250.

By chapter 617 of the Laws of 1853 to $500; and further enlargements of its jurisdiction were afterward made.

By chapter 144 of the Laws of 1849 (§ 7) section 107 of the Act of 1813, which declared the court to be a court of record, and authorized it to have a seal, was totally repealed; but by chapter 389 of the Laws of 1852 (§ 10) the common council was directed to provide the clerk of the Marine Court with a seal, with the proviso that nothing in the Act contained should authorize said court to issue certificates of naturalization.

So much, however, of the repealed section 107 of the Act of 1813 as declared the court to be a court of record was not at that time reenacted; and at the time of the adoption of article 6 of the Constitution the court remained, so far as respects the question of its being a court of record, as left by the Act of 1852.

To constitute a court of record in a legal sense it is not sufficient that the court should have a clerk and a seal. A court of record is defined by Blackstone to be one whose proceedings are enrolled for a perpetual memorial and testimony, which rolls are called the records of the court, and are of such high and super-eminent authority that their truth is not to be called in question. If the existence of a record be denied, it shall be tried by nothing but itself, that is, upon bare inspection, whether there be any such record or no. 3 Bl. Com, 24; Co. Litt. 260a and 117b.

An order entered in the minutes of such a court is not a record, until it has been enrolled. *Croswell* v. *Byrnes*, 9 Johns. 287.

These rolls or records contain a history of the proceedings to which they relate.

As has already been shown, the Revised Act organizing the court (2 R. L. 86, § 105. *et seq.*) did not provide for any rolls or records other than the registers directed to be kept by the clerk, containing dockets of the processes issued by the court and minutes of its orders and judgments, and of the substance of the pleadings, which were oral. Written pleadings were not required until 1857; Laws 1857, chap. 295; and even these were not required in marine cases; and there was no provision for judgment rolls in any case. But after the adoption of article 6 of the Constitution, by chapter 629 of the Laws of 1872 (§ 1) the Marine Court of the City of New York was declared to be a court of record, to and for all intents and purposes. Its powers and jurisdiction were continued, except as otherwise provided in the Act. By subsequent sections the forms of proceedings and remedies prescribed by the Code of Procedure for actions in courts of record, including the forms of pleading, were applied to the Marine Court, and the rules of practice of the Supreme Court were made applicable to it; and in the Code of Civil Procedure of 1877 it was for the first time included in the enumeration of the courts of record of this State.

Before the passage of the Act of 1872 the status of the Marine Court as a court of record was considered in several cases. In *Wheaton* v. *Fellows*, 23 Wend. 375, which related to the Justice's Court of the City of Albany, the question arose whether that court was a court of record. Its organization was similar to that of the Marine Court. Laws 1821, p. 36.

It was composed of three justices, and had a clerk and seal, and was, in the Act organizing it, declared to be a court of record, but its proceedings were to be the same as those in a justice's court. The provisions as to the entry of its proceedings in a register were the same as those in the Marine Court Act of 1813. It was held in the case cited not to be a court of record in a strict legal sense, but only for some special purposes; and a plea *nil debet* was held good in an action upon a judgment rendered by it, although it would not have been a good plea to an action on a judgment of a court of record.

In *Lester* v. *Redmond*, 6 Hill, 590, decided in 1844, a like decision was rendered with reference to the Marine Court of the City of New York; and it was held that that court, although a court of record for certain purposes, was not such in the exercise of its jurisdiction between party and party; and the six years' Statute of Limitations was held to bar an action on its judgments.

In *Ford* v. *Babcock*, 1 Denio, 158, decided in 1845, it was held that whoever set up the authority of the Marine Court must show that the case was one of which it had jurisdiction; and in *Huff* v. *Knapp*, 5 N. Y. 65, decided in 1851, it was held by this court that the Marine Court did not possess the power incident to courts of record to appoint a crier, and had none of the incidental powers of courts of record, it not being a court of record in the strict legal sense of the term.

We do not think, therefore, that section 22 of article 6 of the Constitution, in speaking of the courts of record established in cities, intended to include the Marine Court of the City of New York.

The Act of 1886 does not, in terms, authorize appeals direct to this court from the Marine (now the City) Court of the City of New York. It is only by implication that the right is claimed. By the attempt to constitute it a superior city court it is supposed that the general provisions authorizing appeals from the superior city courts were made applicable to it. We do not discuss that question, nor do we concede that the Legislature had power to establish superior city courts in addition to those enumerated in the Constitution, its authority in this respect being confined by section 19 of article 6 to the establishment of inferior local courts.

The case of *Landers* v. *Staten Island R. R. Co.* 53 N. Y. 450, is apparently adverse to the view that such a power is vested in the Legislature.

The motion for a reargument should be denied, without costs.

All concur.

PEOPLE of the State of New York, *Respts.*,

v.

R. Porter LEE *et al.*, *Appts.*

1. In an **action on a joint and several guaranty** it is **no defense to show that there are other persons liable** for the whole or a portion of the same debt claimed of the defendants, or that such persons are not made parties to the action.
2. **Sureties** in a bond **for a bank, a depositary of the State** for canal tolls, are **not released** from liability thereon **by another bond,** subsequently executed and delivered but not accepted by the State.
3. The words of the **condition of a bond** are **not** to be **limited to** the language of the **recital,** where the language of the condition clearly shows an intention to incur a liability not in terms referred to in the recital.
4. **Guaranties** are to be **interpreted** and enforced **according to** the meaning and **intent** and in the manner designed by the parties at the time of their execution, giving due effect to every part of the same.
5. A **contract** will have a **retroactive effect** where by express words or necessary implication it appears to be the intention of the parties to embrace past transactions.
6. When the **language of** the **contract** was that the **bank** should **account for** and pay over **all moneys** deposited with it and all moneys now on deposit in said bank or for which it shall in any way become liable, *held,* that the sureties thereon intended to be bound for the **continuing security** of the existing deposit.
7. It is **not competent** for parties to such an undertaking **to allege** that they were **ignorant** of the existence **of a debt** expressly provided for, or that they have been misled by the omission of the principals to notify them of its existence.

(Decided March 1, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Third Department, affirming a judgment entered in Albany County upon report of a referee in favor of plaintiff in an action on contracts of guaranty. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **Eugene H. Lewis,** for appellants.

I. The undertakings of 1880 and 1881 are void as to the defendants, and no action can be sustained upon them. At the time of the execution of the undertakings, respectively, the bank was indebted to the plaintiff in large sums for deposits of canal tolls in previous years, which it had never paid over. This fact was not known to the defendants. There was no recital of it in the undertakings themselves. Neither the agents of the plaintiffs nor the officers of the bank disclosed it to them. If they had known the fact, they would not have signed the undertakings. Their contract was, therefore, entered into under mistake of fact, from which they will be relieved by a court of equity.

Bisph. Eq. § 189; Pom. Eq. Jur. §§ 839, 856; California Civ. Code, § 1577; *Kelly* v. *Solari*, 9 Mees. & W. 54; *Lucas* v. *Worswick*, 1 Moody & Rob. 293; *Townsend* v. *Crowdy*, 8 C. B. N. S. 477; *Barber* v. *Brown*, 1 C. B. N. S. 121; *Dails* v. *Lloyd*, 12 Ad. & El. N. S. 531; *Bell* v. *Gardiner*, 4 Man. & G. 11; *Evans* v. *Llewellyn*, 2 Bro. Ch. 150; *Bingham* v. *Bingham*, 1 Ves. 126; *Broughton* v. *Hutt*, 3 DeG. & Jones, 501; *Smith* v. *Mackin*, 4 Lans. 41; *Allen* v. *Mayor*, 4 E. D. Smith, 404; *Waite* v. *Leggett*, 8 Cow. 195; *Union Nat. Bank* v. *Sixth Nat. Bank*, 43 N. Y. 452; *Duncan* v. *Berlin*, 46 N. Y. 685; *Law-*

rence v. *Am. Nat. Bank,* 54 N. Y. 482; *Nat. Bank of Commerce* v. *Nat. Mech. Bank,* 55 N. Y. 211; *Mayer* v. *Mayor,* 63 N. Y. 455; *Paine* v. *Upton,* 87 N. Y. 327; *Wilson* v. *Randall,* 7 Hun, 15; 67 N. Y. 338.

II. The sureties upon the guaranties in suit did not become liable for any indebtedness of the bank to the plaintiff, beyond that arising from deposits of canal tolls made during the current years in which the guaranties were respectively given.

Full effect cannot be given to the language of the concluding clause; it is too broad. In so far as the language of the guaranty is broader than its recitals and special language, it is null and powerless to sustain a liability.

Arlington v. *Merricke,* 2 Saund. 411; *Liverpool Water Works* v. *Atkinson.* 6 East, 507; *Wardens* v. *Bostock,* 2 Bos. & P. N. R. 175; *Pearsall* v. *Summersett,* 4 Taunt. 593; *Hassell* v. *Long,* 2 Maule & S. 363; *Napier* v. *Bruce,* 8 Clark & F. 470; *Tradesmans Bank* v. *Woodward,* Anthon, *N. P.* 300; *Mayor* v. *Kelly,* 98 N. Y. 467.

Upon reference to the contract it will be seen that the deposits agreed by the bank to be received are "one tenth the deposits of the canal moneys collected at Buffalo during the year 1880," and in the ensuing year, are "a part of the canal tolls," etc. Those are the only deposits which are made the subject of any reference in the recitals of the guaranty. Had it been the intention of the parties that the sureties should be made responsible for a balance carried forward from the preceding year, it would have been a simple matter to add a second recital, stating the existence of such a balance.

The State held, at the time that each year's guaranty was taken, a guaranty with perfectly solvent sureties for any balance due it from the preceding year. The principle contended for under this point controls and is decisive of the large class of cases reported in the books where sureties of public officers have been proceeded against for defaults of their principals, happening before the commencement or after the expiration of the terms during which their bonds were given.

U. S. v. *Eckford,* 1 How. 250 (42 U. S. bk. 11, L. ed. 120); *Kingston Mut. Ins. Co.* v. *Clark,* 33 Barb. 196.

The written parts of the instrument must control the printed. The obligation of the guaranty is printed; the recital is in writing.

1 Wait, Act. & Def. p. 27; *Delonguemare* v. *Tradesmans Ins. Co.* 2 Hall, 622. See also cases cited in 1 Wait, Act. & Def. 127; 4 *Id.* 21.

The referee erred in refusing to find that the bond and guaranty of 1882 were accepted by the plaintiff. The real question here is not whether the auditor was so well satisfied with the sureties on the guaranty as would have induced him not to request others later on; but it is whether the deposits made after it was given might have been recovered upon the bond and guaranty of 1882, without further action on the part of the plaintiff's auditor to indicate his approval of the same.

If the plaintiff began to do the things which, as a consideration for the guaranty of 1882, it agreed to do, then the sureties upon that guaranty would be bound; and if they were bound, then the plaintiff is.

1 Pars. Cont. 7th ed. p. 480.

It was not necessary for the auditor to notify either the bank or the sureties, upon the guaranty of 1882, of his acceptance of the guaranty before it took effect as a legal obligation.

Brandt, Suretyship, § 164; *Carman* v. *Elledge,* 40 Iowa, 409. See also Wade, Notice, §§ 403, 404; *Douglass* v. *Howland,** 24 Wend. 35.

The guaranty of 1882 was a completed undertaking on the part of the sureties at the time of its execution and delivery and the State has to this day retained possession of it. It has never notified either the bank or the sureties of its refusal to accept the guaranty. There has been on the part of the State no affirmative act of rejection of the guaranty which it would be necessary for the sureties to establish in an action against them upon the guaranty of 1882.

Davis v. *Wells,* 104 U. S. 159 (Bk. 26, L. ed. 686).

That the State is a party to the contract does not change the rule of law.

U. S. v. *Bank of Metropolis,* 15 Pet. 377 (40 U. S. bk. 10, L. ed. 774); *Cooke* v. *U. S.* 91 U. S. 396 (Bk. 23, L. ed. 242); Morse, Banking, 2d ed. 235; *Bank of U. S.* v. *Dandridge,* 12 Wheat, 64 (25 U. S. bk. 6. L. ed. 552); *Postmaster General* v. *Norvell,* Gilpin, 106.

Mr. **D. O'Brien,** *Atty-Gen.,* for respondents:

It is only in those cases where the words of the condition of the bond are general and indefinite as to the time during which the surety shall remain liable, or as to the subject of his liability, that a recital in the bond specifying the time during which the prescribed duty is to be performed, or the particular duty itself which the principal undertakes to perform, will limit the application of general words in the contract part of the instrument.

Brandt, Suretyship, § 138, p. 194.

When the bond of an officer is general in its terms and the office is not annual, the liability of the surety is not, in the absence of special circumstances, limited to a year.

Id. § 145, p. 204; *Mayor of Birmingham* v. *Wright,* 16 Ad. & El. N. S. 623; *Dedham Bank* v. *Chickering,* 3 Pick. 335.

In the present case while there was an annual designation of the bank, yet the contract between the bank and the State was unlimited as to the term during which the liability was to continue. It provided that such liability should continue until either the bank had made a voluntary payment of the moneys on hand into the state treasury, or had honored the draft of the state treasurer thereon for such amount.

Bank of British N. A. v. *Cuvillier,* 14 Moore, P. C. C. 187; *Thompson* v. *Roberts,* 17 Irish Law Rep. 490; *Worcester Bank* v. *Reed,* 9 Mass. 267; *Evans* v. *Earle,* 1 Hurl. & G. 1.

In this case the application of payments made by the bank during the years 1880 and 1881 is of no materiality, inasmuch as these defendants are upon both bonds, unless it should be held that under the bond of 1880 the defendants were not liable for the balance of $65,000 which was on deposit in the bank at the time the bond was executed. But the account was a continuous one. The relation of debtor and creditor existed between the bank and the State. There was no application by either party, of the payments made; and the general rule is that under such circumstances, if payments be made upon the account, the law will apply them upon the oldest item.

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*See note to this case, Lawyers' edition. [Ed.]

Quincy Union Bank v. *Tutt*, 5 Mo. App. 342; *Ward* v. *Johnson*, 95 Ill. 216; *Johnson* v. *St. Louis Dispatch Co.* 2 Mo. App. 565; *Commercial Bank* v. *Hughes*, 17 Wend. 94; *Marsh* v. *Oneida Cent. Bank*, 34 Barb. 298; *Dows* v. *Morewood*, 10 Barb. 184; *Allen* v. *Culver*, 3 Denio, 284; *Sheppard* v. *Steele*, 43 N. Y. 52, 59, 60.

Ruger, *Ch. J.*, delivered the opinion of the court:

The First National Bank of Buffalo had, prior to 1882, for a series of years, been annually appointed a depositary of the State for canal tolls receivable in the City of Buffalo, and had annually executed and delivered to the State contracts regulating the relations between them, the performance of which had been in each year guarantied on the part of the bank by some of its directors in their individual capacity.

Early in the season of 1882 said bank became insolvent after it had been appointed a depositary, but before it had completed and delivered to the State satisfactory security for the performance of its obligations for the ensuing year; and after that time the State discontinued its relations with such bank.

Upon its insolvency the bank was found to be indebted to the State in a large sum of money; and the question in this case arises over the liability of its guarantors for such debt.

The complaint embraces the guaranties of both the years 1880 and 1881, in its allegations, and seeks to recover the balance appearing to be due on the account for moneys deposited at the commencement of the year 1882.

These contracts and guaranties were expressed in precisely similar language, and so far as the parties to them are concerned are subject to the same rule of interpretation, and must be understood to have been intended to cover the same class of obligations, and to differ only in respect to the time of their execution and the period of time covered by their provisions.

Such guaranties are joint and several in character, and it would constitute no defense to an action upon any of them to show that there were other persons liable to the State for the whole or a portion of the same debt claimed of the defendants, or that such persons are not made parties to the action.

The defendants here are each and all obligors upon the bonds of both 1880 and 1881; and in the view we take of the case it does not enlarge their liability to consider their situation as parties to the guaranty of 1880.

It may be that, as the result of investigation, it will be discovered that other parties liable to the State for a portion of the money due from the bank to the State at the time of its insolvency, may be found, and as a consequence flowing from such fact that the defendants in this action may have a claim for contribution from such parties in case they are obliged to pay the whole sum due the State; but it is not perceived how that fact can affect the liability of such guarantors upon their express contract of indemnity.

The only breach of the obligations of the guaranty alleged in the complaint consists of the refusal of the bank to pay the sum claimed to be due from it by the State on the 20th day of April, 1882, and that amount consisted of the general balance due on the account accruing through a series of years and covering the operations of 1880 as well as those of 1881.

Whatever, therefore, may be the liabilities or obligations of the parties to the contract and guaranty of 1880, it is entirely immaterial in this action; for the guaranty of 1881 covers not only the transactions of that year but also the liability resulting from the transactions of 1880 as represented by the balance due from the bank to the State at the execution of the contract and guaranty of 1881.

If, therefore, it shall appear upon the further examination of the case that the defendants are liable upon the guaranty of 1881, for the whole balance due from the bank to the State in the spring of 1881, no question arises as to the proper application of payments made by the bank in the respective years, or as to the equities of the guarantors of the respective years as between themselves.

Such rights are to be settled and adjusted in an appropriate action, to which all such guarantors are made parties, and where everyone interested may be heard in his own behalf; and these could not be heard here for want of proper parties, if for no other reasons.

This is a simple action at law, upon a written instrument, for a sum of money claimed to be due to the plaintiff from the parties thereto. If the letter of their contract shows that they have made themselves liable for the sum claimed, it is no defense to this action to show that there are other persons who might also be resorted to by the State for a portion of the same sum.

It is claimed by the appellants that the sureties on the bond of 1881 have been released from liability thereon by reason of the acceptance by the State of a contract and guaranty from the bank for the year 1882; and it is contended that such acceptance operated as a discharge of all previous guaranties.

This claim seems to be disposed of by the findings of fact made by the referee. He expressly finds that the State never accepted the same as a compliance by the bank with the condition imposed upon them by the State in respect thereto.

The evidence in the case seems to us fully to support this finding, and renders it not only probable but quite certain that the State authorities did not intend to accept the guaranty in question.

The State could only be bound to such acceptance by the express action of its officers duly authorized to approve such guaranty, or perhaps their omission to act thereon for such a lapse of time as would authorize a legal presumption that they intended to approve the guaranty.

During the period between the receipt of this guaranty and the insolvency of the bank but a few days intervened; and the auditor was diligently employed in this time in inquiring into the responsibility of the persons proposed as sureties, and had received no satisfactory information upon that subject.

Under these circumstances no acceptance of such guaranty could properly be inferred, and no evidence of an actual approval of the guaranty by the State was given. The referee having failed to find that the guaranty of 1882 was received by the State in satisfaction of previous guaranties, there is no evidence in the case authorizing this court to hold that any such discharge was intended or effected, and no foundation for the claim that the sureties on the guaranty of 1881 were discharged by the acceptance by the State of the guaranty of 1882.

The inquiry here may therefore be limited to the liability which the signers of the guaranty of 1881 incurred, by the terms and conditions of their agreement. The main question arises over their liability for the debt, existing at the time of the execution of the guaranty, and arising out of the transactions and deposits of the year 1880.

It is claimed by the appellants that the guaranty taken in 1881 was intended to be prospective in its operation only, and did not cover existing deposits. It is not claimed but that the express terms of the undertaking cover such a liability; but it is contended that the words of the condition should be limited and controlled by the language of the recital, and so restricted could not reasonably be held to include an existing debt.

It cannot be disputed but that there is much authority tending to support the position contended for by the appellants; but we think the cases cited by them are generally cases where the language of the condition was doubtful and uncertain, and a consideration of the whole instrument and the circumstances surrounding the situation of the parties created an ambiguity requiring the application of rules of construction to determine the real interest of the parties.

The rule contended for is, however, one of construction, and obtains only for the purpose of determining the real intention of the parties in making their contract. *Burr* v. *Am. Spiral Spring Butt Co.* 81 N.Y. 178; Brandt, Suretyship, § 138.

It cannot prevail where the language of the condition clearly and unmistakably shows an intention to incur a liability not in terms referred to in the recital. Guaranties are subject to the same rules of interpretation as other contracts, and especially to that fundamental rule requiring them to be enforced according to the meaning and intent and in the manner designated by the parties at the time of their execution. *Rochester City Bank* v. *Elwood,* 21 N. Y. 90; *Burr* v. *Am. Spiral Spring Butt Co.* 81 N. Y. 178.

While the liability of guarantors is *strictissimi juris* and cannot be extended by construction beyond the plain and explicit language of their contract, they are still subject to the rule that effect must be given to all of the language of the contract, and a meaning and effect ascribed to each word and phrase used therein, if it can be done without violating its plain meaning and intent.

The general rule is undoubtedly that a contract cannot be construed to have a retroactive operation; and that such an effect can be given to it only where by express words or by necessary implication it clearly appears to be the intention of the parties to embrace past transactions; but when this does appear it is indisputably *competent* for parties to bind themselves for such liabilities.

We are clearly of the opinion in this case that the contract itself recognizes an existing liability on the part of the bank to the State, and provides for its extension and the surety thereof by the guarantors.

This would seem to be not only a natural course of proceeding on the part of the State, while taking a new security from a debtor, contemplating extended and continued transactions, but a necessary measure of precaution to avoid the complications involved in investigating the transactions of former and perhaps remote years.

It would be not only difficult but almost impracticable for the State to have its transactions with such a depositary separated into distinct divisions, and be compelled to seek its indemnity among the conflicting equities and claims of numerous sureties liable upon different contracts for the transactions of different years.

It is, however, not permissible we think to resort to rules of construction in such a case as this, for there is no ambiguity in the language of the contract, and it provides in express terms for the liability in question. Thus it states not only that the bank shall "well and faithfully account for and pay over all moneys deposited with it or for which it shall in any way become liable in and by said contract, according to the terms and provisions thereof," but "that said bank shall account for and pay over all money now on deposit in said bank" "to the people of the State of New York."

More explicit language could not be used; and it is impossible to assign any other meaning to the language used than that the sureties intended to be bound for the continuing security of the existing deposit.

It is not competent for parties to such an undertaking to allege that they were ignorant of the existence of a debt expressly provided for, or that they have been misled by the omission of the principals to notify them of its existence. *Western N. Y. L. Ins. Co.* v. *Clinton,* 66 N.Y. 330.

The rule applicable to the subject is well stated in Brandt on Suretyship, § 138, in the following language: "When the words of the condition of a bond are general and indefinite as to the time during which the surety shall remain liable, if there is a recital in the bond specifying the time during which the prescribed duty is to be performed by the principal, the general words will be limited by the recital; and the surety will only be liable for the time therein specified. The reason is that, taking the whole instrument together, it is but fair to presume that the parties had in contemplation only a liability for the time specified. It is a rule of construction adopted for effectuating the intention of the parties." See also *Burr* v. *Am. Spiral Spring Butt Co. supra.*

The conclusions reached on the propositions discussed necessarily dispose of all other questions raised by the appellants.

The judgment should, therefore, be affirmed.

All concur.

ERIE COUNTY SAVINGS BANK, *Respt.*,
v.
Caroline E. COIT, Exrx., Impleaded, etc.,
Appt.

1. A **national bank executed a bond to secure deposits** made or which might be made with it **by** the obligee, a **savings bank.** Certain individuals indorsed on the bond: "In consideration of the making of the deposits mentioned in the foregoing agreement we each and severally **guaranty** the performance of the foregoing contract by the" national **bank; a similar bond** between the same banks, which had been in force for some time, **was surrendered** on the execution of the new bond; after the giving of the new bond the national bank failed, having funds of the savings bank on deposit, the date of the last deposit being prior to the execution of the new bond. *Held*, **in an action to recover** such funds **from** the **guarantors** of the new bond, that:

   (*a*) The **new bond** was intended **as a substitute for** the **old** one.

   (*b*) That the **surrender of** the **old bond** was a **good consideration for** the **new bond and** also for the **guaranty,** and that it was immaterial whether the guarantors knew or did not know that the surrender of the old bond was in the contemplation of the parties when they became guarantors.

2. Where a **contract of guaranty** is entered into concurrently with the principal obligation, a **consideration** which supports the principal contract supports the subsidiary one also; and the consideration need not be expressed in the guaranty, but may be shown by parol.

3. An **agreement by a savings bank to make deposits** in an incorporated bank in this State is **permissible,** where the deposit does not exceed the limit prescribed by Laws of 1875, chap. 371, § 27; and an agreement by the bank of deposit to pay **interest** (the deposit being at all times subject to call by the savings bank) does **not** convert the deposit into **an unauthorized loan.**

(Decided March 1, 1887.)

APPEAL from a judgment of the General Term of the Superior Court of Buffalo, affirming a judgment entered upon a verdict directed for plaintiff in an action on a contract of guaranty. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **Daniel L. Lockwod,** for appellant:

A guaranty of past indebtedness without other consideration than the subsisting debt does not create a valid obligation.

McLaren v. *Watson*, 26 Wend. 435; *Westhead* v. *Sproson*, 6 Hurlst. & N. 728; *Morrell* v. *Cowan*, L. R. 7 Ch. Div. 151; 23 Moak, 477; *Parker* v. *Bradley*, 2 Hill, 584; *Vanderbilt* v. *Schreyer*, 91 N. Y. 399–403; *Pratt* v. *Hedden*, 121 Mass. 116; *Ellis* v. *Clark*, 110 Mass. 389.

The defendants are not estopped from asserting and standing upon their rights, based upon the actual facts proved by any recital contained in the contracts. The defendants as sureties were guarantors with no benefit to themselves on a contract collaterally binding them for the performance of a contract between the principals, and for their sole benefit, and without any knowledge of the dealings or arrangements out of which it arose.

Brandt, Suretyship, § 32; 11 Md. 322; Morgan's DeColyar, Guiar. 179; *Halliday* v. *Hart*, 30 N. Y. 474.

A valid agreement to forbear the collection of a debt may furnish a good consideration; but forbearance only cannot.

Manter v. *Churchill*, 127 Mass. 31; *Shupe* v. *Galbraith*, 32 Pa. 10; *Mecorney* v. *Stanley*, 8 Cush. 85.

In the case at bar the plaintiff neither agreed nor intimated that if the contract was given it would permit the deposits to remain in the First National Bank.

The giving of this contract by the First National Bank in no way changed the rights or obligations of it or the plaintiff to each other. The indebtedness was wholly antecedent; nor was there any agreement on the part of either to the other to do or omit to do anything in the future as a consideration of the giving or taking said contract and guaranty. The plaintiff sustained no detriment whatever in getting it; parted with nothing; gave nothing; promised nothing.

Wood v. *Tunnicliff*, 74 N. Y. 38; 3 McLean, 388; *Hopkins* v. *Logan*, 5 Mees. & W. 247.

The plaintiff had no authority to take the guaranty of defendants to secure the payment of money deposited in the First National Bank.

The statute declaring the powers and duties of trustees in the management of savings banks establishes beyond question the want of power in the plaintiff to take the personal obligation of the defendants (the guaranty in suit) as security for the repayment of its deposits with the First National Bank, and that such taking was an illegal and void act; *Bushnell* v. *Chautauqua Co. Nat. Bank*, 10 Hun, 378; and is so declared by the statute.

Sess. Laws 1875, chap. 371.

Section 1, subd. 7, empowers them "To receive money on deposit and invest the same * * * as hereinafter provided."

Section 22 authorizes the receipt of money on deposit, "and to invest the same * * * as hereinafter authorized and provided, and not otherwise."

Section 26 authorizes the trustees to "invest the moneys deposited therein only as follows," naming the securities.

Sections 27 and 28 authorizes the deposit temporarily in certain banks, the excess of current daily receipts, and a sum for current expenses until the same can be judiciously invested in securities named in section 26.

Section 30 declares: "It shall not be lawful for the trustees of any savings bank to loan money deposited or any part thereof upon notes, bills of exchange, drafts, or any other personal securities whatever."

Section 36 provides for making semi-annual reports by savings banks.

Section 37 provides that the report shall state: "Amount loaned on the pledge of securities, with a statement of the securities held as collateral for such loans * * * the amount of cash on deposit in banks or trust companies, with the names of such banks and companies and amount deposited in each," but requires no statement if any or what securities are held for payment of such deposits.

Section 48 declares the deposits which savings banks may make a "lien for the full amount of money deposited" upon the assets of any insolvent bank after payment of its circulation. It makes no provision for or reference to any collateral securities held by the savings bank for the payment of such deposits, or the interest on such deposits.

The question in this case was not passed upon in the cases cited and relied upon by plaintiff's counsel: 13 Hun, 269; 18 Hun, 221. See also 21 N. Y. 490; 14 N. Y. 189; 15 N. Y. 9, 98; 25 Wend. 650.

Mr. **E. C. Sprague,** for respondent:

The defendants, having guarantied "the performance of the foregoing contract by the First National Bank," are estopped from denying its execution by the Bank after the plaintiff has acted upon the faith of and under it.

Brandt, Suretyship, § 31; *Hoboken* v. *Harrison*, 1 Vroom, 73.

So in the case of a guaranty of the payment of rent in a lease: "Entering into the guaranty was an acknowledgement by the guarantors that the lease was duly executed by both lessees."

Otto v. *Jackson*, 35 Ill. 349.

A savings bank must always keep large sums of money on hand to meet sudden calls and emergencies. The statute authorizes the depositing with other banks of the money so kept, and favors such deposits by making them a preferred claim against insolvent state banks.

If it was proper to make the deposits, it could not have been unlawful for the Savings Bank to protect itself and its depositors by procuring security for their repayment with interest.

Upton v. *N. Y. & Erie Bank*, 13 Hun, 269; *Re Patterson*, 18 Hun, 221.

"The guaranty of the payment of the bond by the defendants imports an agreement or undertaking that the makers of the bond were competent to contract in the manner they have, and that the instrument is a binding obligation upon the makers."

Brandt, Suretyship, § 31, 104; *Remsen* v. *Graves*, 41 N. Y. 471; *N. Y. etc. R. R. Co.* v. *Schuyler*, 34 N. Y. 30; *Simons* v. *Steele*, 36 N. H. 73.

The facts, that interest is agreed to be paid on the deposits and that the payment of the deposits themselves is secured by a guaranty, do not change their character or prevent them from being deposits in the ordinary meaning of that term.

Upton v. *N. Y. & Erie Bank* and *Re Patterson, supra.*

The contract of guaranty was made at the same time, and written on the same paper as the contract which it guaranties. It is a part of that contract; and the consideration for the bond is a sufficient consideration for the guaranty.

Jones v. *Post*, 6 Cal. 102; *Simons* v. *Steele*, 36 N. H. 73; *Williams* v. *Marshall*, 42 Barb. 524; *Lippincott* v. *Ashfield*, 4 Sandf. 611; *Leonard* v. *Vredenburgh*, 8 Johns.* 29; *Bailey* v. *Freeman*, 11 Johns. 221.

The consideration need not be expressed in the guaranty but may be shown by parol.

Evansville Nat. Bank v. *Kaufmann*, 93 N.Y. 273.

In the present case the guaranty itself shows the same consideration as the bond. Any consideration, however slight, will support the guaranty and need not move to the guarantor.

Brandt, Suretyship, §§ 6, 7.

The request of the plaintiff for a guaranty and its subsequent acceptance of the bond was sufficient consideration for the guaranty. The guaranty was an inducement to the plaintiff to accept and act under the contract.

Brandt, Suretyship, § 9; *Gardner* v. *King*, 2 Ired. Law, 297; *Jolley* v. *Walker*, 26 Ala. 690; *King* v. *Despard*, 5 Wend. 277; Chitty, Cont. 11th Am. ed. 33.

Continuing to make the First National Bank a bank of deposit, and permitting the deposits to remain there, although they might have been withdrawn at any time, is sufficient consideration for the guaranty.

Chitty, Cont. 11th Am. ed. 35-40.

Andrews, *J.*, delivered the opinion of the court:

The questions involved in this case have been carefully considered in the opinions pronounced at the general term, and we shall content ourselves with a brief statement of our conclusions on the main propositions upon which the appellants rely for a reversal of the judgment.

First: it is insisted that there was no consideration to uphold the contract of guaranty. The bond and guaranty were executed concurrently. The principal obligation recites that it was executed by the First National Bank of Buffalo in consideration of deposits made or which might be made with said bank by the plaintiff, the Erie County Savings Bank; and the recital is followed by an undertaking on the part of the obligor to repay to the Savings Bank, on demand, all deposits which it has made or may make with the First National Bank, on call as required, with interest at 4 per cent per annum. The bond is executed under the seal of the First National Bank, by its president and cashier. The undertaking by the guarantors, which is indorsed on the bond, is as follows:

"In consideration of the making of the deposits mentioned in the foregoing agreement we, each and severally, guaranty the performance of the foregoing contract by the First National Bank of Buffalo."

The bond and guaranty were delivered by the First National Bank to the Savings Bank on the 8th day of March, 1882, in compliance with a request theretofore made by the treasurer of the Savings Bank to the president of the First National Bank, to furnish a new bond, with sureties, to secure deposits of moneys of the Savings Bank in the First National Bank. There had been a previous bond and guaranty, of similar character, executed in 1865, to secure deposits, with interest at the rate of 5 per cent; and from the time of giving that bond to January 17, 1882, the date of the last deposit, deposits were made in each year by the plaintiff with the obligor, payable on call.

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*See note to this case, Lawyers' edition. [Ed.]

Prior to January, 1882, three of the four guarantors on the bond of 1865 had died. In consequence of this fact, in January, 1882, the finance committee of the plaintiff directed its treasurer to obtain a new bond from the First National Bank, as a substitute for the old one; and the request for a new bond was made in consequence of this direction. Within three or four days afterward, the bond and guaranty now in question was delivered to the plaintiff, and the old bond was surrendered to the First National Bank. The latter bank failed April 14, 1882, owing the plaintiff the sum of $30,000 for deposits on and prior to January 17, 1882. This indebtedness has been paid in part by the receiver of the insolvent corporation, and in part by cosureties of the defendant's testator, but leaving a part of the debt still unpaid.

Upon these facts we are of opinion that the surrender of the bond of 1865 was a good consideration for the guaranty. It is a legitimate inference from the circumstances that the new bond was intended by both Banks as a substitute for the original bond, and no other inference is consistent with the acts of the parties and the circumstances. That this was the intention of the plaintiff is plain from the action of its officers. The finance committee directed its treasurer to procure a new bond as a substitute for the former one; and it surrendered the old bond within a few days after receiving the new one. There was no formal action by the First National Bank, showing its intention, beyond the giving of the new bond. But the new bond covered past as well as prospective deposits, and fixed a rate of interest more favorable to the First National Bank than the former one. The president of the First National Bank testified that the rate of interest was referred to in the conversation between the treasurer of the plaintiff and himself before the new bond was given, and that the treasurer of the plaintiff in connection with this subject said "It would be a good thing to have a new contract made."

It was in the interest of the First National Bank that the new bond should be substituted for the old one; and we cannot doubt upon the evidence that it was made and accepted as a substitute for the original one, and that the surrender of the old bond was in conformity with the intention of both Banks when the new bond was given. It is needless to cite authorities to show that the surrender of an existing security is a good consideration for a new undertaking between the parties to the surrendered obligation.

There being a good consideration for the bond between the obligor and obligee, it follows, we think, that the same consideration supports the guaranty, and that it is immaterial whether the guarantors knew or did not know that the surrender of the old bond was in the contemplation of the parties when they became guarantors. Where a contract of guaranty is entered into concurrently with the principal obligation, a consideration which supports the principal contract supports the subsidiary one also. We understand this to be the settled doctrine; *McNaught* v. *McClaughey*, 42 N. Y. 22; *Haigh* v. *Brooks*, 10 Adol. & El. 309; *Simons* v. *Steele*, 36 N. H. 73; Brandt, Sur. §§ 6, 7; and the consideration need not be expressed in the guaranty, but may be shown by parol. *Evansville Nat. Bank* v. *Kaufmann*, 93 N. Y. 273.

The claim that the question of consideration should have been submitted to the jury is not well taken. There was no substantial controversy in respect to the facts. The president of the First National Bank does not deny that he knew that the plaintiff held a bond to secure deposits when the new bond was given. His denial only goes to the point that he was ignorant of the precise form of the security.

Second: the other principal question relates to the validity of the agreement evidenced by the bond. It is claimed that the arrangement between the Savings Bank and the First National Bank was in substance an agreement by the former to loan money to the latter, contrary to the statute prescribing the securities in which investments by savings banks may be made. We think it is a conclusive answer to this objection that the general Act regulating the dealings and operations of savings banks (Laws of 1875, chap. 371, §§ 27, 28) expressly authorizes savings banks to keep 10 per cent of their deposits on deposit in any incorporated bank in this State, and that it does not appear that the deposits made with the First National Bank of Buffalo were in excess of this limit.

The fact that the Savings Bank secured from the First National Bank an agreement to pay interest on the deposit does not convert the deposit into an unauthorized loan. It would seem strange to make an act of provident administration a cause of forfeiture, upon a strained construction of the transaction. The deposits were at all times subject to call by the plaintiff.

There are some subordinate questions treated in the prevailing opinion below.

We think there is no error disclosed in the record, and the judgment should therefore be affirmed.

All concur.

Electus B. LITCHFIELD, Exr., *Appt.*,
v.
Charles R. FLINT, *Respt.*

1. Where the **complaint in an action commenced** by one **as executor** shows **a cause of action in** favor of the plaintiff not in his representative but in his **individual character,** descriptive words therein, such as "executor," etc., may be rejected, leaving the action to stand as one in the individual capacity of the plaintiff.
2. Where an indorser of a note has transferred it but is still liable thereon as indorser, and he makes an **agreement** for a valuable consideration **with a third person to pay** the **note,** the transferee and holder of the note may maintain an action against such third person on such agreement or promise, to enforce payment of the note by him.
3. The **legal obligation of** the **promisee to the holder of** the **note** will so con-

nect him with the transaction as to be a substitute for any privity with the promisor or the consideration of the promise, and furnishes evidence of the intent of the promisee to benefit him and **creates a privity by substitution** with the promisor.

4. Where such **note** is subsequently **retransferred** by the holder to the **indorser,** the latter, having fulfilled such agreement on his part, **may maintain** an **action** thereon **against** such **third person** to enforce payment of the note by him.

(Decided March 1, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, reversing a judgment of the King's Special Term overruling a demurrer to a complaint in an action to recover the amount of a promissory note. *Reversed.*

Statement by **Earl,** *J.*:

The complaint in this action alleges, in substance, that on or about the 27th day of May, 1873, H. Maria Litchfield departed this life in the County of Kings, leaving a last will and testament wherein the plaintiff was nominated executor; that thereafter on the 15th day of October, 1873, the will was admitted to probate by the surrogate of that county and letters testamentary were duly issued to the plaintiff as such executor on the second day of June, 1875; that on the 30th day of April, 1878, the Kings County Central Railroad Company made and executed its promissory note in writing as follows:

"$6,000.

Six months from date, for value received, The Kings County Central Railroad Company promise to pay E. B. Litchfield, executor of the estate of H. Maria Litchfield, deceased, or order, $6,000 and interest, payable at the American Exchange National Bank, New York.

Kings County Central Railroad Co.
[Seal.] Per E. B. Litchfield, President.
Brooklyn, April 30, 1878."

That before the maturity of the note it was transferred and delivered for full value to one Frederick W. Foote, and that there was delivered to him at the same time twelve bonds of the railroad company, as collateral security for the payment thereof; that Foote was the legal holder and owner of the note and bonds on the 24th day of September, 1878, and on that day the note constituted a debt of the railroad company to him; that on that day a written agreement was executed between the plaintiff of the first part and the defendant of the second part, wherein it was recited, among other things, that the party of the first part was chiefly the promoter of the railroad known as the Kings County Central Railroad; that he and the railroad company were financially embarrassed and that he was incapable of further active exertions to resuscitate the railroad company or to manage the road so as to produce from it any profit or benefit; that the party of the second part was willing to examine into the affairs of the railroad company, with a view of determining what could be profitably done with the road, and, if found feasible, to make the attempt to produce some profit to the party of the first part from his interest therein; that the party of the first part placed in the hands of the party of the second part certain stock of the railroad company and transferred to him the interest of the party of the first part in certain bonds of the road preliminary to the agreement, upon which the party of the second part made certain advances in money to the railroad company and for which the party of the second part had and retained a claim against the railroad company; and wherein it was agreed that the party of the first part did absolutely sell and assign to the party of the second part his interest in the bonds mentioned, and that he would assign to any person the party of the second part might designate on demand the stock mentioned, and that he did thereby sell and assign to the party of the second part all his right, title and interest and claims and demands other than stock and bonds, into and upon the railroad company, and wherein, in consideration thereof the party of the second part agreed to pay in cash to the party of the first part the sum of $1,750; and further agreed that when his interest in the road, or in any road or roads he might choose to build in connection therewith, and in the security of the Kings County Central Railroad Company, and of such other road or roads was closed up, he would apply the proceeds as follows: Among other things, that he would pay with the consent of the railroad company, the debt of the company owing to F. W. Foote "for which he holds as collateral twelve bonds of the said the Kings County Central Railroad Company, provided said Foote will relinquish to him his title in four other bonds of said company now held by him; the said bonds to belong thereupon to said party of the second part, the said sixteen bonds to be at a price not to exceed the sum of $6,200, and the said reimbursement shall include the two foregoing items."

The complaint further alleges that this agreement was entered into by the plaintiff individually with the defendant, with the intention and purpose, among other things, of making certain provision for the payment of the promissory note mentioned, and the indebtedness of the Kings County Central Railroad Company evidenced thereby, and of indemnifying the plaintiff as executor from liability thereon; that the plaintiff has fully carried out and performed all the terms and conditions of the agreement on his part to be carried out and performed; that after the execution of the agreement the note above mentioned for value was transferred to and came into the possession of the plaintiff together with the twelve bonds of the "Kings County Central Railroad Company, so as aforesaid held by said Foote, and collateral security for the payment thereof, and at the same time the said Foote delivered to this plaintiff four other bonds of the said, The Kings County Central Railroad Company, then held by him and relinquished and transferred to this plaintiff his title in all of said bonds;" that thereafter, and on the second day of "November, 1878, the day said note by the terms thereof became due and payable, said note was presented at the American Exchange Bank for payment and payment thereof demanded and refused.

Whereupon, said note was duly protested, in manner and form required by law; and notice of the nonpayment thereof was duly served upon this plaintiff."

The complaint further alleges that the enterprise and adventure in the agreement mentioned had been closed up and finally terminated, and that the interest of the defendant in the railroad company and in the securities thereof had been closed up; that the defendant had received on account of the property transferred to him by the plaintiff, and as proceeds thereof large sums of money, and particularly the sum of $27,000, for the proceeds of a sale of the bonds and stock acquired by him, pursuant to the agreement with the plaintiff; and that the balance of such proceeds with the interest thereon, after deducting therefrom all the sums which the defendant may have advanced, expended or laid out in connection with the enterprise referred to in the agreement, directly or indirectly, according to the true intent and meaning of the agreement and in the manner therein provided, with the interest thereon, exceeded the sum of $6,200, and interest thereon at the rate of 7 per cent; that the consent of the Kings County Central Railroad Company to the payment by the defendant of the promissory note mentioned had been duly obtained, of which the defendant had notice; that the plaintiff has duly demanded of the defendant payment of the promissory note, and at the same time tendered to him the sixteen bonds of the railroad company which had been held by Foote, and by him transferred to the plaintiff; but that the "defendant refused and neglected to pay the same, and still refuses and neglects to pay the same, although the plaintiff has at all times been and still is ready and willing to deliver to said defendant said sixteen bonds upon receipt of payment of said note;" and the plaintiff demanded judgment against the defendant for the sum of $6,000, and interest from August 30, 1878; besides costs of the action.

To this complaint the defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled at special term, upon the ground that the complaint stated a good cause of action to enforce a trust, and for an accounting by the trustee. From the judgment overruling the demurrer the defendant appealed to the general term of the supreme court, where the judgment was reversed, as appears from the opinion there pronounced, upon the ground that the agreement mentioned in the complaint did not create a trust; that the plaintiff seeking to enforce payment of the note occupied simply the position of an assignee from Foote; that Foote, if he had continued to own the note, could not have enforced payment under the agreement made by the plaintiff with the defendant, because at the time of that agreement he did not hold any claim against the plaintiff, and the plaintiff was not indebted to him or under any obligation to him. Upon the decision of the general term judgment absolute was rendered against the plaintiff, dismissing his complaint with costs.

Mr. **J. W. Gilbert,** for appellant:

The defendant's undertaking was to apply the proceeds: first, to reimburse himself; second, to purchase fifteen bonds of the M. A. & C. I. Railroad on account of the enterprise; third, to pay the debt held by the plaintiff; and fourth, to divide the balance with Litchfield.

The complaint avers that the defendant elected not to operate the railroad; that the enterprise has terminated; that defendant has in his hands the balance of the proceeds of the property, and contains the averments necessary to show that the plaintiff is the real beneficiary, and is entitled to have the trust enforced.

Barry v. *Lambert*, 98 N. Y. 300, 306-7; *Gilman* v. *McArdle*, 99 N. Y. 451; *Martin* v. *Funk*, 75 N.Y. 134; *Day* v. *Roth*, 18 N.Y. 448; *Wright* v. *Douglass*, 7 N.Y. 564: *Young* v. *Young*, 80 N. Y. 422, 438; Hill, Trusts, p. 63-71; Perry, Trusts, 95; Pom. Eq. Jur. §§ 997-999, and cases in notes.

The defendant is liable to account for the proceeds of the sale of Litchfield's property. That is a good cause of action.

Marston v. *Gould*, 69 N. Y. 220; *Belknap* v. *Bender*, 75 N.Y. 446.

It is not sufficient to show that the particular cause of action indicated by the prayer for relief, or otherwise, is not supported by the facts averred. If those facts show that the plaintiff is entitled to any relief, the court can adapt the relief to the case, and the demurrer must be overruled.

Code Civ. Proc. § 1207; *Hale* v. *Omaha Nat. Bank*, 49 N.Y. 626, 631; *Williams* v. *Slote*, 70 N.Y. 601, 602; *Mackey* v. *Auer*, 8 Hun, 180, 182.

The facts averred bring the case within the principle that where one person, for a valuable consideration, makes a promise to another, for the benefit of a third person, that third person may maintain an action to enforce the promise.

Code Civ. Proc. § 449; *Lawrence* v. *Fox*, 20 N.Y. 268; *Burr* v. *Beers*, 24 N.Y. 178; *Ricard* v. *Sanderson*, 41 N.Y. 179; *Thorp* v. *Keokuk Coal Co.* 48 N. Y. 253; *Claflin* v. *Ostrom*, 54 N. Y. 581, 584; *Glen* v. *Hope Life Ins. Co.* 56 N. Y. 379, 381; *Arnold* v. *Nichols*, 64 N. Y. 117; *Belknap* v. *Bender*, 75 N. Y. 446; *Todd* v. *Weber*, 95 N. Y. 181, 193.

The transfer of the note to the executor made him the beneficiary, the defendant's undertaking being to pay the debt and not a particular person.

Coster v. *Mayor*, 43 N.Y. 399, 411; *Little* v. *Banks*, 85 N.Y. 258, 263; *Barlow* v. *Myers*, 64 N. Y. 41; *Simpson* v. *Brown*, 68 N. Y. 360; *Germania Nat. Bank* v. *Taaks*, 31 Hun, 260, 264.

Mr. **Benjamin F. Tracy,** for respondent:

By the agreement set out in the complaint Flint became the absolute owner of the property transferred to him by Litchfield, no trust in it being created in favor of Litchfield or anyone else.

2 Burr. Law Dic. 549, 550; *Young* v. *Young*, 80 N.Y. 438; *Andrew* v. *Bible Society*, 4 Sandf. 156; *Hungerford* v. *Cartwright*, 13 Hun, 647; *Wellington* v. *Sedgwick*, 12 Cal. 469, 474.

Flint's promise to Litchfield to pay the debt of the railroad company to Foote is a promise that cannot be enforced by Foote or his assignee, Litchfield, executor.

Ætna Nat. Bank v. *Fourth Nat. Bank*, 46 N. Y. 92; *Garnsey* v. *Rogers*, 47 N. Y. 240; *King* v. *Whitely*, 10 Paige, 465; *Merrill* v. *Green*, 55 N. Y. 270; *Cushman* v. *Henry*, 12

Jones & S. 97, referring to *Vrooman* v. *Turner*, 69 N. Y. 284; *Pardee* v. *Treat*, 82 N. Y. 385; *Seward* v. *Huntington*, 94 N. Y. 104.

The defendant, by demurring, did not admit the allegations in the complaint, concerning the purpose and effect of the agreement.

Bogardus v. *N. Y. Life Ins. Co.* 2 Cent. Rep. 150, 101 N. Y. 337.

Earl, *J.*, delivered the opinion of the court:

We are of opinion that the complaint states a good cause of action, and that the demurrer was not therefore well taken.

While the note mentioned in the complaint contains a promise to pay E. B. Litchfield, "executor of the estate of H. Maria Litchfield, deceased," the words quoted are mere *descriptio personæ*.

There is nothing in the complaint showing that the loan was made by him as executor and in no other capacity; and upon the facts alleged in the complaint, if Litchfield had desired to commence suit directly upon the note against the maker thereof, he would have been obliged to commence it in his individual name, and in that capacity he could have recovered. *Peck* v. *Mallams*, 10 N. Y. 509.

So too, although in the title of this action, after the word "Litchfield," the words "executor of the last will and testament of H. Maria Litchfield, deceased" appear, yet the action is the individual action of Electus B. Litchfield. The whole body of the complaint shows an action in his favor to enforce an agreement made by him individually with the defendant for the payment of the note given to and held by him individually. In such a case when the complaint shows a cause of action in favor of the plaintiff, not in his representative but in his individual character, the descriptive words may be rejected, leaving the action to stand as one in the individual capacity of the plaintiff. *Merritt* v. *Seaman*, 6 N. Y. 168; *Stilwell* v. *Carpenter*, 62 N. Y. 639; *Beers* v. *Shannon*, 73 N. Y. 292; *Thompson* v. *Whitmarsh*, 1 Cent. Rep. 4, 100 N.Y. 35.

We agree with the general term that this is not an action to enforce a trust, but simply to enforce the agreement of the defendant to pay the note held by the plaintiff, which is set out in the complaint. It is quite clear that under the authority of *Lawrence* v. *Fox*, 20 N.Y. 268; *Barlow* v. *Myers*, 64 N.Y. 41; *Vrooman* v. *Turner*, 69 N. Y. 280, and other like cases, Foote, if he had continued to hold the note, could, upon the facts alleged in the complaint, have compelled its payment by the defendant. His agreement to pay the note to Foote was founded upon an ample consideration passing to him from the plaintiff.

At the same time the plaintiff was under a legal obligation or duty to Foote, by virtue of his indorsement upon the note which he had transferred to him; and his interest and obligation consequent upon his indorsement bring the case precisely within the rule laid down in *Vrooman* v. *Turner*, *supra*, in the following language: "A legal obligation or duty of the promisee to him (the third party) will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor."

It is true that the complaint does not very distinctly aver the indorsement by the plaintiff, of the note which was held by Foote at the date of the agreement. But the note was payable to plaintiff's order; and the complaint alleges that it was transferred to Foote, which in the case of such a note would imply its indorsement; it avers that payment of the note was demanded, and that it was protested for nonpayment and that notice of protest was duly served upon plaintiff.

It is also alleged that the agreement was entered into for the purpose, among other things, of making certain provision for the payment of the note and the indebtedness of the Kings County Central Railroad Company evidenced thereby, and of indemnifying the plaintiff as executor from liability thereon. From all this language we think it can be inferred that the plaintiff was the indorser of the note, while it was in the hands of Foote: and therefore the promise of the defendant became available to Foote, and the assignment and transfer of the note to the plaintiff enabled him as such assignee, standing in the shoes of Foote, to enforce the agreement.

But even if this were not so, the conclusion would still be reached that the plaintiff could enforce payment of the note. The defendant promised to pay this note upon ample consideration furnished by the plaintiff. He thus became bound to some one to pay it. If he did not become bound to Foote, he certainly did to the plaintiff; and the plaintiff having become possessed of the note, can, not simply as assignee of Foote but as a party to the agreement, enforce payment of the note. The plaintiff holds, not only all the rights, if any, Foote had under that agreement, but all the rights which he had thereunder as a party thereto; and there can be no doubt that he is in a position to enforce the promise the defendant made to him to pay the note.

Therefore the plaintiff having become owner and holder of the note, having procured the consent of the Kings County Central Railroad Company to its payment by the defendant, and having tendered to him the sixteen bonds to which he was entitled under the agreement, and the enterprise mentioned in the agreement having been closed up and terminated, the defendant having ample funds for the payment of the note, we see no reason to doubt that the complaint sets forth a sufficient cause of action and that the demurrer should not have been sustained.

The judgment of the general term should, therefore, be reversed, and that of the special term overruling the demurrer affirmed; and the defendant should have leave to withdraw his demurrer and serve an answer within thirty days, upon payment to the plaintiff of all the costs since the service of the demurrer.

All concur.

Ellen POMFREY, *Respt.*,

v.

Village of SARATOGA SPRINGS, *Appt.*

1. A **village** which is constituted a separate road district and the trustees of

which are commissioners of highways of the village, is **bound to keep its streets and sidewalks** in a reasonably **safe** and proper condition for public use; and for neglect of such duty it is liable to persons who thereby, without fault on their part, receive injuries.

2. If the **municipal authorities** have actual **notice of** a dangerous **defect in** a **street** or sidewalk, it is their **duty,** without unreasonable delay **to repair** it; and when a street or sidewalk has been out of repair for considerable time, so that by reasonable diligence they could have had notice of the defect, such **notice** may be **imputed** to them.
3. Where one of the principal streets of a village had been open and used for about forty years, and its sidewalk had been laid out and used for the same time, and the village had assumed jurisdiction of and made improvements upon it, the **jury** are **authorized to find** that the **street and sidewalk** were **dedicated to public use** and were lawful.
4. Where, by the village charter, the walks are placed under the care of the trustees and the superintendent is bound to repair them, *held*, that money raised for the repair of the streets is applicable also to the repair of the sidewalks, and that the word **"streets"** in the charter **included sidewalks.**
5. It is **not sufficient to exonerate** the **village that** the **superintendent had no money in his hands to repair walks,** where he had authority to call upon the trustees for the same and it does not appear but that there were sufficient funds for that purpose in their hands.
6. A **claim for** damages for **injuries** received **from** a **defective** and unsafe **sidewalk** is **not** one which is **required** by statute **to be presented** to the officers of the defendant village **for audit.**
7. In an action for such damages, an **ordinance** of the village, imposing a penalty on lot owners for neglect to keep the sidewalks in front of their lots in repair **is admissible in evidence** for plaintiff.
8. **Evidence that others had fallen on the sidewalk,** at the same place where plaintiff was injured, is **admissible** for plaintiff.
9. **It was not negligence in law** for the plaintiff to attempt to cross a bank of snow and ice on the sidewalk, although such obstruction was visible.

(Decided March 1, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Third Department, affirming a judgment of the Saratoga Circuit entered on a verdict for plaintiff for $8,000 damages in an action to recover for injuries received from a fall on a sidewalk, occasioned by accumulations of snow and ice. *Affirmed.*

Reported below, 34 Hun, 607.

The facts and questions raised appear from the opinion.

Mr. **Charles S. Lester,** for appellant:

I. If any duty rested upon defendant to keep its sidewalks clear of ice and snow, this duty was not created or increased by the passage of any by-laws or ordinances, as it is evident that no ordinance or by-law of a corporation can enlarge, diminish or vary its powers or duties.

Thompson v. *Carroll's Lessee*, 22 How. 422 (63 U. S. bk. 16, L. ed. 387); Dill. Mun. Corp. §§ 251, 542, 620.

It is well settled that a corporation is not liable to an action for neglect in not enforcing any of its ordinances or by-laws, or for any neglect of its officers in that respect, and is not responsible for their violation.

Levy v. *New York*, 1 Sandf. 465; *Hutson* v. *New York*, 5 Sandf. 303; *Lorillard* v. *Monroe*, 11 N. Y. 396; *Griffin* v. *Mayor*, 9 N. Y. 458; *Stillwell* v. *Mayor*, 17 Jones & S. 360; Dill. Mun. Corp. § 754.

Neither is a corporation liable for a failure to pass any ordinance.

Wilson v. *Mayor*, 1 Denio, 595; *Hutson* v. *New York*, 5 Sandf. 303; Dill. Mun. Corp. § 753; *Fowle* v. *Com. Council of Alexandria*, 3 Pet. 398 (28 U. S. bk. 7, L. ed. 719); *Hines* v. *Lockport*, 50 N. Y. 236.

The judge, in admitting the several by-laws as evidence, in effect instructed the jury that they were material and proper to be considered, and that the defendant was at fault in not enforcing its by-laws, the enforcement of which would have prevented the accident. This was error.

Coleman v. *People*, 58 N. Y. 561; *Baird* v. *Gillett*, 47 N. Y. 186; *O'Hagan* v. *Dillon*, 76 N. Y. 170; *Erben* v. *Lorillard*, 19 N. Y. 299; *Arthur* v. *Griswold*, 55 N. Y. 400; *Anderson* v. *Rome etc. R. R. Co.* 54 N. Y. 334; *Brague* v. *Lord*, 67 N. Y. 495, 499; *Worrall* v. *Parmelee*, 1 N. Y. 519; *People* v. *Gonzalez*, 35 N. Y. 59; *Enders* v. *Sternbergh*, 1 Keyes, 264, 271.

II. It has been held that proof of former accidents happening at the same place is immaterial.

Sherman v. *Kortright*, 52 Barb. 269; *Blair* v. *Pelham*, 118 Mass. 420; *Parker* v. *Portland Pub. Co.* 69 Maine, 173; *Hubbard* v. *And. & Ken. R. R. Co.* 39 Maine, 506; *Collins* v. *Dorchester*, 6 Cush. 396; *Hudson* v. *C. & N. W. R. R. Co.* 59 Iowa, 581; 27 Alb. L. J. 115.

It has also been held that evidence of former accidents happening at the same place is admissible; but in all such cases the obstruction has been a fixed, permanent, unalterable obstruction, as:

An iron switch projecting above the pavement.

Wooley v. *Grand St. & N. R. R. Co.* 83 N. Y. 130.

An uneven sidewalk with permanent elevations and depressions.

Quinlan v. *Utica*, 11 Hun, 217; affd. 74 N. Y. 603.

A pile of stone which could not increase nor decrease daily with the weather.

Eggleston v. *Columbia Turnpike R. Co.* 18 Hun, 146.

A permanent water gate projecting from the sidewalk.

Burns v. *Schenectady*, 24 Hun, 10.

The evidence as to a previous accident by the witness tended to prove a cause of action in favor of the witness which would require as extended evidence as the case of plaintiff. The negligence of defendant could not be thus proved; and the admission of such evidence was error for which a new trial should be granted.

Dale v. *Delaware etc. R. R. Co.* 73 N. Y. 468; *Hawley* v. *Hatter*, 9 Hun, 134.

III. The court should have charged, as requested by defendant, "That if the obstruction was visible and apparent to any passer-by the plaintiff was guilty of negligence in attempting to cross it;" and "If the defect complained of was such as would be seen by any ordinary person passing along the street, it was negligence for the plaintiff to attempt to pass over the defect; but she should have gone around the same."

Salter v. *Utica etc. R. R. Co.* 75 N. Y. 276; *Pakalinsky* v. *N. Y. Cent. etc. R. R. Co.* 81 N. Y. 424; *Durkin* v. *Troy*, 61 Barb. 437, 456.

The rule is also well settled in other States that a municipal corporation is not liable for an accidental injury happening in the daytime, if there is sufficient space to walk which is free from ice.

Quincy v. *Barker*, 81 Ill. 300; *O'Laughlin* v. *Dubuque*, 42 Iowa, 539.

If by a proper use of his faculties a passenger could have discovered an approaching train, and fails to do so, he is chargeable with contributory negligence and cannot recover.

Salter v. *Utica etc. R. R. Co.* 75 N. Y. 273; *Ernst* v. *Hudson River R. R. Co.* 39 N. Y. 61; *Wilcox* v. *Rome etc. R. R. Co.* 39 N. Y. 358, 366.

IV. The place where the plaintiff was injured, although open to the public, was not in fact a public street over which the defendant had jurisdiction.

The owner could not by the mere removal of his fence impose on the public this strip of land as a street; nor could the public deprive him of any right or interest or control over it by that circumstance.

Rozell v. *Andrews*, 4 Cent. Rep. 209; *S. C.* 24 N. Y. Week. Dig. 448; *Niagara Falls Suspension Bridge Co.* v. *Bachman*, 66 N. Y. 269 and cases cited.

V. It is not alleged nor was it proved that this claim has ever been presented to or acted upon by the auditors of the Village of Saratoga Springs. The law is explicit that "Until such claims are presented to and acted upon by said auditors no suit or action in law can be maintained thereon."

Laws 1875, chap. 517.

The motion for a nonsuit should have been granted. A noncompliance with this requirement can be raised by the defendant at any stage of the action.

Reining v. *Buffalo*, 3 Cent. Rep. 294, 102 N. Y. 308; *Minick* v. *Troy*, 83 N. Y. 514.

VI. There is no duty on the defendant to clear off its sidewalks from snow and ice, because no power has been conferred upon it to raise and expend money for such purpose. The duty imposed by law on a municipality is only commensurate with the power conferred. Absence of necessary funds or the legal means of procuring them will excuse the performance of any duty. These are legal axioms.

Hines v. *Lockport*, 50 N. Y. 238; *Weed* v. *Ballston Spa*, 76 N. Y. 335.

The charter of the Village of Saratoga Springs differs essentially from the charters of those villages which have been held liable to keep their sidewalks clear of snow and ice. It contains a complete plan to compel owners of property to build, grade, repair and keep free from obstructions all the sidewalks adjoining their premises. It does not authorize the raising of any money by tax for this purpose, but by the clearest implication excludes it.

There is a recognized difference between streets in cities or incorporated villages and roads and highways designated in the general highway system of the State.

Re Application of Woolsey, 95 N. Y. 135; *Re Lexington Avenue*, 29 Hun, 303.

The uniform legislation of the State recognizes the fact that sidewalks are no portion of the highways, and that there is no authority to expend any portion of the highway fund for the construction of sidewalks.

The village superintendent testified that he had no funds in his hands for the purpose of cleaning off sidewalks. This was a defense and for this reason the complaint should have been dismissed.

Garlinghouse v. *Jacobs*, 29 N.Y. 297; *Hover* v. *Barkhoof*, 44 N. Y. 113, 120; *Hines* v. *Lockport*, 50 N. Y. 236; *Weed* v. *Ballston Spa*, 76 N. Y. 335; *People* v. *Little Valley*, 75 N. Y. 316.

It will be found on examination, in every case where a village has been held liable for negligence in not repairing or removing obstructions from sidewalks, that there was some provision in the charter casting that duty upon the municipality.

Hiller v. *Sharon Springs*, 28 Hun, 344.

In *Weet* v. *Brockport*, reported in a note to *Conrad* v. *Ithaca*, 16 N. Y. 161, it is expressly stated that "It appeared that the defendant had ample funds to make and complete the improvement in question," and it was held liable on that ground. The case of *Conrad* v. *Ithaca* was for damages for negligently constructing a bridge; and the duty of defendant and its power to raise funds was unquestionable.

In *Hickok* v. *Plattsburgh*, 15 Barb. 427, reversed, 16 N. Y. 161, the main question was whether the corporation was liable for the negligence of the trustees, and it was held that it was.

Messrs. **L. B. Pike** and **Charles M. Davison,** for respondent:

The street in question was one of the streets or highways of the Village, over which it had jurisdiction and which it was bound to keep in repair. It had been used by the Village for more than twenty years, which presumes a dedication and acceptance by user.

Pearsall v. *Post*, 20 Wend. 115; *Hickok* v. *Plattsburgh*, 41 Barb. 135; *Post* v. *Pearsall*, 22 Wend. 477; *Wiggins* v. *Tallmadge*, 11 Barb. 457; *People* v. *Loehfelm*, 2 Cent. Rep. 874, 102 N. Y. 1.

This dedication cannot be defeated by showing that the owner of the servient estate did not grant it.

19 Wend. 309; 14 Barb. 511; 8 Pick. 504; 36 Vt. 503; 32 Vt. 183; 10 Fost. 446.

Whether there was dedication or not, as between the defendant and the abutting owners, is immaterial; the defendant treated it as one of the village streets; controlled it; paid for its sidewalks in scrip; kept it in repair, and at the request of abutting owners fixed the grade, and permitted it to be used; and by this made itself liable. No matter how the sidewalk came into existence.

Saulsbury v. *Ithaca*, 94 N. Y. 30; *Requa* v. *Rochester*, 45 N. Y 129; *Sewell* v. *Cohoes*, 75 N. Y. 45.

Sidewalks are parts of the highway.

Graves v. *Otis*, 2 Hill, 466–470.

The evidence tended to prove the actual dedication, acceptance and user, and that it was one of the streets over which the defendant had and exercised jurisdiction, and this court is concluded thereby.

People v. *Loehfelm*, 2 Cent. Rep. 874, 102 N. Y. 1.

The sidewalk in this case having been built, no matter by whom, the keeping in repair was a ministerial act, and not in any sense judicial.

Saulsbury v. *Ithaca*, 94 N. Y. 27.

The case of *Urquhart* v. *Ogdensburg*, 91 N. Y. 67, or as distinguished and limited in 97 N. Y. 238, does not, as defendant supposes, support the theory of the appellant, but quite the contrary.

The duty to keep the sidewalk in repair is imposed by the charter of the Village.

Laws 1866, chap. 220, § 25, subd. 23, 39, 43, 45; §§ 35, 36, 38, 39, 54.

The Corporation had funds; if it had not, it had the means of obtaining them. Proof that the superintendant had not funds in his hands is no evidence that the defendant had not; it was his duty to report to the trustees if he had not.

Charter, § 39.

The Corporation or its officers did not do nor attempt to do anything; and the defense of want of power is plainly an afterthought. The burden of showing want of means was upon the defendant, and this is not shown either by the charter or the evidence.

Weed v. *Ballston Spa*, 76 N. Y. 335.

The corporation defendant had constructive notice, at least, of the condition of the sidewalk. Constructive notice was sufficient.

Requa v. *Rochester*, 45 N. Y. 129; *Todd* v. *Troy*, 61 N. Y. 506; *Kinney* v. *Troy*, 38 Hun, 287.

The time in which the condition existed was for about two weeks or more; and the jury determined that this time was sufficient to infer knowledge of its condition by defendant.

Deyoe v. *Saratoga Springs*, 3 Thomp. & C. 504.

This court is concluded thereby.

Goodfellow v. *New York*, 1 Cent. Rep. 21, 100 N. Y. 15.

It was the duty of defendant to keep the street clear of this obstruction, keep the sidewalk in condition that the traveler might safely pass over it, no matter by whom or how the obstruction was placed there; and if, after actual or constructive notice, it neglected its duty, it is made liable for any damages resulting therefrom to a traveler whose own negligence does not contribute to the injury.

Todd v. *Troy*, 61 N. Y. 509; *Weed* v. *Ballston Spa*, 76 N. Y. 333; *Hines* v. *Lockport*, 50 N. Y. 236; *Saulsbury* v. *Ithaca*, 94 N. Y. 27; *Rehberg* v. *Mayor*, 91 N. Y. 137; *Hyatt* v. *Rondout*, 44 Barb. 385; *Hume* v. *Mayor*, 74 N. Y. 270; *Kinney* v. *Troy*, 38 Hun, 287; *Moore* v. *Gadsden*, 87 N. Y. 86, 87, 88.

Earl, *J.*, delivered the opinion of the court:

The plaintiff commenced this action to recover damages for injuries received by her from falling upon one of the sidewalks in the Village of Saratoga Springs, on the 9th day of January, 1883. At that time snow and ice had accumulated upon the sidewalk on the southerly side of Lake Avenue, opposite the premises of one Andrews, until the embankment was about three feet thick above the surface of the ground, and two and one half feet thick above the snow upon the sidewalk easterly and westerly of the premises mentioned. While she was passing along the sidwalk over this embankment, she slipped down and received the serious injuries of which she complains. This snow and ice had fallen from time to time from the roof of a barn standing near the sidewalk, and had been there for at least two weeks.

Under its charter (chap. 220, Laws 1866) the Village of Saratoga Springs is constituted a separate road district, exempt from the superintendence and care of the commissioners of highways of the Town of Saratoga Springs; and the trustees are constituted and declared to be the commissioners of the Village; they are authorized to appoint a superintendent who is to have the care and supervision of the streets and sidewalks of the Village, subject to their general control and direction; they are empowered, and it is made their duty to establish such ordinances, by-laws and regulations as they may think proper and reasonable—among other things, to establish the grade of the streets and sidewalks, to provide for and regulate the paving, repaving and improving streets and sidewalks and the cleaning of streets and sidewalks as often as may be necessary; and ample power is conferred upon the Village and its trustees to raise money for the purpose of discharging the duties and obligations thus imposed upon it in reference to its streets and sidewalks.

That under such a charter it was the duty of the defendant to keep its streets and sidewalks in a reasonably safe and proper condition for public use, and that for neglect of such duty it was liable for damages to persons without fault on their part, receiving injuries upon its streets, has been settled by many decisions in this State and is no longer open to question. *Conrad* v. *Ithaca*, 16 N. Y. 158; *Requa* v. *Rochester*, 45 N. Y. 129; *Hines* v. *Lockport*, 50 N. Y. 236; *Todd* v. *Troy*, 61 N. Y. 506; *Evans* v. *Utica*, 69 N. Y. 166; *Weed* v. *Ballston Spa*, 76 N. Y. 329; *Saulsbury* v. *Ithaca*, 94 N. Y. 27; *Dubois* v. *Kingston*, 3 Cent. Rep. 58, 102 N. Y. 219.

The rule of municipal responsibility as to streets and sidewalks is equally applicable to incorporated villages and to cities; and the same principles which impose liability upon the one class of corporations impose it upon the other.

If the municipal authorities have actual notice of a dangerous defect in a street, then it is their duty without unreasonable delay to repair it. They do not fill the measure of their responsibility, however, by acting simply when they have actual notice, but they owe to the public the duty of active vigilance, and when a street or sidewalk has been out of repair for any considerable length of time so that by reasonable diligence they could have notice of the defect, such notice may be imputed to them. So in this case, if all the other conditions existed for imposing liability upon the defendant, it is not claimed that the facts of the case were not such that the jury could find that the defendant had or ought to have had notice of the dangerous condition of this sidewalk.

But the defendant seeks to escape liability upon various grounds which will be separately noticed:

1. It is claimed that the place where the plaintiff was injured, although used by the public, was not in fact a public street or sidewalk over which the defendant had jurisdiction. But it is undisputed that this street had been open to its full width for about forty years; that it was one of the principal streets of the village, extensively used by the public; that the sidewalk had been laid out and used during all of that time; that water mains had been laid through the street; that the Village had assumed jurisdiction over it and that curb stones had been placed along the sidewalk at the expense of the Village.

We think that there was abundant evidence from which the jury could properly find that this street, for its whole width, had been dedicated to and accepted by the public, and that it was legally and lawfully one of the streets of the Village. *Cook* v. *Harris*, 61 N. Y. 448; *People* v. *Loehfelm*, 2 Cent. Rep. 874, 102 N.Y. 1.

2. It appears sufficiently that the defendant either had the means to clear this sidewalk of the accumulation of ice and snow or the ability to raise the means. By section 38 of the village charter it is made the duty of the village superintendent in the month of April of each year to report in writing to the board of trustees the general condition of "the streets, bridges, culverts, sidewalks, lanes and alleys with estimates of the probable expense to put them in good repair. He shall also within ten days prior to each annual village election report in writing to the board of trustees, the condition of the streets, bridges, culverts, sidewalks, lanes and alleys, with the probable amount necessary to keep them all in good order during the coming year."

Section 39 provides that "Whenever any repairs shall be necessary on any public street, bridge, culvert, sidewalk, lane or alley in said Village, the village superintendent shall attend to such repairs; and when there are no funds in his hands to make such repairs, he shall report the fact to the board of trustees, with his opinion as to the amount necessary for such purpose, to the end that the means may be provided and drafts drawn upon the particular fund belonging to the highway department to make such expenses. He shall be subject to the same direction and control of the commissioners of highways of the Village in the care and supervision of the public streets, bridges, culverts, sidewalks, lanes and alleys therein, and to the same penalties for neglect of duty as the overseers of the highways of the several road districts in the Town of Saratoga Springs are to the commissioners of highways of said town. He shall be personally responsible to the public, for neglect of duty, to the same extent as the commissioners of said Village.

Section 54 provides that "For the purpose of providing the means of sustaining the several departments and defraying the expenses of the Corporation, the board of trustees are authorized to levy and collect an annual tax in amounts and for the purposes as follows: 1. Not exceeding $7,500 for the support of roads, bridges, culverts, streets, lanes and alleys within the Village."

The claim on the part of the defendant is that because sidewalks are not mentioned in this last section, therefore there was no power in the trustees to raise any money for the repair of sidewalks. But in various other parts of the charter sidewalks are specially mentioned and they are placed under the care and supervision of the trustees, and the superintendent under their direction is bound to attend to and make the repairs upon them as well as the streets. The word "streets" is used here in its broad sense and was intended to include not only the road way for teams but the sidewalks for pedestrians. *Re Burmeister*, 76 N. Y. 174.

While it is made the duty of the Village to keep the sidewalks in repair, it would be quite extraordinary if there were no provision in the charter by which it could procure funds for the purpose of discharging that duty. We think, therefore, that the word "streets" should be held to mean the entire space between the outer lines of the streets, including the sidewalks, and that the money authorized to be raised under that section could be used as well for the repair of the sidewalks as of the road bed in the centre of the streets.

The only evidence given on the trial to prove that the Village had no funds to repair this sidewalk was the evidence of the village superintendent who testified that he did not have any money in his hands for that purpose. But there was no proof that there was not sufficient funds in the treasury of the Village which under the charter could have been placed in his hands and used for that purpose if he had applied for it.

3. It is further objected that the plaintiff's claim was never presented to or acted upon by the auditors of the Village as required by chapter 517 of the Laws of 1875. A sufficient answer to this objection is that it was in no way made upon the trial, and is not presented to us by any proper exception. But it may, however, be further said that the plaintiff's claim is not one of those which is required to be audited under that Act. The claims there referred to are clearly claims for expenditures made on behalf of the Village, or for services rendered for or goods or materials furnished to the Village. And this claim, therefore, required no audit.

4. Upon the trial the plaintiff offered in evidence one of the ordinances of the Village which imposed penalties upon persons who should throw any snow or ice from roofs upon sidewalks, and upon the owners or occupants of lots or buildings who should neglect to keep

the sidewalks in front of their lots and buildings free and clear of snow and ice, and other incumbrances. The defendant objected, and the objection was overruled, and the evidence admitted.

In this we perceive no error harmful to the defendant. It was not held liable for failure to make proper ordinances, or to enforce the ordinance proved. So far as it had any effect whatever it would seem to have been beneficial to the defendant, as it showed that it had so far discharged its duty by passing proper ordinances for keeping the sidewalks free and clear of ice and snow. It had no material bearing in favor of the plaintiff, except to show that the trustees were aware of the importance of removing such obstructions from the sidewalks of the Village and of their dangerous character.

5. It is also claimed that there was error in allowing one of the witnesses to testify, against the objection of the defendant, that she fell down once at the same place where the plaintiff was injured. She was called by the plaintiff to testify to the condition of the walk, and testified that she recollected its condition; that the snow was packed very hard from falling from the roof of the barn; that the embankment at each end was slanting and that a person had to be very careful or fall; that she knew that to be a fact and spoke from experience; and then she was permitted to say that she fell there once herself. That evidence was given, apparently, to show how she came to know the condition of the walk at that place. But such evidence has been held to be competent. *Quinlan* v. *Utica*, 11 Hun, 217, affirmed in 74 N. Y. 603.

6. The evidence tended to show that this embankment of snow and ice was perfectly visible, that the plaintiff must have seen it as she passed over it, and that there was a light covering of recent snow over the ice. The defendant requested the court to charge the jury "That if the obstruction was visible and apparent to any passer by, the plaintiff was guilty of negligence in attempting to cross it;" also that "If the defect complained of was such as would be seen by an ordinary person passing along the street, it was negligence for the plaintiff to attempt to pass over the defect, but she should have gone around the same."

The court declined to charge as requested, and the defendant's counsel excepted. The charge of the judge sufficiently laid down the rule of law as to plaintiff's contributory negligence; and it would not have been proper for the judge to charge as matter of law that it was negligence for the plaintiff, under the circumstances disclosed in this case, to attempt to pass over the embankment. *Evans* v. *Utica*, 69 N. Y. 166; *Brusso* v. *Buffalo*, 90 N. Y. 679; *McGuire* v. *Spence*, 91 N. Y. 303; *Bullock* v. *Mayor*, 99 N. Y. 654.

We have now noticed all the objections to plaintiff's recovery which were brought to our attention upon the argument of this case by the learned counsel for the appellant, and we do not think any of them furnish a sufficient reason for the reversal of the judgment. We may, however, say that the responsibility cast upon cities and villages, for injuries caused by slipping down upon streets and sidewalks in consequence of snow and ice, is a very serious one. In this climate, where during several months of the year snow falls in large quantities and ice is from time to time created, it is quite impossible, particularly in villages, at all times to keep the streets and sidewalks in a safe condition.

In this Village it appears that there were seventy-five miles of sidewalks and but one superintendent having charge of all the streets and sidewalks. It is manifestly difficult, under such circumstances, for such a village to keep its sidewalks at all times clear of snow and ice; and the proof should be very satisfactory, showing clear neglect of duty, before liability for injuries caused by snow and ice should be imposed.

The evidence from which such notice could be imputed to the defendant as would charge it with negligence in not removing this embankment of snow and ice was very meager and slight; but we cannot say that it was not sufficient for the consideration of the jury. Indeed it was not claimed at the trial or on the argument before us that it was not.

Actions of this nature are becoming quite numerous; and they may well cause some alarm to those who bear the burdens of village taxation. But they must rely for their protection against unjust accident claims on the justice and sound sense of jurors, and on the power which the courts below possess to deal with verdicts which are excessive in amount or against the weight of evidence.

We, therefore, reach the conclusion that the judgment should be affirmed, with costs.

All concur, except **Peckham**, *J.*, not sitting.

PEOPLE of the State of New York, *Respts.*,
v.
George H. OGLE, *Appt.*

1. On the **trial** of an indictment **for murder,** the **action of** the **officers** in seeking for the prisoner after the crime was committed is **admissible** in evidence **to show** the **flight of** the **prisoner.**

2. It is not error for the district attorney, upon the **cross examination of** the **prisoner,** to ask him if he had been arrested for shooting a man, where his counsel had already proved the same fact by another witness.

3. It is not error for the judge to refuse to charge the jury in relation to the acts necessary for the **corroboration of** an **accomplice,** "that they must be inconsistent with the innocence of the defendant and which exclude every hypothesis but that of guilt."

4. The rule as to **corroboration of** an **accomplice** only requires a corroboration as to some material fact which goes to prove that the prisoner was connected with the crime.

5. One who had no knowledge that a crime was to be committed, and who neither aided nor abetted in its commission, is not an **accomplice.**

(Decided March 1, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Court of General Sessions of the Peace on conviction of defendant of murder in the second degree. *Affirmed.*

The defendant was tried for murder in the first degree, the charge being that he stabbed and killed one James A. Brown, December 1, 1882.

The case on the part of the People rested chiefly on the evidence of Lawrence Rogers and John Hopper, whom the defendant's counsel regarded as accomplices or accessories.

Further facts, together with the questions raised, appear from the opinion.

Mr. **William F. Howe,** for appellant:

It was error to allow the district attorney to prove by the police officers what they did in seeking the prisoner.

Ryan v. *People*, 79 N. Y. 601.

This error was prejudicial.

Coleman v. *People*, 58 N. Y. 561; *Anderson* v. *Rome etc. R. R. Co.* 54 N. Y. 341; *Stokes* v. *People*, 53 N. Y. 184; *Worrall* v. *Parmelee*, 1 N. Y. 520.

There was error in permitting the district attorney to inquire as to a previous arrest and indictment of the defendant for shooting.

People v. *Irving*, 95 N. Y. 541; *People* v. *Brown*, 72 N. Y. 571; *Real* v. *People*, 42 N. Y. 281; *Ryan* v. *People*, 79 N. Y. 600; *Crapo* v. *People*, 15 Hun, 272; *People* v. *Crapo*, 76 N. Y. 290; *People* v. *Gay*, 7 N. Y. 378; *Jackson* v. *Osborn*, 2 Wend. 555.

The error was not cured by a subsequent question put by the district attorney, as to whether Ogle had been tried on that indictment and acquitted, to which the answer was in the affirmative. The examination shows that the district attorney seemed to be well aware of the fact that the defendant had been acquitted of the previous indictment; and it is therefore clearly apparent that the question was not put for the purpose of affecting the defendant's credibility.

People v. *Brown*, 72 N. Y. 573.

In each of the cases in which questions as to arrest and accusations have been held incompetent, the reason for such incompetency proceeded upon the theory that arrests and accusations proved nothing; that the person so arrested or accused was to be presumed innocent.

People v. *Irving*, 95 N. Y. 541; *Ryan* v. *People*, 79 N. Y. 600; *Crapo* v. *People*, 15 Hun, 272; *People* v. *Crapo*, 76 N. Y. 290; *People* v. *Brown*, 72 N. Y. 571; *People* v. *Gay*, 7 N. Y. 378; *Jackson* v. *Osborn*, 2 Wend. 555; *Coleman* v. *People*, 58 N. Y. 561; *Anderson* v. *Rome etc. R. R. Co.* 54 N. Y. 341; *Stokes* v. *People*, 53 N. Y. 184; *Worrall* v. *Parmelee*, 1 N. Y. 52.

The court should have charged the jury as requested: That the acts necessary for corroboration must be inconsistent with the innocence of the defendant, and which exclude every hypothesis but that of guilt.

People v. *Plath*, 1 Cent. Rep. 772, 100 N. Y. 593.

Whenever corroboration is required it must be as to material facts.

People v. *Plath*, *supra; People* v. *Courtney*, 28 Hun, 589; *People* v. *Williams*, 29 Hun, 520; *Ormsby* v. *People*, 53 N. Y. 474; *Kenyon* v. *People*, 26 N. Y. 207; *Boyce* v. *People*, 55 N. Y. 645; *Armstrong* v. *People*, 70 N. Y. 38.

The court should have charged as was requested: That the jury is justified in requiring every fact sworn to by the witnesses, Rogers and Hopper, to be corroborated to its satisfaction; and if not so corroborated, it may reject such fact as not proven.

Penal Code, § 28; *People* v. *Lindsay*, 63 N. Y. 153; 1 Russ. Crimes, 261; *People* v. *Petmecky*, 99 N. Y. 415.

Messrs. **DeLancey Nicoll** and **McKenzie Semple,** *Asst. Dist-Attys.*, for the People, respondents:

The admission of the question asked the prisoner, as to the shooting of a man in front of Miner's Theater, was not error.

Nolan v. *Brooklyn R. R. Co.* 87 N. Y. 63.

The court properly left the question to the jury as to the credibility of Rogers and Hopper.

People v. *Ryland* and *People* v. *Courtney*, 1 N. Y. Cr. Rep. 123, 64; 2 N. Y. Cr. Rep. 441; *People* v. *Plath*, 1 Cent. Rep. 772, 4 N. Y. Cr. Rep. 53.

Peckham, *J.*, delivered the opinion of the court:

Several grounds are stated by the counsel for the prisoner for granting a new trial, but we think that not one is sufficent. It seems, on the contrary, to be quite a plain case for an affirmance of the judgment. But as the prisoner has been convicted of murder in the second degree and sentenced to imprisonment for life, we have not only given full attention to the arguments advanced by his counsel, but in reference to the gravity of the case we will briefly state the reasons for the result arrived at by us.

1. The first alleged error consists in permitting proof of the action of the officers in seeking for the prisoner after the crime was committed. It was offered and received upon the question of the flight of the prisoner. The court decided correctly in admitting the evidence.

The crime was committed on the 30th day of November, 1882, and a brother of defendant was charged with its commission, and both were arrested that night. The prisoner was present at the examination of his brother, but was not called as a witness. The brother was subsequently indicted, but was finally discharged on his own recognizance as there was no proof against him, and at that time none against the prisoner.

Subsequently, in January, 1884, several persons were arrested and brought down before the district attorney, or some of his officers, and statements were made by some of them which led the authorities to desire the arrest of the prisoner.

The evidence objected to was then permitted to be given by the district attorney, showing what the officer did in order to arrest the prisoner; that he went to his house for the purpose of looking for him, but did not find him there, and also to a saloon kept by one Ogle (but not the prisoner, nor was it his home) and did not find him, and also searched the neighborhood or vicinity without success, and also made inquiries, but without finding him until September 6, 1886, when he was arrested in New York;

and he then told the officer, as the officer swore, that he had been in Montana, Kansas City and Montgomery, Alabama, and that if the officer had not got him then, he "was going away tomorrow evening" and "I guess you would never have got me."

All this evidence was perfectly proper. The district attorney claimed that it proved that the prisoner had run away, and from that (among other things) he might ask the jury to infer guilt. If it did not prove flight, no harm was done. All that could be said was the People had tried to prove a fact and failed; but the evidence was so plainly admissible that no argument upon it is required.

2. The next ground taken by counsel for the prisoner to obtain a reversal, rests upon the fact that the district attorney, upon the cross examination of the prisoner, asked him if he had been arrested for shooting a man at Miner's Theater. The evidence was admitted under the objection and exception of the prisoner's counsel. Whatever the ruling of the court might otherwise have been, it is clear that no right of the prisoner was illegally invaded under the facts of this case, for his counsel had already proved the same fact in the examination of the father of the prisoner, who testified that his son had been arrested and honorably acquitted upon the trial of a charge for shooting a man at Miner's Theater, showing conclusively that the two examinations referred to the same transaction.

3. The counsel asked the court to charge the jury in relation to the acts necessary for the corroboration of an accomplice, "that they must be inconsistent with the innocence of the defendant and which exclude every hypothesis but that of guilt." The court refused, and counsel excepted.

In this the court was clearly right. There is not and never was any such rule as to corroboration. The whole law of evidence will be searched in vain for it. The authorities cited by prisoner's counsel maintain no such rule. The rule is stated in one of them (*People* v. *Plath*, 1 Cent. Rep. 772, 100 N. Y. 593), and is wholly different from the request herein made. It only requires a corroboration as to some material fact which goes to prove that the prisoner was connected with the crime.

Another answer is that the witnesses in regard to whom the request was made were not accomplices in any sense of the word. Neither was even charged with any crime whatever. The most that could be alleged was that one of them, after the crime was committed, had the knife placed in his hand, and he threw it under a chair in the ball room, to which he immediately returned after seeing the prisoner plunge it into the deceased.

There is no evidence whatever that either had the least thought that the murder was to be committed, or in any way aided or abetted in its commission. Even if the rule as to the evidence of an accomplice had been erroneously stated by the court, it was therefore wholly immaterial in this case.

4. The court was also asked to charge the jury that it would be justified in requiring every fact sworn to by the witnesses Rogers and Hopper to be corroborated to its satisfaction, and if not so corroborated, to reject such fact as not proved. The court left the question of the credibility of the witnesses under proper instructions to the jury. The charge was an eminently fair one, and all the legal rights of the prisoner were therein carefully and fully guarded.

The record reveals no error, and the judgment must be affirmed.

All concur.

PEOPLE, *ex rel.*, ROME, WATERTOWN & OGDENSBURG R. R. CO., *Appt.*,
v.
ASSESSORS OF the Towns of WILSON AND SOMERSET, *Respts.*

1. The **provision** of section 9 of the Act of 1880 (chap. 269), **that** the completed and verified tax **assessment roll** shall **be delivered to** the **town clerk** or other proper officer **on** or before the **first** day **of September, is directory merely; and delay** in so doing, which does not result in prejudice to one claiming to be aggrieved by the assessment, and which permits the roll to remain open for inspection in the hands of the clerk for fifteen days after notice, **does not vitiate the assessment.**
2. The object of the **notice of** the completion and **delivery of** the **assessment roll** required by section 9 of the Act of 1880 is to set running the fifteen days within which a *certiorari* may be sued out, and the **omission** to give such notice is **not fatal to** the validity of **the assessment.**
3. When upon the evidence under a **certiorari to review** an alleged erroneous **assessment** the **question** of value of property assessed is purely one **of fact,** it is **not open to** review by the **court of appeals.**

(Decided March 1, 1887.)

APPEAL from orders of the Supreme Court at General Term in the Fifth Department, affirming orders of the Erie Special Term quashing writs of *certiorari* to review assessments for taxes for the years 1883, 1884 in the Towns of Somerset and Wilson, Niagara County. *Affirmed.*

The facts and questions raised sufficiently appear from the opinion.

Mr. **Edmund B. Wynn,** for appellant:

In estimating the value of railroad property for purposes of taxation the earning capacity is largely the test.

People v. *Pond*, 13 Abb. N.C. 1; 92 N. Y. 648; *People* v. *Keator*. 67 How. Pr. 277; affd. 36 Hun, 592; *People* v. *Weaver*, 67 How. Pr. 477; affd. 34 Hun, 321, appeal dismissed, 99 N. Y. 659; *People* v. *Roosa*, 2 How. Pr. N. S. 454.

The return of the Assessors of the Town of Somerset for 1883 to the writ of *certiorari* obtained by the relator to correct the illegal and erroneous assessment of relator's property in that town, that year, shows, we think, a fatal omission of the duty imposed upon assessors by the Act of 1880, § 9, chap. 269, requiring that "All assessment rolls, when finally completed and verified by the assessors, shall, in towns, on or before the first day of September, * * * be delivered to the town, village or city clerk, or other officer, to whom such rolls are or may be required by law to be delivered; and there to remain with such clerk or other officer for a period of fifteen days for public inspection. The assessors or other officers who complete and verify the assessment roll shall, after they have delivered the same to the said town, village or city clerk or other officer, forthwith give public notice (by posting the same in at least three of the most public places in said town, village or city, or by publishing the same in one or more newspapers published therein) that such assessment roll has been finally completed, the officer to whom the same has been delivered, and the place where the same will be open to public inspection."

The assessment roll was completed the 29th of August, 1883, and the Assessors return "That we publish no notice of the completion of said roll or the officer to whom the same had been delivered, or the place where the same would be open to public inspection, except as herein before stated." The "herein before stated" is nothing, the return showing neither a posting nor a publication as required by statute; and that of itself renders the assessment of 1883 illegal so far as regards the relator.

Mr. **F. Brundage,** for respondents:

The writs should have been quashed for the reason that there was no proof that the relator appeared before the Assessors on grievance day, and availed itself of the statutory means of correcting the errors complained of.

People, ex rel. Osgood v. *Comrs. of Taxes*, 99 N. Y. 154; *People, ex rel. Mut. Tel. Co.* v. *Comrs. of Taxes*, 99 N. Y. 254; 2 R. S. p. 994, § 6.

The Assessors in their return say that they assessed the property of relator at its full and true value as they would appraise the same in payment of a just debt due from a solvent debtor. This was in strict compliance with the statute.

2 R. S. p. 992, §§ 17, 18; *People* v. *Frederick*, 48 Barb. 173; *People* v. *Barker*, 48 N. Y. 70; *People* v. *Dixon*, 8 Hun, 178; *Albany etc. R. R. Co.* v. *Canaan*, 16 Barb. 244; *People* v. *Board of Assessors*, 39 N. Y. 81.

Railroad corporations are to be assessed in the same manner as individuals.

2 R. S. p. 990, § 6, and cases above cited.

Before the passage of the Act, chap. 269, Laws 1880, it was settled by a long line of authority that where it appeared by the return of the assessors that they assessed the property in the mode pointed out by the statute the court would not interefere with their determination.

People v. *Comrs.* 67 N. Y. 516, 521; 16 Barb. 244; 5 Lans. 142; 48 Barb. 175; 48 N. Y. 70, 76; 91 N. Y. 574; 76 N. Y. 64, 75.

In the valuation of property assessors act judicially; and their decision can only be attacked for fraud or excess of jurisdiction.

People, ex rel. Beadle, v. *Newton,* 2 Alb. L. J. 437; 91 N. Y. 574, 581.

Their return is held to be conclusive.

People v. *Mayor*, 6 Hun, 652; *People* v. *Fire Comrs.* 73 N. Y. 437.

Messrs. **Ellsworth & Potter,** also for respondents.

Finch, *J.*, delivered the opinion of the court:

The papers in four appeals from orders quashing as many writs of *certiorari*, and in another similar case not before us, are printed for our use with a disorder and confusion scarcely to be excused. With the aid of the briefs of counsel we hope that we have been enabled to understand and appreciate the questions sought to be raised.

The general term says that no questions of law and only questions of fact were presented by the appeals; but in the brief of the appellant we find three errors in the assessments alleged and relied upon as sufficient to vitiate the tax imposed.

One of these is that the Assessors of the Town of Wilson did not meet to hear complaints on the third Tuesday of August, 1883, but met for that purpose only on the 31st of that month; and that the fact appears in the copy of their notice marked "Exhibit II." The fact so appears in the printed copy of that notice; but a stipulation signed by counsel for both parties certifies that the date of August 31 is a misprint and should read August 21. The ground of objection, therefore, disappears.

It was charged in one of the petitions that the assessment roll of the Town of Wilson for 1883 was not finally completed and verified by the Assessors and delivered to the town clerk or other officer to whom such roll is required by law to be delivered on or before the first day of September, 1883. No proof was given on the subject, but the admissions of the return are relied upon. Those show that the Assessors met to hear complaints on the third Tuesday of August; that from that day until the 20th of September the roll remained in possession of Cooper, one of their number, "open to inspection;" and on that day was "left, completed and verified, with the town clerk."

The admission goes no further than the date of delivery to the town clerk, and does not show that the roll was not completed and verified on or before September. An extract from the roll is all that is printed, the printing of the roll and assessors' affidavit having been waived.

The delivery of the completed and verified roll is required by section 9 of the Act of 1880 to be made to the town clerk or other proper officer "on or before the first day of September." The return shows a delivery twenty days later. Such delay did not vitiate the assessment. The provision is directory, and since the relator had his fifteen days after the delivery to the town clerk within which to sue out his writ and did actually do so, we cannot see how it has suffered any prejudice from the delay. The town clerk returns that after its delivery to him it remained open for inspection in his hands for the required fifteen days.

The return shows that the roll, which we must assume was completed and verified on or before September 1, remained open to inspection in the hands of one of the assessors until the 20th and then after due notice so remained for fifteen days in the hands of the clerk. We should sacrifice substance to form, if we held that such a mistake vitiated the whole assessment.

The question under the Act of 1880 assumes a different form as it respects the Town of Somerset. Apparently the Assessors of that town never published a notice of the delivery to the town clerk at all. The sole object of that provision, however, appears to be to set running the fifteen days within which parties aggrieved may sue out their writ. Sec. 2.

If the notice be not given, the right to review by *certiorari* remains unlimited as to time. The fifteen days are not set running. The consequence of the omission cannot be fatal to the validity of the assessment, but leaves the door open for a review unlimited as to time. The assessment lawfully made and completed did not become "illegal" by the omission of the notice required by section 9 of the Act of 1880.

The remaining questions arise wholly upon the facts. An inequality of assessment was asserted. Evidence of the value of farms, largely in excess of the assessed values, was given on behalf of the relator, but met by an equal if not a larger body of evidence sustaining the official valuations. An overvaluation of the railroad was sought to be proved, and a body of evidence was given relating to its earning capacity, and tending to show that its value was over estimated. On the other hand the sources and accuracy of that evidence were criticised, the cost of construction was shown, the opinion of experts were given; and back of all that remained the observation and judgment of the Assessors.

Upon the evidence the question of value was purely one of fact. It has been reviewed by the special and general terms, but should not be by us. No legal error is disclosed by the record which warrants our reversal of the proceedings.

The order should be affirmed, with one bill of costs in this court.

All concur.

PEOPLE of the State of New York, *Respts.*,
v.
Charles J. EVERHARDT, *Appt.*

1. Under section 399 of the Code, in order that there may be a conviction of a crime on the **testimony of** an **accomplice,** there is required corroborative evidence which tends to connect the defendant with the commission of the crime. Whether the evidence is sufficient **corroboration** of the accomplice is for the determination of the jury.
2. The law is complied with if there is some other **evidence fairly tending to connect** the **defendant with** the commission of **the crime** so that his conviction will not rest entirely upon the evidence of the accomplice.
3. On the trial of an **indictment for forgery** committed by uttering a forged check knowing it to be forged, **evidence of** the **uttering** by defendant of **other forged checks** upon other occasions **is admissible** to show his guilty knowledge and intent.
4. When the **defendant** was **described in** the **indictment** as "George Hartman, otherwise called George Peters, otherwise called Mash Market Jake, otherwise called Charles Coke, otherwise called Charles McGloin," it is **not error** for the clerk **in administering** the **oath to** the **jurors** challenged, and to the witnesses, **to repeat such names, after** the **true name** of the defendant is **discovered.**
5. Where the **term** of the court **at which defendant** was **convicted** was **adjourned** without day, no judgment having been rendered, and defendant not having applied for or assented to any delay except to the Tuesday following the day on which the verdict was rendered, and **at the next term** of the same court, the same judge presiding, the **defendant** was **sentenced,** *held*, that the **defendant,** not objecting to the delay, but moving for a new trial for errors committed on the trial and that judgment should be arrested because judgment was not rendered at the trial term, **waived** the **delay, and was not prejudiced thereby.**

(Decided March 1, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Court of General Sessions of the Peace on conviction of defendant of forgery in the second degree. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **A. Suydam** with **James M. Brady,** for appellant:

The corroboration of the accomplice was wholly insufficient. The additional evidence did not tend to connect the defendant with the commission of the crime.

Code Crim. Proc. § 399; *People* v. *Courtney*, 28 Hun, 589; *People* v. *Plath*, 1 Cent. Rep. 772, 100 N. Y. 593.

All the evidence in regard to the uttering of other forged checks was improperly admitted.

Stokes v. *People*, 53 N.Y. 164, 170; *Rosenzweig* v. *People*, 6 Lans. 462; *Coleman* v. *People*, 55 N. Y. 81, 90, 91; *Copperman* v. *People*, 56 N.Y. 592; *People* v. *Gibbs*, 93 N. Y. 470, 473; *People* v. *Baker*, 96 N. Y. 340.

It is contended, on behalf of the appellant, that, according to common-law rules, and by the clear interpretation of the provisions of the Code of Criminal Procedure, judgment in a criminal action must be rendered at the same term at which the action was tried, unless there is a reason for delay arising out of some proceeding between verdict and judgment, and that such reason must appear on the record.

Mills v. *Commonwealth*, 13 Pa. 627; *Rex* v. *Fletcher*, Russ. & Ry. 58; *Brown* v. *Rice*, 57 Me. 55; *Commonwealth* v. *Maylor*, 57 Pa. 291; *Ex parte Lange*, 18 Wall. 163, 174 (85 U. S. bk. 21, L. ed. 872); *Lowenberg* v. *People*, 27 N. Y. 336.

The repetition of the *alias* names in the hearing of the jury, against the objection of the defendant, was error and affected his substantial rights.

There was no necessity for using more than one name in the indictment, for section 277 of the Code of Criminal Procedure distinctly provides that an indictment shall not abate for a misnomer.

The two jurors were in all respects fully qualified to serve, except for the prejudice excited by this very proceeding of which the appellant now complains. They had been duly summoned, and the appellant had a right to their services; and their disqualification by reason of the action of the court in unnecessarily permitting the repetition of the *aliases* was error for which the judgment must be reversed.

Hildreth v. *Troy*, 2 Cent. Rep. 273, 101 N.Y. 234.

In the last cited case, this court expressly held that the erroneous exclusion of a juror was ground for reversal, notwithstanding that twelve competent jurors were afterwards found and impaneled. It will not be seriously contended that any difference exists, in this respect, between a civil and a criminal action. The first twelve competent persons are to constitute the jury.

Code Crim. Proc. § 387.

Mr. **McKenzie Semple,** *Asst. Dist-Atty.*, for the People, respondents:

So far as the formation of the jury is concerned, the accused has a constitutional right to demand that it should be fair and impartial; but that right is not impaired by the exclusion of jurors, although never so impartial, so long as impartial jurors remain to try the case.

Thompson & M. Juries, pp. 228, 229; *Grissom* v. *State*, 8 Tex. App. 376–378.

The court, in the exercise of this discretion, may, of its own motion, and without assigning any cause, excuse any juror it may see fit to excuse.

Thompson & M. Juries, § 259.

The power of the court to excuse a juror for satisfactory reasons is not impaired by a statutory provision to the effect that the first twelve persons who shall appear as their names are drawn and called and who shall be approved as indifferent between the parties, shall be sworn and shall be the jury to try the case.

Atlas Min. Co. v. *Johnston*, 23 Mich. 37.

Proof of other previous forgeries was admissible as evidence in this case, upon the question of intent. Special intention to defraud was one of the constituent elements of the crime charged.

People v. *Weyman*, 4 Hun, 511; *People* v. *Shulman*, 80 N. Y. 373, note; *Mayer* v. *People*, 80 N. Y. 364, and numerous other cases.

The last point raised is as to the jurisdiction of the court to pronounce judgment after the expiration of the term at which the defendant was tried and convicted, where the defendant has not waived the delay.

Section 572 of the Criminal Code, as amended by Laws of 1882, expressly provides that "Any delay may be waived by the defendant."

Even if the delay cannot be deemed to have been waived by the defendant, and if the rendering of judgment after the expiration of the term at which the defendant was tried and convicted can be deemed a departure from the mode of procedure prescribed by the Code, or an error or mistake therein, it is not such a departure, error or mistake as renders the judgment invalid, or one which furnishes ground for reversal, for it did not actually prejudice the defendant or tend to his prejudice in respect to a substantial right.

Code Crim. Proc. § 684.

Such error or mistake was not available on motion in arrest of judgment, which must be founded upon some one of the "defects in the indictment mentioned in section 323."

Code Crim. Proc. § 467.

Earl, *J.*, delivered the opinion of the court:

The defendant was convicted in the Court of General Sessions in the City of New York of the crime of forgery in the second degree, committed by uttering a forged check knowing it to be forged.

Prior to his conviction one Gaylord had been convicted of the same offense, for uttering the same check, and had been sentenced to the state prison at Sing Sing. He was produced as a witness on the trial of the defendant, and testified that he received the forged check from him and was induced by him to attempt to obtain the money upon it from the bank upon which it was drawn. He was, therefore, an accomplice, and the objection is now made that his testimony was not sufficiently corroborated under section 399 of the Code of Criminal Procedure, which provides that "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

Prior to the enactment of this section it was customary for judges to instruct jurors that they should not convict a defendant of crime upon the evidence of an accomplice, unless such evidence was corroborated; and yet it was the law in this State that a defendant could be convicted upon the uncorroborated evidence of an accomplice—if the jury believed it. This section has changed that rule of law, and requires that there should be simply corroborative evidence which tends to connect the defendant with the commission of the crime.

Here, without referring particularly to the evidence of Schulken and of Caroline Gaylord, we think such evidence was sufficient to show some active agency on the part of the defendant in uttering the check, and thus to connect him with the commission of the crime; and that satisfies the law. Whether that evidence was sufficient corroboration of the accomplice was for the determination of the jury. The law is complied with if there is some other evidence fairly tending to connect the defendant with the commission of the crime so that his conviction will not rest entirely upon the evidence of the accomplice.

Upon the trial the People were allowed to prove, against the objection of the defendant, the uttering of other forged checks by him upon other occasions. In this there was no error. The defendant by his plea of not guilty had put in issue everything which it was incumbent upon the People to prove. They had no direct or positive evidence that he personally forged the check which he uttered, and it was open for him to show that at the time he uttered it he had no knowledge that it was forged and was therefore innocent of crime; and for the purpose of showing the prisoner's guilty knowledge in such cases it has always been held competent to prove other forgeries. *Mayer* v. *People*, and *People* v. *Shulman*, 80 N. Y. 364, 373.

Such proof is not received for the purpose of showing other crimes than that charged in the indictment, but for the purpose of showing the guilty knowledge and intent which are elements of the crime charged; and it can be considered by the jury only for that purpose.

Although the evidence of Gaylord, corroborated as it was, as to the guilty knowledge of the defendant, was quite clear and convincing, yet the People were not bound to rest upon a *prima facie* case, but had the right to confirm that evidence by the proof as to the uttering of other forged checks.

The defendant was described in the indictment as "George Hartman, otherwise called George Peters, otherwise called Mash Market Jake, otherwise called Charles Coke, otherwise called Charles McGloin."

Upon the trial of the action these names were repeated by the clerk in the oath administered to the jurors challenged, and the counsel for the defendant objected to the repetition of such names upon the ground that it tended to prejudice the defendant in the minds of the jurors; and he admitted and offered to prove that the true name of the defendant was Charles Everhardt.

The trial judge stated in reply that he could see no objection to the clerk inserting in the subsequent proceedings the name which the defendant asserted was his true name, and referring to the fact that he was indicted under another name. The defendant's counsel excepted, and again asked the court to instruct the clerk in swearing the jurors and witnesses that he should designate the defendant as Charles J. Everhardt, and omit the fictitious names.

The court replied that he would instruct the clerk to designate the defendant as Charles J. Everhardt, and would allow him to state the several other names. To this ruling the defendant's counsel excepted.

Thereafter, throughout the trial, at each administration of an oath the clerk under the instructions of the court designated the defendant as "Charles J. Everhardt, indicted as George Hartman, otherwise called George Peters, otherwise called Mash Market Jake, otherwise called Charles Coke, otherwise called Charles McGloin."

At each repetition of these names defendant's counsel objected thereto and moved that the defendant be designated by the name of Charles J. Everhardt, and not by the fictitious names. The objections were overruled and the motion denied and defendant's counsel excepted.

It appeared from the examination of some of the jurors that they were prejudiced by the fact that the defendant appeared to have so many different names, and they were excluded from the jury on that account; and twelve jurors were finally impaneled against whom there was no objection.

Section 277 of the Code of Criminal Procedure provides that "If the defendant is indicted by a fictitious or erroneous name, and in any stage of the proceeding his true name is discovered, it may be included in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment."

No material error was committed by the repetition of the fictitious names. While undoubtedly they might with propriety have been omitted in the administration of the oath to jurors and witnesses, after the true name was discovered and inserted in the indictment and other proceedings, yet, as such names all appeared in the indictment and in the evidence, it was not error to repeat them whenever it became necessary to name the defendant; and it cannot be assumed that any legal harm was thereby done to him.

After the jury returned their verdict of guilty the counsel for the defendant requested that the defendant be remanded until the Tuesday following, which was the 22d day of December, that he might then make a motion for arrest of judgment and for a new trial; and the court granted the request and ordered that the prisoner should be remanded until that day. The record then states that no further proceedings were had and no motion was made by either party during the December Term of the court; that afterward on the 24th day of December, 1885, the December Term of the court was finally adjourned without day; that afterward on the 7th day of January, 1886, at the January Term of the court, the same judge presiding, the following proceedings were had: the defendant being again led to the bar of the court, the district attorney moved for judgment, and the defendant being asked if he had any cause to say why judgment should not be pronounced against him, his counsel moved for a new trial upon various grounds mentioned, being for errors committed during the progress of the trial. He also moved that judgment should be arrested because, among other things:

"The verdict was rendered and the jury discharged, on the 18th day of December, 1885, and during the December Term of the court; and afterward, to wit: on the 24th day of December, 1885, the court was duly adjourned until the next term, by which adjournment the December Term was finally adjourned without day, no judgment having been rendered; and the defendant not having applied for or consented to any delay in the rendition of judgment beyond the 22d day of December, 1885, being the Tuesday following next after the day on which the verdict was rendered. And the court now holding the January Term, 1886, has no jurisdiction to render judgment in the action."

The court which pronounced the judgment was the same court which tried the indictment and in which the verdict was rendered; and it would be a sufficient answer in this case that no substantial harm was done to the defendant by the delay from the 22d day of December to the 7th day of January following. But upon this record it may fairly be said that the defendant, by not objecting, waived any delay within the meaning of section 472 of the Code of Criminal Procedure, which provides that the time for pronouncing judgment after a verdict of guilty "must be at least two days after the verdict, if the court intend to remain in session so long, or if not, as remote a time as can reasonably be allowed; but any delay may be waived by the defendant."

Judgment in this case was postponed at the request of the defendant until the 22d day of December, to enable his counsel to make a motion for arrest of judgment and for a new trial. On that day he did not appear or request to appear in court to make his motion, and hence, he must be assumed to have been wholly indifferent to the delay, and to have consented thereto. There is, therefore, no reason for saying that the court lost jurisdiction to pronounce judgment on a subsequent day.

We have now noticed briefly all the allegations of errors brought to our attention by the counsel for the defendant, and believe that none of them are well founded.

The judgment should be affirmed.

All concur.

PEOPLE of the State of New York, *Appts.*,

v.

John E. O'SULLIVAN, *Respt.*

1. Although as a general rule it is improper upon the trial of a prisoner for one offense to prove that he has been guilty of another, yet, **upon** the **trial of** any **particular crime,** as rape, it is **competent to prove,** upon the question of his guilt, that **defendant had made** the **attempt at some prior time,** not too distant, **to commit the same offense.**
2. Such **evidence** is not incompetent because it comes **from** the **complainant** herself.
3. As a general rule, the **evidence** of a witness can **not** be **corroborated** or confirmed **by proof** that he **stated** the **same facts** testified to in court on some occasion **when not under oath.**
4. There is **an exception to** this **rule in** the **case of rape;** but where the disclosure of the rape by the person upon whom it is committed is not recent, as soon as suitable opportunity is furnished, the reason for receiving it in evidence does not exist.
5. Such a **disclosure** made nearly eleven months **after** the commission of the alleged rape, where there was nothing to justify the delay, *held* **too remote** to be received in evidence.
6. The **want of** an **early disclosure** of such offense **may be explained** by facts which show that it was impracticable or that it was prevented by circumstances consistent with the natural impulse to complain—as, when the prosecutrix is among strangers or when she is induced to silence by threats.

(Decided March 1, 1887.)

APPEAL by the people from a judgment of the Supreme Court at General Term in the Fourth Department, reversing a judgment of the Onondaga Oyer and Terminer and ordering a new trial, upon conviction of rape. *Affirmed.*

The facts and question raised appear from the opinion.

Mr. **Ceylon H. Lewis,** for the People, appellants:

The judgment of the supreme court states and certifies that the supreme court exercised its discretion in this case and refused a new trial upon the facts, and upon the ground that the verdict was against the weight of evidence, and ordered said new trial for errors of law, and not for errors of fact or as matter of discretion.

The case is, therefore, properly before this court for review on the questions raised by the defendant's exceptions taken on the trial.

People v. *Poucher,* 99 N. Y. 610; *People* v. *Boas,* 92 N. Y. 560; *People* v. *Conroy,* 97 N. Y. 72.

It is settled by a strong current of authority and by several cases in trials for rape, that upon the question of motive, disposition, purpose, intent and passion on the part of the defendant toward the object of his assault, evidence of previous solicitations and prior sexual attempts by defendant on the person of the same woman are admissible and relevant.

Whart. Cr. Ev. 35, 46, 49; *State* v. *Knapp,* 45 N. H. 156; *Strang* v. *People,* 24 Mich. 6; *Sharp* v. *State,* 15 Tex. App. 171; *Reg.* v. *Rearden,* 4 Fost. & Fin. 76.

The same species of evidence was admitted in the following trials for rape: *Reg.* v. *Jones,* 4 Law Rep. N. S. 154; *Reg.* v. *Chambers,* 3 Cox, C. C. 92.

And under indictments for assault, with intent to ravish.

Williams v. *State,* 8 Humph. 585; *State* v. *Walters,* 45 Iowa, 389.

In indictments for incest, previous acts of criminal intimacy between the parties charged in the bill have been held competent.

People v. *Jenness,* 5 Mich. 316.

In trials under indictments for adultery, in those jurisdictions where adultery is indictable as a crime, the State, after proving the alleged offense, has always been permitted to prove prior acts of improper familiarity and adultery between the defendant and the person with whom the adultery is charged.

Commonwealth v. *Nichols,* 114 Mass. 285; *Commonwealth* v. *Lahey,* 14 Gray, 92; *Commonwealth* v. *Merriam,* 14 Pick. 518; *State* v. *Marvin,* 35 N. H. 22; *State* v. *Wallace,* 9 N. H. 515; *State* v. *Way,* 5 Neb. 287; *Lawson* v. *State,* 20 Ala. 65.

The injured girl was permitted by the court to state the fact that she told Father Moriarty of the alleged outrage, but she was not permitted to detail the particulars of her disclosure. This was strictly within well settled rules of evidence in this class of cases.

Baccio v. *People,* 41 N. Y. 269; *People* v. *Clemons,* 3 N. Y. Cr. Rep. 571; *Mallett* v. *People,* 3 Hawley, Cr. Rep. 379, and cases cited in note; Whart. Crim. Ev. 273; 3 Greenl. Ev. 213.

The rule requiring immediate complaint is not inflexible.

Remoteness of time bears only on the question of fact, and it is to be considered by the jury in determining the effect of the evidence. The reason for the delay, as being under the control or influenced by the fear of her ravisher, may be taken into consideration.

3 Chitty, Cr. Law, 812; 1 East, P. C. p. 445, 438, citing the case of *Reg.* v. *Russen*; *Higgins* v. *People,* 58 N. Y. 379; *Baccio* v. *People,* 41 N. Y. 266; *State* v. *Byrne,* 47 Conn. 466; *State* v. *DeWolf,* 8 Conn. 99; *Mallett* v. *People,* 3 Hawley, Cr. Rep. 382, and cases cited in note.

***Mr.* John C. Hunt,** for respondent;

It was error to admit evidence of a previous assault on prosecutrix with intent to ravish. Evidence of another crime than the one for which defendant was indicted is inadmissible.

Coleman v. *People*, 55 N. Y. 81, 90, 91; *People* v. *Corbin*, 56 N. Y. 363, 365; *People* v. *Kennedy*, 32 N. Y. 141; *Copperman* v. *People*, 56 N. Y. 591; *People* v. *Brown*, 72 N. Y. 591; *Carncross* v. *People*, 17 N. Y. Week. Dig. 383; Roscoe, Cr. Ev. Sharswood's 6th Am. ed. p. 810, title, *Rape*.

It was error to admit the testimony of the prosecutrix that she told of the transaction to the priest in Syracuse, more than ten months after its occurrence.

Baccio v. *People*, 41 N. Y. 265; *People* v. *Clemons*, 37 Hun, 580, 585, 586.

Earl *J.*, delivered the opinion of the court:

The defendant was convicted, in the Onondaga Oyer and Terminer, of the crime of rape committed upon Abbie O'Connor on the 6th day of May, 1884. He was a Roman Catholic priest in charge of a church at Camillus in Onondaga County. The complainant was a domestic, working for him in the parsonage which adjoined the church. She testified that she was at the time of the alleged crime about seventeen years old; but there was other evidence, apparently more reliable, that she was about twenty. Before she went to live with him, she resided with her foster parents, who brought her up from infancy, and she and they were members of and regular attendants at his church. She went into his service on the 25th day of January, 1884, and from that time forward, his family consisted of himself, Mrs. Doehner, his housekeeper, Timothy O'Sullivan, his man servant, and the complainant.

She testified that the defendant entered her bedroom in the night time and there outraged her. At that time, the housekeeper was in New York and she was alone in the house with him and the man servant. No criminal complaint was made against him until November, 1885, and he was not indicted until January, 1886.

Upon the trial, after the complainant had testified to the rape, she was permitted, against the defendant's objection, to testify that four days previously he made an attempt to ravish her, that she resisted him and that he failed. For the reception of this evidence the court at general term, as appears by the opinion there pronounced and concurred in by a majority of the judges, reversed the conviction, holding that it was incompetent upon the trial of the defendant for the crime alleged to prove any other crime committed or attempted by him.

We do not agree with the learned general term in the view thus taken of this evidence. It is quite true that it is a general rule of law that upon the trial of a prisoner for one offense, it is improper to prove that he has been guilty of other offenses; as, where a prisoner is put upon trial for larceny, or burglary, or murder, it is incompetent to prove that he has been guilty of other larcenies or burglaries or murders, or other crimes. In this case it would have been incompetent to prove that the defendant had committed or attempted to commit rape upon any other woman. But where a prisoner is tried for a particular crime, it is always competent to show upon the question of his guilt that he had made an attempt at some prior time, not too distant, to commit the same offense.

Upon the trial of a prisoner for murder it is competent to show that he had made previous threats or attempts to kill his victim. *People* v. *Jones*, 99 N. Y. 667.

Upon the same principle, it must always be competent to show that one charged with rape had previously declared his intention to commit the offense, or had previously made an unsuccessful attempt to do so. In this case if witnesses other than the complainant could have been called who witnessed the unsuccessful attempt of the defendant to ravish the complainant four days before the crime was in fact accomplished, no one would have questioned the competency of their evidence. And the evidence is not rendered incompetent because it comes from the complainant herself. It is not as valuable, or trustworthy, or important as if it had come from other witnesses. It probably did not have a very important bearing with the jury, because, unless they believed her evidence as to the principal offense, they would not believe her evidence as to the prior attempt. But it may have had some tendency to corroborate her story as to the principal offense, and thus may have had some weight with the jury. But whether it was important or not, there is no rule which condemns it and there is abundant authority to justify its reception. Whart. Crim. Ev. 35, 46, 49; *State* v. *Knapp*, 45 N. H. 156; *Strang* v. *People*, 24 Mich. 6; *Sharp* v. *State*, 15 Tex. App. 171; *Reg.* v. *Rearden*, 4 Fost. & Fin. 76; *Reg.* v. *Jones*, 4 Law Rep. N. S. 154; *Reg.* v. *Chambers*, 3 Cox, C. C. 92; *Williams* v. *State*, 8 Humph. 585; *State* v. *Walters*, 45 Iowa, 389; *Commonwealth* v. *Nichols*, 114 Mass. 285; *Commonwealth* v. *Lahey*, 14 Gray, 92; *Commonwealth* v. *Merriam*, 14 Pick. 518; *State* v. *Marvin*, 35 N. H. 22; *State* v. *Wallace*, 9 N. H. 518; *State* v. *Way*, 5 Neb. 287; *Lawson* v. *State*, 20 Ala. 65.

We do not agree, therefore, that the judgment should have been reversed on account of the reception of the evidence alluded to. But there is at least one other error disclosed by the record, for which we think the conviction ought to have been reversed.

As before stated, the alleged rape was committed in defendant's house on the 6th day of May, 1884. The complainant remained in his service from that time until the 20th day of August following, without in any manner, by speech, action or appearance, disclosing or intimating to anyone that she had suffered this great wrong. During that time she visited her foster parents whose place of residence was not far distant from Camillus, and saw them nearly every Sunday at church and at defendant's house, having full and free communication with them in defendant's absence. When she left the service of the defendant it was apparently not on account of the crime that had been committed upon her, but because he whipped her for some trifling offense. Then she went home to live with her foster parents and remained there until the 10th day of September, and then she went to Syracuse to work in a situation procured for her at her request by the defendant; and while living there, on the 28th day of March, she disclosed to Father Moriarty, a Roman Catholic priest, at confessional, that the assault had been committed upon her; and that was the first disclosure of the crime made by her to any person.

During all the time, from the 6th of May to the 28th of March, nearly eleven months, there was not a day when she could not have made a disclosure to some one. She was at perfect liberty to leave the defendant's house at any time, and she remained there of her own free will and consent. The only excuse put forth for the great delay in making the disclosure is based upon the following facts: she testified that after the assault upon her, she went voluntarily and without any solicitation of the defendant to his confessional and confessed to him while living with him, on three different occasions; and that on each occasion he asked her whether she had told anything about the assault upon her, and she replied: "No, Father;" and he said "God bless you, my child."

She also testified that while she lived with him he told her it was a sin to "tell on a priest," and that if she ever "told on a priest" she would go to hell or purgatory. She further testified that she did not go to confessional again until the 28th day of March, 1885, when she made the disclosure to Father Moriarty, and that she told him about it the first time she went to his confessional.

It may well be that the fact that this disclosure was made at the confessional under the sanction of religion, gave it additional weight with the jury. But we are of opinion that such a disclosure, made nearly eleven months after the commission of the alleged assault, was too remote to be received in evidence. There was nothing whatever to justify the delay.

It is a general rule that the evidence of a witness can never be corroborated or confirmed by proof that the witness stated the same facts testified to in court on some occasion when not under oath. Such statements, like all hearsay evidence, are excluded as unsatisfactory and incompetent. But there is an exception to the rule in the case of rape. The outrage in such a case upon a virtuous female is so great that there is a natural presumption that at the first suitable opportunity she would make disclosure of it; and she would be so far discredited if she did not make the disclosure, for the purpose of confirming her evidence where she is a witness, such disclosure may be received. But where the disclosure is not recent, as soon as suitable opportunity is furnished, the reason for receiving it in evidence does not exist, and the principle justifying its reception does not apply.

In 1 Hale's Pleas of the Crown, 632, it is said that "The complainant must make fresh discovery and pursuit of the offense and offender; otherwise, it carries a presumption that her suit is but malicious and feigned."

In 1 East's Pleas of the Crown, 445, it is said that the evidence of the complainant "is confirmed if she presently discovered the offense and made pursuit for the offender," and that "Her evidence is discredited if she concealed the injury for any considerable time after she had opportunity to complain." And the same language is substantially embodied in 4 Blackstone's Commentaries, 214.

In *Baccio* v. *People*, 41 N. Y. 265, the defendant was indicted for rape, and upon the trial the prosecution was permitted to give evidence that the complainant disclosed the crime to her mother twenty-four days after its commission; and the conviction in that case was reversed, on the ground that the mother of the complainant was permitted to testify in detail on her direct examination to the statements made to her by the complainant of the time and manner of the offense. *Judge* Woodruff, writing the opinion, said:

"I was at first inclined to say that evidence of any complaint made so long after the alleged injury, and espcially when forced from the daughter, by the mother, after her daughter had once declared that her injury was due to a fall, should not have been received at all from any person; the complaint was certainly not made recently after the alleged outrage. But in a case in which the fact of complaint is admissible, it is perhaps competent to explain the want of such early complaint, by facts which show that it was impracticable, or that it was prevented by circumstances consistent with the natural impulse to complain thereof, so far at least, as to destroy the presumption of falsehood derivable from concealment on the part of the female."

In the course of his opinion the same learned judge said that the rule admitting such declarations in cases of rape is an exception to the general rule excluding declarations made out of court by a person who has been or might be examined as a witness, and is properly confined within narrow limits; and he suggested that the reason for the admission of such declarations is "that it is so natural as to be almost inevitable, that a female upon whom the crime has been committed will make immediate complaint thereof to her mother, or other confidential friend; and inasmuch as her failure to do so would be strong evidence that her affirmation on the subject, when examined as a witness, was false, that the prosecution may anticipate such a claim by affirmative proof that complaint was made."

In *Higgins* v. *People*, 58 N. Y. 377, the defendant was indicted for rape. In that case it appeared that the prosecutrix arrived in New York an entire stranger, and having lost her baggage she was inveigled into a basement on a pretense of finding it, where she was outraged. Upon coming out into the street she met a woman who asked her what was the matter, also a policeman who took her to the station-house. To neither of these did she state the real offense; but it appeared that as soon after arriving at the station house as her excitement would admit, she stated the facts to the police captain. Upon these facts defendant's counsel requested the court to charge that "If the jury believe the prosecuting witness did not make prompt disclosure of the alleged wrong, it is a circumstance against her, casting a great discredit on her testimony, and tends strongly to disprove the truth of the accusation." This the court refused to charge, and it was held that, conceding the proposition to be entirely accurate, it was an abstract one, as there was no ground for saying that the disclosure was not sufficiently prompt, and that it was not error, therefore, to refuse so to charge.

Church, *Ch. J.*, writing the opinion said:

"This proposition (which the court was requested to charge) is, doubtless, substantially correct, although it is quite general and somewhat vague. Any considerable delay on the part of a prosecutrix to make complaint of the outrage constituting the crime of rape is a circumstance of more or less weight, depending upon the other surrounding circumstances. There may be many reasons why a failure to make immediate or instant outcry should not discredit the witness. A want of suitable opportunity, or fear may sometimes excuse or justify a delay. There can be no iron rule on the subject. The law expects and requires that it should be prompt; but there is, and can be, no particular time specified. The rule is founded upon the laws of human nature, which induce a female thus outraged to complain at the first opportunity. Such is the natural impulse of an honest female."

In Connecticut a more liberal rule as to disclosures made by a prosecutrix has been adopted than prevails in this State. *State* v. *De Wolf*, 8 Conn. 93; *State* v. *Byrne*, 47 Conn. 465.

There it may be proved, not only that she made disclosures of the crime, but the details of the crime as she disclosed them may also be proved. In the two cases cited the disclosures were made after a much longer time than in any other case which has come to our attention.

In the first case the complainant was deaf and dumb, and the disclosure was made more than a year after the commission of the crime. But there she was prevented from making the disclosure by the threats and influence over her of the prisoner; and it was held that her mental and physical condition were such as to furnish her an excuse for not making an earlier disclosure.

In the other case the complainant did not make the disclosure until more than a year and a half after the commission of the crime. But, she was only twelve years old, and the defendant was her stepfather, and she was living in his family, and he threatened to take her life if she told her mother or anybody else what had happened. Under such circumstances it was held to be for the jury, in weighing her evidence, to determine what effect should be given to her failure to make an earlier disclosure.

It will be seen from these authorities that the very reason upon which the rule is based for the reception of such evidence, requires that the disclosure should be recent and made at the first suitable opportunity. But there may be circumstances which will excuse delay; as, when the prosecutrix is under the physical control of the defendant; when she is among strangers and there is no one in whom she can confide; when she is induced to silence by threats and is so far within the power or reach of the defendant that the threats may be executed. In such and other like cases delay may be excused, and the disclosure may be proved and all the facts submitted to the jury for them to determine what weight shall be given to the disclosure and what effect the delay shall have.

But here there was absolutely nothing to justify the great delay. There was no time after the commission of the offense when she could not have left the defendant's house. She was of mature age and near her friends, and saw them frequently. She was in Syracuse having access to priests months before she made the disclosure. It does not appear from her evidence that she delayed the disclosure from fear of the defendant, or from any influence of superstition, or from the apprehension of consequences to herself in this life or in the life to come.

We think the delay, under such circumstances, was so great and so unjustifiable that, as matter of law, the disclosure should have been excluded as evidence, and that it was therefore error to receive it. If this disclosure was competent, then no disclosure, however distant from the time of the offense, could be excluded; and all such disclosures would have to be received and submitted to the jurors for such damaging effect as they would allow them to have. A disclosure at such a distant time is of no more value in a case of rape than it would be in a case of robbery or murder, or any other crime. A disclosure in a case of rape has no legal value whatever, unless it is the natural result of the horror and sense of wrong which would prompt every virtuous female to make outcry at the first suitable opportunity.

Our attention has also been called to error in the charge of the learned trial judge. We have carefully considered the charge, and are constrained to believe that it was in part erroneous. But as we have reached the conclusion that for the error to which we have given particular attention the conviction was properly reversed, it is unnecessary to further notice the charge, as the error complained of is not likely to be repeated upon the new trial, if one should be had.

We therefore conclude that the judgment of the General Term should be affirmed.

All concur.

Edmund A. SAUNDERS *et al.*, *Respts.*,
v.
Bernard REILLY, Late Sheriff, *Appt.*

1. While **firm property** will not pass under successive sales upon executions issued against the individual partners, it **will pass under a sale upon a joint execution against all the partners,** issued upon a judgment recovered for any joint debt whatever.
2. Tooker and Irwin were partners under the firm name of Tooker & Irwin, and were also, with others, partners under the firm name of Tooker, Arnold & Co. Plaintiffs recovered a judgment against Tooker & Irwin, and placed an execution thereon in the hands of the sheriff. Later on the same day one Jane Irwin issued to the sheriff an execution on a judgment she had recovered against the firm of Tooker, Arnold & Co. The sheriff levied on the personal property of Tooker and Irwin, and advertised the same for sale. The plaintiffs then having a further claim against the firm of Tooker & Irwin, not then in judgment, gave notice to the sheriff that as credit-

ors of the firm of Tooker & Irwin they claimed application of firm property to payment of firm debts, and forbade any sale of the assets of the firm under Jane Irwin's execution against Tooker, Arnold & Co. Thereafter the sheriff, after selling enough of the firm property to satisfy the executions then in his hands against the firm of Tooker & Irwin, sold the balance of the property on Jane Irwin's execution, announcing that he sold the right, title and interest of Tooker and Irwin or either of them, in the property. Thereafter plaintiffs recovered judgment against the firm of Tooker & Irwin on their second claim, and issued execution thereon, at the same time instructing the sheriff to levy on any assets of the firm of Tooker & Irwin of which he had only sold the interest of Tooker and Irwin individually under Jane Irwin's execution, and stating that if he had sold under that execution any of the assets of the firm, then they required him to apply the proceeds of such sale to their execution. The property sold on Jane Irwin's execution or some of it was still accessible to the sheriff and ample to satisfy the plaintiffs' last execution if the sheriff had the right and was bound to seize it notwithstanding the prior sale; the sheriff, however, returned this execution unsatisfied, and plaintiffs brought this action against him for a false return. *Held:*

(*a*) That **after** the **sale of** the **joint property upon** a **joint judgment,** although the judgment was not recovered upon a debt against the separate firm of Tooker & Irwin, **there were no rights** legal or equitable **left to either member of** the **firm** in the property, and therefore **no equity in** the **firm property** to be worked out under them by any of the firm creditors.

(*b*) That the fact that the **sheriff,** when he made sale of the property on Jane Irwin's execution, announced that he sold the right, title and interest of Tooker and Irwin or either of them in the property, makes no difference; he **sold all he had the right to sell** by virtue of his execution, and if he sold all the right, title and interest of Tooker and Irwin in that property, he sold the whole of it and gave good title to the purchaser; he therefore **had no right to seize** any of their **property again** and sell it by virtue of plaintiffs' last execution, **and his return was not false.**

(Decided March 8, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Circuit on a verdict directed for plaintiffs in an action to recover damages for making a false return to an execution. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **Henry Thompson,** with *Messrs.* **Vanderpoel, Green & Cuming,** for appellant:

The only creditor that a sheriff, armed with process under which he is about to sell property, can regard is a judgment creditor or attachment creditor. A general creditor, who has sold the judgment debtor goods which are not paid for, has no claim to the property which the officer can respect.

Greenwood v. *Brodhead,* 8 Barb. 596, 597; Crocker, Sheriffs, § 451; Freeman, Executions, § 110; *Handy* v. *Dobbin,* 12 Johns. 220.

It was the Sheriff's right, and it was his bounden duty, failing joint property, to levy upon and sell under Jane Irwin's and Smith Williams' executions, the separate or firm property of William T. Tooker and Thomas J. Irwin, which they owned, apart from the firm property of Tooker, Arnold & Co.

Story, Partn. 7th ed. § 260; *Ex parte Ruffin,* 6 Ves. 119, 126; *Foster* v. *Barnes,* 81 Pa. 377; *Jones* v. *Clayton,* 4 Maule & S. 349; *Randolph* v. *Daly,* 16 N. J. Eq. 313, 316; Collyer, Partn. 5th Am. ed. 818; *Herries* v. *Jamieson,* 5 Term. Rep. 556; *Abbot* v. *Smith,* 2 W. Bl. 947.

The levy having been rightfully made upon the property of William T. Tooker and Thomas J. Irwin, the sale of February 7 was right and proper; and the purchasers thereat obtained the whole title of the judgment debtors, Tooker and Irwin, and rightfully took possession of their purchases.

Freeman, Executions, § 115; Crocker, Sheriffs, § 490, 491; *Catlin* v. *Jackson,* 8 Johns. 520; *Menagh* v. *Whitwell,* 52 N. Y. 146; *Hull* v. *Carnley,* 11 N. Y. 501, 507.

The case of *Menagh* v. *Whitwell* has no application to the present case, either in its facts or principles. The present case is a case of a levy on separate property for the payment of firm debts. *Menagh* v. *Whitwell* was a case of the seizure of the partnership property for the satisfaction of the separate debt of one of the partners; "A question," says *Judge* Story, "of a more complicated nature, and involving more conflicting rights, and the equities of their partners."

Story, Partn. 2d ed. § 260.

"Where one of two partners retires from business, relinquishing to the other all his interest in the partnership property, the remaining partner acquires the same dominion as if it had ever been his own separate property; the transfer being made in good faith, the title vests in the remaining partner, as his own private estate, free from any lien or equity in favor of partnership creditors, and such remaining partner may lawfully transfer such property in payment of his individual debts."

Stanton v. *Westover,* 2 Cent. Rep. 139, 101 N. Y. 265, 267; *Dimon* v. *Hazard,* 32 N. Y. 65; *Sage* v. *Chollar,* 21 Barb. 598; *Read* v. *McLanahan;* 15 Jones & S. 277; *Loeschigk* v. *Addison,* 3 Robt. 344. See also *Field* v. *Hunt,* 22 How. Pr. 463; *Kirby* v. *Schoonmaker,* 3 Barb. Ch. 46; *Cory* v. *Long,* 2 Sweeney, 495; *Smith* v. *Howard,* 20 How. Pr. 121.

This exercise of dominion over the firm property by some member of the firm, in order to subject it to execution at the suit of a firm creditor, is indispensable.

Fitzpatrick v. *Flannagan,* 106 U. S. 648 (Bk. 27, L. ed. 211); *Case* v. *Beauregard,* 99 U. S. 119 (Bk. 25, L. ed. 370); 101 U. S. 688 (Bk. 25, L. ed. 1004); *Menagh* v. *Whitwell,* 52 N. Y. 146; *Doner*

v. *Stauffer*, 1 Penr. & W. 198; *Coover's App.* 29 Pa. 9.

Possession was rightfully taken by the purchasers of the property sold February 7, 1879. Up to the time of the sale, the partners, Tooker & Irwin, were in possession of and owned the firm property. Their right, title and interest therein, and that of either or any of them was sold. The purchasers succeeded to whatever title Tooker & Irwin had. That title certainly carried with it the right to the possession of the property.

See authorities cited *supra*.

Even if this had been a case of a sale by the Sheriff, of the interest of one of the several partners in the firm property under a separate execution against him, as plaintiffs seem to claim, the purchasers would still have the right to possession subject to account with the creditors of the firm.

Phillips v. *Cook*, 24 Wend. 389; *Schrugham* v. *Carter*, 12 Wend. 131; *Walsh* v. *Adams*,[*] 3 Denio, 125; *Waddell* v. *Cook*, 2 Hill, 47; *Berry* v. *Kelly*, 4 Robt. 106; *Smith* v. *Orser*, 42 N.Y. 132; *Atkins* v. *Saxton*, 77 N.Y. 195; *Read* v. *McLanahan*, 15 Jones & S. 277; *Staats* v. *Bristow*, 73 N. Y. 264.

Mr. **George H. Forster,** for respondents: The return was unquestionably false.

Menagh v. *Whitwell*, 52 N. Y. 147; *Wilder* v. *Keeler*, 3 Paige, 168; *Payne* v. *Matthews*, 6 Paige, 19; *Kirby* v. *Schoonmaker*, 3 Barb. Ch. 47; *Ganson* v. *Lathrop*, 25 Barb. 455; *Wilson* v. *Conine*, 2 Johns. 280.

Earl, *J.*, delivered the opinion of the court:

This action was brought by the plaintiffs against the defendant, late Sheriff of the City and County of New York, to recover damages against him for making a false return to an execution issued upon a judgment recovered by the plaintiffs against William T. Tooker and Thomas J. Irwin, who were partners under the firm name of Tooker & Irwin.

The action was put at issue by the answer of the defendant, and brought to trial at a circuit court; and the trial judge after the close of the evidence directed a verdict for the plaintiffs. The defendant appealed from the judgment entered upon the verdict, to the general term, and from affirmance there to this court.

The material facts are as follows: in January and February, 1879, William T. Tooker and Thomas J. Irwin were partners, under the firm name of Tooker & Irwin, carrying on business in the City of New York. At the same time Tooker and Irwin together with Julius A. Candee and Daniel Webster Arnold were partners under the firm name of Tooker, Arnold & Co., also carrying on business in the City of New York. In the latter firm Arnold's share was three twelfths, Candee's share four twelfths and Tooker and Irwin's share jointly five twelfths.

On the 16th day of January, 1879, these plaintiffs recovered a judgment against Tooker & Irwin for upwards of $800; and early on the next day they issued and placed in the hands of the Sheriff an execution on that judgment.

Later on the same day Jane Irwin issued an execution to the Sheriff on a judgment recovered by her for upwards of $7,000 against the firm of Tooker, Arnold & Co. The Sheriff under these executions levied on the personal property of Tooker and Irwin, and advertised the same for sale. The plaintiffs then having a further claim for goods sold to the firm of Tooker & Irwin, which was not then in judgment, gave notice to the Sheriff on January 23, that as creditors of the firm of Tooker & Irwin they claimed the application of the firm property to the payment of firm debts, and they forbade any sale of the assets of the firm under the execution issued by Jane Irwin on her judgment against Tooker, Arnold & Co.

On February 7, the Sheriff, after selling enough of the firm property to satisfy the executions then in his hands against the firm of Tooker & Irwin, proceeded to sell the balance of the property on the execution in his hands in favor of Jane Irwin. In making that part of the sale he announced that he sold the right, title and interest of Tooker and Irwin or either of them in the property.

On the 17th day of February, 1879, the plaintiffs recovered judgment against the firm of Tooker & Irwin on their second claim against the firm, which was duly docketed and execution thereon issued on the same day to the Sheriff.

At the same time their attorney wrote to the Sheriff that they required him under that execution to levy on any of the assets of the firm of Tooker & Irwin of which he had only sold the interest of William T. Tooker individually and Thomas J. Irwin individually, under the execution issued by Jane Irwin, and that if he had sold under the execution issued to him by Jane Irwin any of the assets of the firm notwithstanding the notice which the plaintiffs had given him, then they required him to apply the proceeds of such sale to their execution. That execution he returned unsatisfied; and that is the return which the plaintiffs complain of as false.

The property sold on the execution issued by Jane Irwin or some of it was still accessible to the defendant and ample to satisfy the plaintiffs' last execution if the defendant had the right and was bound to seize it notwithstanding the prior sale.

The claim of the plaintiffs, which has been sustained by the court below, is that the sale upon the execution issued upon the judgment of Jane Irwin simply operated as a sale of the separate interests of Tooker and Irwin in the firm property, and not as a sale of the corpus of the firm property; and thus no greater effect was given to the sale than if it had been made by virtue of two executions upon judgments separately recovered against Tooker and against Irwin.

The decision below was based upon the authority of *Menagh* v. *Whitwell*, 52 N. Y. 147. But we are of opinion that that case cannot be properly invoked as an authority for the decision made below, and that the principle there decided was misapplied by the learned court.

A mere general creditor of a firm having no execution or attachment has no lien whatever upon the personal assets of the firm. But when a firm becomes insolvent and thus it becomes necessary to administer its affairs in insolvency or in a court of equity, then the rule is well settled that firm property must be devoted to firm debts and individual property to the payment of the individual debts of the members of the firm. If one member of a firm conveys to a person not a member of the firm all his interest in the firm property, the purchaser takes no part in the corpus of the firm property, but only such interest as remains after the equities between the partners have been adjusted and the firm debts have been paid and satisfied; so too it was decided by the case above cited that if all the members of a firm should severally convey to different persons each his interest in the firm property, the persons so purchasing, would not take any of the corpus of the firm property but only the interest of each partner after the firm debts were paid, and the equities between the partners adjusted.

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[*] See note to this case, Lawyers' edition. [Ed.]

It is also settled that it would be a fraud upon firm creditors for a member of a firm to take firm property and apply it upon his individual debts, or for the firm to take firm property and apply it upon the individual debts of any member of the firm. *Ransom* v. *Van Deventer*, 41 Barb. 307; *Wilson* v. *Robertson*, 21 N. Y. 587.

But one of two partners may transfer all of his interest in the partnership property to his copartner; and the purchasing partner will be vested with the absolute title to the corpus of all the partnership property, as if it had always belonged to him; *Stanton* v. *Westover*, 2 Cent. Rep. 139, 101 N.Y. 265; and all the members of a firm may sell the partnership property, even if wholly insolvent, to a purchaser in good faith, and thus convey, free from the claim of firm creditors, a good title to the firm property. Instead of selling for cash they may transfer firm property to pay a firm debt. And they may transfer the firm property to pay a joint debt for which they are jointly liable outside of the business of the firm; and the joint creditor will obtain a good title to the firm property. Therefore, while firm property will not pass under successive sales upon executions issued against the individual partners, we can see no reason to doubt that such property will pass under a sale upon a joint execution against all the partners, issued upon a judgment recovered for any joint debt whatever.

Upon the facts of this case it is entirely clear that Tooker and Irwin could have taken their firm property and applied it upon this joint judgment against them; and inasmuch as they had the power and right to do that, they could have turned it out to the Sheriff when he came with the joint execution against them; and as they could have turned it out upon the debt before judgment, or upon the execution after judgment, there can be no reason to doubt that the Sheriff could take and sell it upon the execution, free from the claim of their firm creditors.

After this sale of the firm property upon a joint judgment against both members of the firm, no equity was left in either member of the firm, to have the property thereafter applied in discharge of the firm debts. Having been applied in discharge of the joint debt against both members of the firm, all the equities of both members in the property, as against each other was wiped out; and it is only through the equity which one member of a firm has in the firm property or against his copartners that firm creditors, on the principle of subrogation, can enforce their claims against the firm property. And so, in effect, it was held in the case of *Menagh* v. *Whitwell*, and *Stanton* v. *Westover*, *supra*.

In 3 Kent's Commentaries, 65, it is said that "Creditors have no lien upon the partnership effects for their debts. Their equity is the equity of the partners operating to the payment of the partnership debts."

In *Kirby* v. *Schoonmaker*, 3 Barb. Ch. 46, it was said by the chancellor: "The copartners, however, have certain equitable rights between themselves arising out of the copartnership, by which either can compel the other to have all the effects of the firm applied in the first place to the payment of the debts due from them as copartners. And this, as is said in the books, gives the joint creditors a quasi equitable lien upon the property of the firm to be worked out through the medium of the equity of the copartners as between themselves and with their assent; or, at least with the assent of one of them."

In *Case* v. *Beauregard*, 99 U. S. 119 [Bk. 25, L. ed. 370], *Mr. Justice* Strong said: "No doubt the effects of a partnership belong to it so long as it continues in existence, and not to the individuals who compose the firm. The right of each partner extends only to a share of what may remain after payment of the debts of the firm and the settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity the partners have as between themselves; and in certain circumstances it inures to the benefit of the creditors of the firm. They are said to have a privilege or preference, sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of the firm in course of liquidation, to the exclusion of the creditors of the several members of the firm. Their equity, however, is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. * * * But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration."

In *Fitzpatrick* v. *Flannagan*, 106 U. S. 648 [Bk. 27, L. ed. 211], *Mr. Justice* Matthews said: "The legal right of a partnership creditor, to subject the partnership property to the payment of his debt, consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity, in preference to creditors of an individual partner is derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligations; and this equity of the creditor subsists as long as that of the partner through which it is derived remains; that is, so long as the partner himself retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity and enforce through it the application of those assets primarily to payment of the debts due them whenever the property comes under its administration.

Therefore, after the sale of the joint property upon a joint judgment, although the judgment was not recovered upon a debt against the separate firm of Tooker & Irwin there were no rights, legal or equitable, left to either member of the firm, in the property, and therefore no equity in the firm property to be worked out under them by any of the firm creditors.

The statute (Code, § 1369) requires the sheriff to satisfy an execution against property "out of the personal property of the judgment debtor;" and if sufficient personal property cannot be found, then out of the real property belonging to him.

There is no statute or rule of law which requires the sheriff to satisfy a joint execution out of the joint property of the execution debtors, or out of the separate property of each debtor. He may satisfy such an execution out of the joint property, or out of the separate property of any one or more of the debtors.

In 1 Lindley on Partnership, 515, it is said that "Although the writ of execution on a joint judgment must be joint in form, it may be levied upon all, or any one or more of the persons named in it;" and that "The consequence of this is that the sheriff may execute a writ issued against several partners jointly, either on their joint property, or on the separate property of any one or more of them, or both on their joint or their respective separate property; and so long as there is within the sheriff's bailiwick any property of the partners, or any of them, a return of *nulla bona* is improper." And these rules have now been embodied in section 1935 of the Code.

As between themselves Tooker and Irwin were jointly liable for the debts of Tooker, Arnold & Co.; and neither can complain that their joint property has been taken to satisfy such joint liability.

The fact that the Sheriff, when he made the sale of this property on the execution in favor of Jane Irwin, announced that he sold the right, title and interest of Tooker and Irwin or either of them in the property can make no difference. He sold all he had the right to sell by virtue of his execution; and if he sold all the right, title and interest of Tooker and Irwin in that property, he sold the whole of it, and gave good title to the purchaser. He, therefore, had no right to seize any of that property again and sell it by virtue of the plaintiffs' execution; and his return was not false.

The general denial contained in the defendant's answer put in issue the material allegations of the complaint, and was sufficient to authorize the defense asserted by the defendant.

The judgment should, therefore, be reversed and a new trial granted; costs to abide event.

All concur (**Andrews,** *J.*, in result) except **Ruger,** *Ch. J.*, not voting.

DAVIS SEWING MACHINE CO., *Respt.*,
v.
William J. BEST, Receiver, etc., *Appt.**

1. Where **notes of** a **company** have been unlawfully **converted by its president** the **company may recover** possession of them from the holder, **by replevin,** unless he is a *bona fide* purchaser for value, without notice of the facts invalidating the title or right to their possession.
2. The **burden of proving** a **purchase in good faith** and for value devolved upon the defendant after it was established that the notes had surreptitiously been put in circulation and diverted from the purpose for which they had been delivered to such president.
3. It also then became incumbent upon the defendant to show that the **notes** had been executed **in a form authorized by** the **company.**
4. Where **notes purporting to be** those **of** such **company, were not properly executed** because not signed by its president, although a blank space with a diagonally ruled line with the title of his office printed thereunder was apparently left at the foot of each note for such signature, and this defect was apparent upon the face of the paper, it **deprived** the notes **of** the **character of commercial paper.**
5. The transferee of such notes by paying value for them cannot become clothed with the character of a **bona fide purchaser.**
6. One drawing the form of a promissory note which is unsigned, and which falls into the hands of another, does **not** thereby **authorize** the **holder to attach** the **maker's signature** or to add anything which is incomplete in its execution.
7. One buying **commercial paper** which remains incompleted in some essential particular, and imperfect, does not acquire the character of a **bona fide holder.**
8. **Authority** given **by** a resolution of a **company to** its **treasurer to have** its **notes signed** only authorizes him to have them signed by the officers who had theretofore been authorized to sign such instruments for the corporation.
9. **Notes not enforceable** as the pecuniary obligations of a corporation by reason of their defective execution have no other value than that of the material upon which they are written, and **in an action of replevin** for them **only nominal damages** can be **recovered** for their detention.

(Decided March 15, 1887.)

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*See Credit Co. v. Howe Machine Co. 3 New. Eng. Rep. (Conn.) 561; Webster v. Same, *Id.* 567; National Bank of Republic v. Young, 5 Cent. Rep. (N. J.) 113.

APPEAL from a judgment of the Supreme Court at General Term in the Fourth Department, affirming a judgment of the Jefferson Circuit Court on a verdict directed for plaintiff in an action to recover possession of ten coupon notes. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **Delos McCurdy** with *Messrs.* **Robert S. Green,** and **A. J. Vanderpoel,** for appellant:

These notes lacked no formalities required by law to make a valid obligation of a Corporation. If the paper has in fact been authorized by the Company, as was the case here, the omission of one or more officers to certify the promise cannot affect its validity. The only existing rule is that the name of the corporation shall appear in the body of the instrument as the contracting party, and that it is signed by some officer or agent of the company.

Gottfried v. *Miller*, 104 U. S. 527 (Bk. 26, L. ed. 853).

There was no by-law of the Company bearing upon the execution of the obligations of the Company.

We insist that even if there was a by-law requiring the president to sign and the Company issued its coupon notes without such a signature and they came into the hands of a *bona fide* holder for value, the omission could not successfully be urged as a defense. As to the defendant in this case, the notes would be valid, notwithstanding such by-law.

Morawetz, Priv. Corp. § 370; *Flint* v. *Pierce*, 99 Mass. 68; *Samuel* v. *Holliday*, 1 Woolw. 400; *Mechanics etc. Bank* v. *Smith*, 19 Johns. 115; *Martino* v. *Commerce Fire Ins. Co.* 15 Jones & S. 520.

These were negotiable notes. The test of negotiability is whether the paper is in form one the title to which will pass by delivery or indorsement, and give the holder a complete cause of action.

1 Edwards, Bills & Notes, p. 198; 1 Smith, L. Cas. Eq. 603, notes to *Miller* v. *Race*.

This class is being enlarged rather than restricted.

Gorgier v. *Mieville*, 3 Barn. & Cress. 45; *Goodwin* v. *Robarts*, L. R. 10 Exch. 337; *S. C.* L. R. 1 App. Cas. 476; *Rumball* v. *Metropolitan Bank*, L. R. 2 Q. B. Div. 194; *Williams* v. *Ayers*, L. R. 3 App. Cas. 133.

The intent of the party putting them on the market (that they shall pass by delivery) is largely controlling; and former rules as to form are being disregarded.

Dinsmore v. *Duncan*, 57 N. Y. 573; *Mercer Co.* v. *Hackett*, 1 Wall. 83 (68 U. S. bk. 17, L. ed. 548); *Gelpcke* v. *Dubuque*, 1 Wall. 206 (68 U. S. bk. 17, L. ed. 526).

The incompleteness of these notes did not affect their negotiability.

It will be observed that the name of Norris Winslow is wanting, both as payee and as president. It is not and cannot be urged that the failure to fill in his name as payee affects injuriously the negotiability of the note, or the liability of the Company upon it.

Crutchley v. *Clarance*, 2 Maule & S. 90; *Dinsmore* v. *Duncan*, 57 N. Y. 573; *White* v. *Vt. & Mass. R. R. Co.* 21 How. 575 (62 U. S. bk. 16, L. ed. 221); *Hubbard* v. *N. Y. Cent. etc. R. R. Co.* 36 Barb. 286; *Dutchess Co. Mut. Ins. Co.* v. *Hachfield*, 4 Thomp. & C. 158; *Boyd* v. *Kennedy*, 9 Vroom, 146.

The above cases all hold that the issue of a note with name of payee in blank will not destroy its negotiability.

The rule has also been applied to cases of named omissions in the following cases:

Amount, date and time of payment blank; *Russell* v. *Langstaffe*, 2 Doug. K. B. 514; *Androscoggin Bank* v. *Kimball*, 10 Cush. 373; *Davidson* v. *Lanier*, 4 Wall. 447 (71 U. S. bk. 18, L. ed. 377).

Date blank; *Mitchell* v. *Culver*, 7 Cow. 336; *Page* v. *Morrell*, 3 Keyes, 117.

Place of payment blank; *Redlich* v. *Doll*, 54 N. Y. 234; *Kitchen* v. *Place*, 41 Barb. 465.

Amount blank; *Van Duzer* v. *Howe*, 21 N. Y. 531.

Amount so carelessly filled that it was increased by writing in the blank; *Young* v. *Grote*, 4 Bing. 253.

Acceptance blank as to date, amount, name of drawer and payee; *Bank of Pittsburgh* v. *Neil*, 22 How. 96 (63 U. S. bk. 16, L. ed. 323).

Indorsement of a blank piece of paper; *Violett* v. *Patton*, 5 Cranch. 142 (9 U. S. bk. 3, L. ed. 61).

Indorsement in blank; *Putnam* v. *Sullivan*, 4 Mass. 45.

Assignment in blank; *Brainerd* v. *N. Y. Cent. etc. R. R. Co.* 25 N. Y. 496.

Signing a blank stamp; *Collis* v. *Emett*, 1 H. Bl. 313.

Drawer and date blank; *Goodman* v. *Simonds*, 20 How. 361 (61 U. S. bk. 15, L. ed. 934).

Blank acceptance; *Montague* v. *Perkins*, 22 Eng. Law & Eq. 516.

Mr. **Francis Kernan,** for respondent:

Where the principal confers power or authority to execute an instrument on two or more persons, all must unite in executing it. An execution by one of them is not sufficient. This is the settled law, and it is a wise rule, especially as to private corporations, to guard against frauds.

Story, Agency, § 42; 2 Kent, Com. p. 633; *Green* v. *Miller*, 6 Johns. 39; *Copeland* v. *Mercantile Ins. Co.* 6 Pick. 198, 202, 203; *Salisbury* v. *Brisbane*, 61 N. Y. 617; *People* v. *Walker*, 23 Barb. 304, 306; *People* v. *Batchelor*, 28 Barb. 310, 312, 313; *Fleming* v. *Burnham*, 1 Cent. Rep. 267, 100 N.Y. 1, 10.

The several coupon notes or bonds were not executed for or on behalf of the plaintiff, as they were to be required to be by the resolutions which alone authorized them to be made and issued. Neither of them was signed by Winslow as president, or guarantied by him individually. This was expressly required by the plaintiff to make them completed instruments.

Ledwich v. *McKim*, 53 N. Y. 307, 313, 314.

The notes being incompleted instruments and this appearing on their face, the Trust Company did not acquire title to them as against the plaintiff.

1 Dan. Neg. Inst. §§ 841, 842; *Ledwich* v. *McKim*, 53 N. Y. 307, 313, and cases cited.

Actual notice of the defect is not required, where the evidence of the infirmity consists of matter apparent on the face of the instrument.

1 Dan. Neg. Inst. § 789.

The Trust Company was not authorized by its charter to invest or loan its capital or its trust funds in or upon these promissory notes of the plaintiff. It was illegal for it to do so. Its charter prescribed and directed the securities in which it might invest its capital and upon which it might loan its trust funds. Promissory notes are not such securities.

1 Laws 1867, §§ 7, 18, p. 1129; 1 Laws 1870, chap. 276, §§ 2, 3, p. 610; 2 Laws 1872, chap. 725; § 1, p. 1716; *Pratt* v. *Short*, 79 N. Y. 437, 442, 443; *Pratt* v. *Eaton*, 79 N. Y. 449.

The plaintiff had a right to have the value of the notes found, that it might have judgment for the recovery of the possession of the notes from the defendant, or, if they were not delivered to the plaintiff, to recover the value thereof.

Code Civ. Proc. §§ 1718, 1726, 1730; *Phillips* v. *Melville*, 10 Hun, 212; *Brewster* v. *Silliman*, 38 N. Y. 429, 430, 431, 432; *N. Y. Guaranty etc. Co.* v. *Flynn*, 55 N. Y. 653.

Ruger, *Ch. J.*, delivered the opinion of the court:

The facts in this case were practically undisputed, and upon the trial a verdict was ordered by the court for the plaintiff, for seven of the ten notes claimed by it. The general term affirmed the judgment, and the defendant appeals from such affirmance to this court.

The questions presented by the appeal are substantially embraced in two propositions, viz.: 1, whether the notes in suit were negotiable paper entitling a *bona fide* purchaser thereof to hold them as against the true owner, and 2, whether in case of a recovery by the plaintiff the jury was authorized to assess their value at the amount appearing to be due upon their face or at a nominal sum only.

The plaintiff sought to recover what purported to be nine promissory notes of the Davis Sewing Machine Company of Watertown, for $1,000 each, with collateral guaranty and interest coupons attached, payable November 1, 1876, and one similar note payable February 1, 1880, each of which was made upon a printed blank of similar form.

Three of these instruments appeared to be complete in form with all the blanks properly filled except the payee's name, and were duly signed by the president and treasurer of the plaintiff company. The remaining seven notes were in the same form, except that they were not signed by the president, although a blank space with a diagonally ruled line with the title of his office printed thereunder was apparently left at the foot of each instrument for such signature.

The National Trust Company was a banking institution located in the City of New York, and had been, previous to this transaction, largely engaged in the business of buying, selling and negotiating similar obligations for the plaintiff and its agents, and which had theretofore been uniformly signed by both the plaintiff's treasurer and president.

In September, 1875, a contract was made between the plaintiff and one Winslow, whereby the latter agreed that if the plaintiff would make ten bonds of $1,000 each, payable in short time with coupons for interest attached, properly guarantied, he would negotiate them in the market at par for the plaintiff at a compensation of 1 per cent upon the amount received. Accordingly, the following resolution was adopted on September 14, 1875, by the plaintiff's directors, and the notes in suit were issued thereunder:

"Resolved, That the treasurer be instructed *to have signed*, and negotiate $10,000 of bonds, due November 1, 1876, at ninety-nine cents with Mr. N. Winslow * * * *have such bonds signed* as may be necessary to make up the amount required."

According to the directions contained in the resolution, the treasurer filled up the notes above described and procured them to be signed by all of the parties whose signatures were required to be affixed thereto, except that of Winslow, as president and guarantor, and delivered them to Winslow to be signed and disposed of as agreed.

Instead of selling the notes Winslow placed them with other notes of the plaintiff amounting to $10,000 then belonging to the Security Bank of Watertown, and hypothecated them with the National Trust Company of New York for a loan of $10,000, for the benefit of the Security Bank.

Subsequently the Security Bank repaid the Trust Company $5,000 of such loan and required the notes belonging to it to be returned, leaving the notes in suit in the possession of the Trust Company, as security for the unpaid balance of the loan.

Upon the discovery of the conversion by Winslow of its notes the plaintiff demanded them from the defendant, who had then been appointed receiver of the Trust Company and had possession of all its assets; and upon his refusal to surrender them brought replevin for their recovery, demanding the usual relief.

It is not seriously questioned that the notes were unlawfully converted by Winslow and that the plaintiff was entitled to recover their possession, unless the Trust Company became the *bona fide* holder thereof, by virtue of its purchase from the Security Bank.

Winslow could not, as against the plaintiff, have retained possession of the notes, except for the purpose of executing the authority conferred upon him in accordance with its terms; neither could his transferee acquire any better title than he, except by a purchase for value without notice of the facts invalidating the title or right to their possession. *Decker* v. *Mathews*, 12 N. Y. 313; *Comstock* v. *Hier*, 73 N. Y. 273; *Fairbanks* v. *Sargent*, 5 Cent. Rep. 919.

It therefore becomes necessary to inquire whether the Trust Company received them charged with knowledge of their invalidity, or Winslow's want of authority to pledge them for a loan of money.

The burden of proving a purchase in good faith and for value devolved upon the defendant, after it was established that the notes had been surreptitiously put in circulation and diverted from the purpose for which they had been delivered to Winslow. It then became incumbent upon the defendant to show that the notes had been executed in a form authorized by the plaintiff, and that the Trust Company had paid value for them upon their transfer to it.

It is claimed by the plaintiff that the seven notes for which it has obtained judgment were never properly executed, owing to the absence of Winslow's signature, not only as president of the Company but also as a guarantor, and that this defect was apparent upon the face of the paper, and deprived the notes of the character of commercial paper.

The case shows that the plaintiff had never adopted any general by-law prescribing a method for the execution of its pecuniary obligations; and there is no claim that it ever authorized the treasurer alone to issue them by any special resolution of its board of directors. Resolutions had frequently been adopted by the board, authorizing the treasurer and president together to execute notes for specified amounts duly guarantied by the twelve resident directors of the plaintiff company; and one or two resolutions were also adopted, providing for small amounts of paper, which did not prescribe any particular form of execution. But it had theretofore been the uniform practice of the plaintiff to cause all of its bonds and notes to be signed by both its president and treasurer, and guarantied by its twelve resident directors, of whom Winslow was one. Three of the notes in suit were so signed and guarantied and they belonged apparently to the same series as the seven not so signed.

The Trust Company had theretofore dealt largely in the plaintiff's paper, and at the time of receiving the securities mentioned was perfectly familiar with its mode of executing such obligations. It was also obvious from the form of the notes that it was intended to have them signed by the president, since a blank was left for that purpose at the usual place for a maker's signature. Not only did the seven notes in dispute show by mere inspection that they were imperfect and improperly executed, but they were never in fact authorized by the plaintiff to be issued in that form. There is nothing in the resolution of September, 1875, indicating an intention to authorize the treasurer to negotiate the notes with his signature alone; but it expressly required him not to sign them, but "to have them signed."

What is the natural significance of this language? It was obviously to have them signed by the officers who had theretofore been accustomed to sign such instruments for the Corporation.

Certainly no inference could be drawn that any other persons were authorized to sign and issue them than those whose usual practice it had been to sign like instruments. Indeed, a portion of these very notes issued under the same authority indicated the mode of execution intended; and it is an irresistible inference therefrom, either that they bore an unnecessary name, or that the other seven lacked an essential signature.

It, therefore, appears not only that the plaintiff never in fact authorized the transfer of obligations bearing the treasurer's signature alone; but there are no circumstances from which third parties had any right to infer such authority. On the contrary universal experience justifies the inference, from the very appearance of an unfinished instrument, especially when incomplete as to the signatures from which provision seems to have been made, that the original intention which impelled the maker to undertake its execution was abandoned.

Although Winslow was intrusted to sell these notes and would have been authorized to transfer them by affixing his signature, as president and guarantor, thereto, yet he had no authority to dispose of them without performing the implied condition imposed by the plaintiff upon such exercise of authority.

Not only the paper itself but the plaintiff's uniform custom bore evidence of the condition which attached to Winslow's right to transfer the paper. The performance of this condition materially affected the legal rights of the plaintiff and its guarantors, and could not be omitted without prejudice to their interests. It is quite clear, therefore, that these seven notes were never executed as the plaintiff intended they should be; and the question arises, not whether for any reason they were enforceable against the plaintiff but whether the transferee of such notes, by paying value therefor, became clothed with the character of a *bona fide* purchaser.

The authorities seem to be consistent and uniform to the effect that the defendant cannot be considered such a holder.

The suggestion that a party issuing negotiable paper with blank spaces therein, apparently intended to be filled up to make a complete contract, impliedly authorizes its holder to insert appropriate words in such blanks may be dismissed as inapplicable to such a case as this.

It has sometimes been held that a party signing such paper and delivering it to a third party unfilled, by implication confers such authority; but it can hardly be claimed that one drawing the form of a promissory note, which is unsigned and falls into the hands of another, thereby authorizes the holder to attach the maker's signature or to add anything which is incomplete in its execution.

The rule that a party buying commercial paper which remains in some essential particular incompleted and imperfect does not acquire the character of a *bona fide* holder, rests upon sound reasons and is well established in commercial law.

No stronger evidence could be afforded that such paper had been prematurely put in circulation contrary to the will and intention of its maker than the fact that it had not been fully and completely prepared to perform the office for which it was designed. It is apparent that such paper must have been taken from the possession of its maker before an intention to part with it had been fully formed, and that he still designed to add some provision or formality to give it vitality and effect. It was said by the late *Judge* Folger in *Ledwich* v. *McKim*, 53 N. Y. 313, that "A negotiable instrument must be a complete and perfect instrument when it is issued, or there must be authority reposed in some one afterwards to supply anything needed to make it perfect."

The rule is also laid down in Daniels on Negotiable Instruments. §§ 841, 842.

We cannot, therefore, hold that the Trust Company became the *bona fide* holders of the seven notes.

The reasons which lead us to this conclusion would also seem to require us to hold that the trial judge erred in directing the jury to assess the value of the notes at the amount apparently due thereon.

If the notes were not enforceable as pecuniary obligations of the plaintiff and its guarantors, it necessarily follows that they could not have had any other value than that which pertained to the material upon which they were written. It is, therefore, evident that the court erred in directing their value to be assessed upon the principles stated.

That this was a material error is evident from the fact that the jury did not find any damages for the detention of the notes; and therefore the assessment of the value controls the question of costs in the case.

We see no ground upon which such notes can be appraised at anything but a nominal value; and we think it was error in the trial court to refuse to so direct the jury.

The judgment should, therefore, be reversed and a new trial ordered, with costs to abide the result.

All concur.

Mary Jane WARD, Individually and as Executrix, *Respt.*,

v.

DeWitt Clinton WARD, *Appt.*, and DeWitt C. Ward, Exr. *et al.*, *Respts.*

1. A **will and codicil** of the same testator are to be taken as **one instrument** and construed together. It is sufficient if from both instruments it can be implied that his intent was to establish a trust.
2. When the duties imposed upon the **executors** are active and render the possession of the estate convenient and reasonably necessary, they will be **deemed trustees** for the performance of their duties, to the same extent as though declared to be so by the most explicit language.
3. Where the **will** gives to the wife of the testator the use and income of all his estate during her life or until, after testator's death, she marries again, with power to the executors to dispose of any of it and to change the investment, and upon his wife's death gives such use and income to his two sons, share and share alike, and upon the decease of his sons, to their heirs, should both have heirs, their father's portion only, and in case of one having no heirs then to the heirs of the other, share and share alike, and if both should have no heirs, then as the law directs—the **suspension of absolute ownership** will or may exceed a **longer** period **than two lives in being** at the death of the testator, as three lives, those of his wife and two sons, must terminate not only as a condition precedent to the taking effect of the gift over but before it will be known who will be entitled ultimately to take. Such limitation is too remote and renders the disposition void.
4. A **valid trust** was created by the will, to continue **during** the **life** or widowhood **of the testator's wife,** but **on her death** the **residue** then remaining **of** the **estate should be divided** according to the Statute of Distributions in cases of intestacy.

(Decided March 15, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Special Term in an action for the construction of a will. *Modified.*

Statement by **Danforth, J.**:

The action is brought for the purpose of obtaining the direction of the court in regard to certain questions arising on the will of Mortimer Ward, deceased. The plaintiff is his widow and the executrix of the will, and in both capacities interested in its construction. The defendants are DeWitt Clinton Ward, executor and brother of the deceased, Walter Edmund Ward and DeWitt Clinton Ward, his only children and Abby P. Ward, the mother, Sarah Brindley, the aunt, and Henrietta B. Ward, the sister of the testator, and beneficiaries under his will.

The defendants appeared and answered separately. A trial was had at the special term, and from the judgment there rendered, DeWitt Clinton Ward, the son, alone appealed to the general term; and from its judgment he appeals to this court.

Mr. **James M. Hunt,** for appellant:

The will of Mortimer Ward suspends the power of alienation of a portion of the estate for a greater period than during the continuance of two lives in being at the death of the testator and is void.

If it was the intention of the testator that the trustees should hold the corpus of the estate intact, after the death of the widow, and simply divide "the income" between the two sons, the trust is obnoxious to the statute.

Knox v. *Jones*, 47 N. Y. 389; *Colton* v. *Fox*, 67 N. Y. 348.

The words of the will are: "And upon the decease of my sons, I give, bequeath and devise to their heirs, should both have heirs." The gift over does not become vested until the decease of both sons.

Shipman v. *Rollins*, 98 N. Y. 311, 325.

As to the meaning of the word "heirs" as used by the testator; the usual meaning of the word must prevail, unless the context shows that the testator intended to attach to it a different meaning.

Bundy v. *Bundy*, 38 N. Y. 410, 421; *Cushman* v. *Horton*, 59 N. Y. 149, 152.

The context shows that the testator did not, by the word "heirs," intend to include collateral, but only lineal heirs. He used the word as equivalent to "children him surviving."

Bundy v. *Bundy*, 38 N. Y. 410, 421; *Scott* v. *Guernsey*, 48 N. Y. 106, 122; *Lytle* v. *Beveridge*, 58 N. Y. 592, 605; *Cushman* v. *Horton*, 59 N. Y. 149, 152; *Thurber* v. *Chambers*, 66 N. Y. 42, 47; *Smith* v. *Scholtz*, 68 N. Y. 41, 59.

The well settled rule is that if, under the provisions of the will, the power of alienation may by any circumstance be suspended for a greater period than during the continuance of two lives in being at the death of the testator, then the will is obnoxious to sections 14 and 15, article

1, title II, chapter 1, part II, or section 1, title IV, chapter 1V, part II of Revised Statutes.

Knox v. *Jones*, 47 N. Y. 389, 397; *Schettler* v. *Smith*, 41 N. Y. 328, 334; *Colton* v. *Fox*, 67 N. Y. 348; *Smith* v. *Edwards*, 88 N. Y. 92.

Does the will create a valid, express trust?

Section 60 of the Statute of Uses and Trusts (1 R. S. 679), provides that a valid, express trust shall vest the whole estate in the trustees, in law and in equity, subject only to the execution of the trust. Conversely, if no estate is given to trustees, there is no valid express trust. In no clause of this will is any estate whatever given directly to the executors. Neither "trust" nor "trustee" appears in any portion of the will except the codicil, and the fact that the codicil contains the word "trustees" does not create a valid trust.

Verdin v. *Slocum*, 71 N. Y. 345.

The gift is directly to the wife. She takes absolutely and directly; *Monarque* v. *Monarque*, 80 N. Y. 320; and an estate thus given cannot be taken away or cut down by any subsequent words that are not as clear and decisive, certainly not by implication.

Roseboom v. *Roseboom*, 81 N. Y. 356; *Campbell* v. *Beaumont*, 91 N. Y. 464.

By the provision "And upon my wife's decease the use and income of all my estate subject to the above provisions, to my two sons," etc, the estate is given after the mother's decease directly to the sons, for them to enjoy the use and income of it while they live.

Smith v. *Van Ostrand*, 64 N. Y. 278, 282.

Words must be supplied to cut down an apparent absolute gift; and this cannot be done unless the language actually used by the testator requires it. We are not to conjecture what he meant, but ascertain the meaning of his words.

Campbell v. *Beaumont*, 91 N. Y. 467.

The cases relied upon by the court below are distinguishable.

The will in the case of *Robert* v. *Corning*, 89 N. Y. 227, by its fourth paragraph gives the estate directly to the executors; while the will in question places the estate immediately in the hands of the widow and the sons.

In *Savage* v. *Burnham*, 17 N. Y. 561, the will gave the estate in question to specified trustees upon certain specified trusts.

In *Vernon* v. *Vernon*, 53 N. Y. 351, the will gave all the estate to the executors and trustees in the first instance, and then gave a house and lot to the wife; but it said that the executors might sell the same (it was held that the executors took no estate in that house and lot), and then gave his wife an annuity "to be paid semi-annually by my executors" out of certain specified rents.

In *Low* v. *Harmony*, 72 N. Y. 408, the will directed the executors to invest $10,000; "And the interest of the same shall go towards the support of Alice Harmony, * * * only the interest or income paid over to herself."

In *Tobias* v. *Ketchum*, 32 N. Y. 319, 321, the will gave the executors express directions as to the division of the proceeds of testator's estate and authorizes them "to rent, lease, repair and insure."

In *Bliven* v. *Seymour*, 88 N. Y. 469, 477, the will is more like the one under consideration, than is that found in either of the above cited cases; and the decision of *Bliven* v. *Seymour*, and the cases cited in 88 N. Y. 477, are direct authorities against the construction of a trust in this will.

If the more important provisions of this will, should be controlled by the less important and contingent provisions, it is submitted that if the latter provisions impose any active duties whatever upon the executors, such duties are merely to pay debts, expenses and (in certain contingencies) legacies, and that such duties are insufficient for the purposes of a trust.

Re Will of Fox, 52 N. Y. 530, 536; *Dill* v. *Wisner*, 88 N. Y. 153.

It is well settled that an instrument should not be construed to create a trust, unless its words plainly indicate such an intention.

Heermans v. *Robertson*, 64 N. Y. 332, 343; *Heermans* v. *Burt*, 78 N. Y. 259.

Mr. **George G. DeWitt**, *Jr.*, for respondent:

While there is no express gift of the estate to the executors in trust, the testator's intention is clearly defined in the codicil, where he declares that he appoints his executors named in his will as trustees for purpose of carrying out its provisions. The will and codicil are to be regarded as a single instrument; and their various clauses must be construed in connection with each other.

Westcott v. *Cady*, 5 Johns. Ch. 334; *Howland* v. *Union Theological Seminary*, 5 N. Y. 193; *Morse* v. *Morse*, 85 N. Y. 60.

The fact that there is no express devise to the executors in trust is immaterial. No devise in express words is necessary to create a trust estate.

Robert v. *Corning*, 89 N. Y. 225.

The courts have uniformly held that to create a trust it is not essential to use the words "trust" or "trustee;" or that the authority to receive rents and income should be conferred in express language. They have also held, where it appears to have been the intention of the testator, as gathered from his will, that the income given to one by the will is to be received by the beneficiary through the medium of an executor, that a trust is established.

Craig v. *Craig*, 3 Barb. Ch. 76; *Leggett* v. *Perkins*, 2 N. Y. 297; *Savage* v. *Burnham*, 17 N. Y. 561; *Tobias* v. *Ketchum*, 32 N. Y. 319; *Vernon* v. *Vernon*, 53 N. Y. 351; *Low* v. *Harmony*, 72 N. Y. 408; *Morse* v. *Morse*, 85 N. Y. 53; *Marx* v. *McGlynn*, 88 N. Y. 357; *Robert* v. *Corning*, 89 N. Y. 225; *Hathaway* v. *Hathaway*, 37 Hun, 265.

It was the intention of the testator to continue the trust after the death of the wife during the lives of the sons.

There is no illegal suspension for a period beyond two lives. The trusts for the two sons, although embraced in a single fund, are distinct and separable trusts and terminate at their deaths respectively.

Savage v. *Burnham*, 17 N. Y. 561; *Stevenson* v. *Lesley*, 70 N. Y. 512; *Monarque* v. *Monarque*, 80 N. Y. 320; *Wells* v. *Wells*, 88 N. Y. 323.

By the well settled rules of construction the word "heirs," as used in the trust clause, is equivalent to "children" or "descendants."

Heard v. *Horton*, 1 Denio, 165; *Vannorsdall* v. *Van Deventer*, 51 Barb. 137; *Scott* v. *Guernsey*, 48 N. Y. 106; *Lytle* v. *Beveridge*, 58 N. Y. 592.

The executors are empowered by the will to sell the real estate and give good title. Such power of sale is created by the following words of the will:

"Should my executors deem it necessary and advisable for the better security and interest of my estate to change the investment of my property, they may dispose of all or any part of it."

Livingston v. *Murray*, 39 How. Pr. 102; *Phillips* v. *Davies*, 92 N. Y. 199.

Danforth, *J.*, delivered the opinion of the court:

The testator died in August, 1884, leaving a will and codicil, which were duly admitted to probate, as a will of real and personal estate. These, under established rules, are to be taken as one instrument and construed together as expressing the intent of the testator. If in one, therefore, the omission of certain technical words gives color to the contention of the appellant: that no express trust is created, the other declares the design of the testator that the executor and executrix shall take the residuary estate for the object declared and set forth in the will, and it is sufficient if from the two instruments it can be implied that his intent was to establish a trust. *Morse* v. *Morse*, 85 N. Y. 53.

By the will he appoints his wife executrix and his brother executor, and by the codicil he says, "I do nominate and appoint" them "as my trustees for the purpose of carrying out any of its provisions." In the first place it would be difficult if not impossible to carry into effect the plan devised by the testator, except through the intervention of some third person who might collect, manage and retain his property until the time arrived for final distribution. Such functions are imposed upon the executors. They are to pay the debts of the testator out of his estate, as soon "as shall by them be found convenient."

Each son is to have in property or money $10,000 on arriving at the age of thirty years. It was also the intention of the testator to provide for the support of his mother, his aunt and his sister, out of the property, and that so much as might be necessary should be paid to them for that purpose. To his wife the testator gave all his household furniture, "and the use and income" of all his real and personal estate "during her life," or "until after" his "death she marries," but in that case, "in lieu of all dower, $10,000 in money to be paid" by his executors; and they are in terms authorized to dispose of any of his property to pay this sum, or to pay the legacies given to his sons. And although, as we have seen, his wife was to have the income of his estate, the executors are authorized in their discretion "to change the investment of" the testator's property, or dispose of all or any part of it, "and invest the proceeds" in United States government, or New York state, or New York city bonds registered, or on bond and mortgage.

Upon his wife's decease the testator gives the "use and income" of his estate, subject to diminution by the support of his relatives above named, and the payment when due of the legacies to his sons, to those sons "share and share alike; and upon the decease of his sons, to their heirs, should both have heirs, their father's portion only; and in case of one having no heirs, then to the heirs of the other share and share alike; and if both should have no heirs, then as the law directs."

It is plain, therefore, that the executors are to have the management and direction of, and title to the property not specifically bequeathed, until the children attain the age of thirty years; and upon their death only the residue goes to whomsoever shall be entitled to it, in remainder. The executors may not only invest, but reinvest; and in whose name, if not their own, shall the government, state or city securities be registered? They may also sell any part of the estate as in their judgment becomes necessary; they are to divide, therefore they are to receive, the income.

By these incidents the case seems to be brought within the rule that when the duties imposed are active and render the possession of the estate convenient and reasonably necessary, the executors will be deemed trustees for the performance of their duties, to the same extent as though declared to be so by the most explicit language. *Tobias* v. *Ketchum*, 32 N.Y. 319; *Robert* v. *Corning*, 89 N.Y. 225.

The remaining question has been presented with much earnestness on the part of the learned counsel for the appellant, and is of greater difficulty. His contention is that the power of alienation of a portion of the estate is illegally suspended for a period beyond two lives; and the argument is placed on words already quoted.

As before suggested the trust created by the testator will continue after the wife's death and during the lives of the two sons. But upon the death of either, the children of the one dying, if he has any, will be entitled to his share, but if he has none, then the heirs of his brother will be entitled to it, and upon the death of that brother, leaving heirs, the same result follows; or, both dying without heirs, the estate must go where the law directs.

It follows that the property cannot be sold, except for the purposes of the trust, during the life of the widow. That is a suspension for life. It must remain undisposed of during the life of the son first dying, that is the second life, and still undisposed of during the life of the other son, for the time fixed for distribution is the death of both sons. That makes the third life; and it is clear that the suspension of absolute ownership will or may exceed a longer period than the continuance of two lives. All these lives were in being at the time of the death of the testator, and must terminate not only as a condition precedent to the taking effect of the gift over, but before it can be known who will be entitled ultimately to take. This limitation is too remote and renders the disposition void. 1 R. S. 773, § 1; *Knox* v. *Jones*, 47 N.Y. 389; *Colton* v. *Fox*, 67 N.Y. 348; *Smith* v. *Edwards*, 88 N.Y. 92; *Bailey* v. *Bailey*, 97 N.Y. 460.

In *Monarque* v. *Monarque*, 80 N.Y. 320, the widow had the first life estate, and at her death the four daughters of the testator took for life; and upon the death of any daughter the fee of one fourth part at once vested in her children.

In *Wells* v. *Wells*, 88 N. Y. 323, there was a similar provision, first for the wife, then for the testator's children; but it was also provided that upon the death of either child, leaving issue, such issue or next of kin should take his proportion.

In neither case was the final disposition of the estate suspended beyond the first and second life; for, that ending, the share of the child dying was at once liberated from the trust; but in the case before us it is otherwise. The testator provides for the devolution of the share of the child dying to the heirs of that child, if any, but if not it is still to be held by the trustee for the children of the other son; and until it is seen that neither has issue does the trust terminate.

Another question is presented by the pleadings and was considered by the court below: that relating to the mother, aunt and sister of the testator, all beneficiaries under the will, but we understand from concessions of counsel on the argument of this appeal that it was no longer deemed material by either party.

Other questions raised by the pleadings and answered by the court below, become immaterial, by reason of the death of the testator's widow unmarried, and still others are not presented on this appeal; but on the question argued we think a valid trust was created by the testator, to continue during the life or widowhood of the plaintiff, Mary Jane Ward (and she having died that question even becomes unimportant); but as to the residuary estate then remaining, it should be divided according to the Statute of Distributions in cases of intestacy.

The judgment appealed from should be so modified, and as modified, affirmed; the costs of this appeal to be paid out of the estate.

All concur.

John LOUGHLIN, *Respt.*,
v.
STATE of New York, *Appt.*

1. The **master** is **responsible for** the **negligent act of one servant causing injury to a coservant** where such servant was, by the appointment of the master, charged with the performance of duties which the master was bound to perform for the protection of his servants.
2. A failure to perform such duties, or a **negligent performance** of them **by a servant delegated to perform** them, **is** regarded in law the **master's** failure or **negligence**, and not merely the failure or negligence of the coservant.
3. If the **coservant** whose act caused the injury was at the time representing the master in doing master's duty, the master is liable; if, on the other hand, he was simply performing the work of a servant in his character as a servant or employee merely, the master is not liable.
4. For an **injury sustained** by the claimant **from** the **negligence of** the **captain of the state boat**, who, at the time, was engaged with several hands employed on the boat, including the claimant, in digging clay from a bank and loading it on to the boat, which negligence consisted in setting the claimant to work under the bank after the captain had loosened the overhanging earth so that it fell upon and injured the plaintiff, the State is not liable.
5. The **captain** of the boat, although he had power to direct those under him, **was** nevertheless **a coservant**, within the rule.
6. **Where** the injury is one for which the master, if an **individual**, would **not** be **liable**, it is not one for which the **State** is liable under chapter 321 of the Laws of 1870.

(Decided March 22, 1887.)

APPEAL by the State from an award of $1,200 by the State Board of Claims to the claimant, for an injury while in the State's employ, alleged to have been caused by the negligence of defendant's agent. *Reversed.*

The claimant was a day laborer employed on the state boat on the Champlain Canal. The business of the hands employed on said boat was to load and transport earth and other materials as required by the needs of the canal. They were in charge of a captain who was the agent of the State and who had absolute control of the men.

When the injury occurred for which damages was claimed the hands, including the claimant, were engaged in digging sand for the canal. They were at work on a high bank and had dug several feet under the top of the embankment. The captain tried to break the top of the embankment under which they had dug and had some men helping him. They failed to break it, although they had made several deep holes with crowbars, and had used all their force in trying to pry the top off and had started a large crack, which was unknown to the claimant. A portion of the edge of the same embankment had been broken off, and the captain ordered the claimant to take his wheelbarrow and go into the excavation and wheel out the sand. As the claimant was proceeding into the embankment with his wheelbarrow, the top of the embankment fell, and he received the injuries for which he claims damages.

The board of claims held that the captain and claimant were not coservants within the rule that a corporation is not liable to a servant for the negligence of a coservant and awarded claimant the sum of $1,200; whereupon, the State appealed.

Mr. **D. O'Brien,** *Atty-Gen.*, for the State:

A servant who has accepted service with knowledge of the character and position of structures from which he may be liable to injury, cannot maintain an action against his employer in case of injury resulting therefrom. He assumes apparent risks.

Gibson v. *Erie R. Co.* 63 N.Y. 449; *De Forest* v. *Jewett,* 88 N. Y. 264; *Powers* v. *N.Y. etc. R. R. Co.* 98 N. Y. 274; *Kennedy* v. *Manhattan R. Co.* 33 Hun, 457; *Leary* v. *Boston etc. R. R. Co.* 139 Mass. 580; *Brick* v. *Rochester etc. R. R. Co.* 98 N. Y. 211.

The claimant was a fellow servant with Wells, the captain of the boat; both were engaged in the same general business of the master, viz.: the taking of the clay to the state boat.

Hofnagle v. *N.Y. Cent. etc. R. R. Co.* 55 N.Y. 608; *Laning* v. *N.Y. Cent. etc. R. R. Co.* 49 N.

Y. 528; *Crispin* v. *Babbitt*, 81 N. Y. 516; *Neubauer* v. *N. Y. etc. R. Co.* 3 Cent. Rep. 66.

The general rule of law is that the master is not responsible to one servant for an injury occasioned by the negligence of a coservant of the common employer. To this there are two exceptions: 1, when the servant, whose negligence caused the injury, was a person unfit and incompetent to be intrusted with the duty to which he was assigned, of which the master had knowledge; and 2, when the accident resulted from unsafe and imperfect machinery and appliances.

Murphy v. *Boston etc. R. R. Co.* 88 N. Y. 151; *Besel* v. *N. Y. Cent. etc. R. R. Co.* 70 N. Y. 176.

There was no evidence that the captain was negligent; and the finding of the board to the contrary is against the evidence.

Leonard v. *Collins*, 70 N. Y. 95.

Mr. **A. D. Wait,** for respondent:

Wells, the captain in charge of the work, was an officer appointed by the superintendent of public works.

1 R. S. 7th ed. p. 629, § 15; art. 5, § 8, Const., as amended in 1877.

He was more than a mere fellow servant with others, charged with a special duty; he was the general agent of the principal, placed there by the latter to direct and control the others. And in such case the master (the State) is liable to a subordinate, who has been exposed to unreasonable risk and injured from the want of due care and the negligence of one thus acting in its stead.

Fort v. *Whipple*, 11 Hun, 587, 591, and cases cited; *Flike* v. *Boston etc. R. R. Co.* 53 N. Y. 549; *Corcoran* v. *Holbrook*, 59 N. Y. 517; *Malone* v. *Hathaway*, 64 N. Y. 5-13; *Noyes* v. *Smith*, 28 Vt. 59, 64; *Ormond* v. *Holland*, 96 E. C. L. 100; *Patterson* v. *Wallace*, 28 Eng. Law & Eq. 50: *Ryan* v. *Fowler*, 24 N. Y. 410, 413, 414.

The claimant was justly and equitably entitled to an award for the damages sustained. The award appealed from in this case should be affirmed, upon the facts of the case and the law applicable thereto.

Chicago etc. R. Co. v. *Ross*, 112 U. S. 377 (Bk. 28, L. ed. 787); *Brickner* v. *N. Y. Cent. etc. R. R. Co.* 2 Lans. 516, affirmed in 49 N. Y. 672; *Flike* v. *Boston etc. R. R. Co.* 53 N. Y. 550, 552, 553; *Fuller* v. *Jewett*, 80 N. Y. 46, 52; *Pantzar* v. *Tilly Foster Iron Mining Co.* 99 N. Y. 368; *Booth* v. *Boston etc. R. R. Co.* 73 N. Y. 40; *Hawley* v. *Northern Cent. etc. R. R. Co.* 82 N. Y. 370, 372; *Stringham* v. *Stewart*, 1 Cent. Rep. 779, 100 N. Y. 516, 526.

Andrews, *J.*, delivered the opinion of the court:

We think the award in this case is in conflict with the decisions of this court defining the responsibility of employers for injuries sustained by servants while engaged in performing the service for which they were employed, resulting from the negligence of coservants.

The master is sometimes responsible for the negligent act of one servant causing injury to a coservant; but this liability, when it exists, does not rest upon the doctrine of *respondeat superior*, but solely upon the ground that in the particular case the coservant whose act or neglect caused the injury was, by the appointment of the master, charged with the performance of duties which the master was bound to perform for the protection of his servants, a failure to perform which, or a negligent performance of which, by a servant delegated to perform them, is regarded in law as the master's failure or negligence, and not merely the failure or negligence of the coservant.

The liability of the master when the negligence was not his personal act or omission, but the immediate act or omission of a servant, turns, as was said in *Crispin* v. *Babbitt*, 81 N. Y. 521, upon the character of the act; and this was but the enunciation of the established doctrine in this State upon the subject. If the coservant whose act caused the injury was at the time representing the master in doing the master's duty, the master is liable; if on the other hand he was simply performing the work of a servant, in his character as a servant or employee merely, the master is not liable.

The injury in the case last supposed, would, as between the master and the servant sustaining the injury, be attributable solely to the immediate author, and not to the master.

In harmony with the general principle that the character of the act is the decisive test, it has been repeatedly decided in this court that the fact that the person whose negligence caused the injury was a servant of a higher grade than the servant injured, or that the latter was subject to the direction or control of the former, and was engaged at the time in executing the orders of the former, does not take the case out of the operation of the general rule, nor make the master liable. *Hofnagle* v. *N. Y. Cent. etc. R. R. Co.* 55 N. Y. 608; *McCosker* v. *Long Island R. R. Co.* 84 N. Y. 77; Allen, *J.*, in *Wright* v. *N. Y. C. R. R. Co.* 25 N. Y. 565; Folger, *J.*, in *Laning* v. *N. Y. C. R. R. Co.* 49 N. Y. 528.

These decisions are decisive against the claim of liability on the part of the State, for the injury sustained by the claimant. It is found that it resulted from the negligence of Wells, the captain of the state boat, who at the time was engaged with several hands employed on the boat (including the claimant), in digging clay from a bank, and loading it on to the boat. The negligence consisted in setting the claimant to work under the bank, after Wells had loosened the overhanging earth so that it fell upon and injured the plaintiff.

The case is within the decisions above cited. Wells, although captain of the boat, with power to direct those under him, was nevertheless a coservant within the rule. The manner of proceeding with the work was committed to Wells. It involved the exercise of such discretion and judgment only as is committed to a foreman.

It is not claimed that Wells was incompetent for his position; and no question as to the suitableness of appliances furnished by the State arises. It is the ordinary case of mismanagement by a coemployee of superior grade, as to the manner of prosecuting an ordinary work in which he and other employees acting under him were at the time engaged. This was a risk incident to the employment, which the claimant assumed, and the injury not being one for which the master, if an individual, would be liable, it is not therefore one for which the State is liable under chapter 321 of the Laws of 1870.

The case of *Chicago etc. R. R. Co.* v. *Ross*, 112 U. S. 377 [Bk. 28, L. ed. 787], cited in the opinion below, was decided by a bare majority of the court, and is in conflict with the course of decisions in this State and elsewhere. *Slater* v. *Jewett*, 85 N. Y. 61; *Wilson* v. *Merry*, L. R. 1 H. L. Scotch App. 326; *Farwell* v. *Boston etc. R. R. Corp.* 4 Met. 49.

The award should be reversed, and the case remitted to the Board of Claims for a rehearing.

All concur.

Kathleen HICKEY, *Respt.*,
v.
John P. TAAFFE, *Appt.*

1. It is the **master's duty to furnish machinery to** his **employees** which is safe, considering the use for which it is designed. He is not obliged to furnish the best possible appliances, but only those which are reasonably safe and suitable.
2. An **employee,** in accepting service with a knowledge of the character and position of the machinery, the dangers of which are apparent, **assumes** the **risks incident to** the **employment;** and he cannot call upon the employer to make alterations to secure greater safety.
3. On putting a person of immature years at work upon dangerous machinery, an **employer** is **bound to give** the **employee** such **instructions** as to make him fully understand, in fact, its dangerous character, and to appreciate such dangers and the consequences of a want of care, and the necessity of care and caution.
4. **Merely going through** the **form of giving instructions, by** the **employer,** even if such form includes everything requisite to the proper discharge of his duties by the employee, **is not sufficient.**
5. If a **person** is so young that even after full instructions he wholly fails to understand them and does not appreciate the danger arising from a want of care, then he is **too young for** such **employment,** and the **employer** puts or **keeps him** at such work **at his risk.**
6. If an **employee of immature years** (here a female of fourteen years) has had **no instructions as** to the **danger of a machine** at which she is set at work, and never worked at any machinery before, and is injured by such machine within a short time of her employment, because of her unfamiliarity with and lack of appreciation of the dangers attendant upon the working of the machine, the **employer** will be **liable.**
7. But **where** such **employee has acquired** from practical experience full **knowledge of** the **dangers** of the machine at which she was set at work and was competent to perform the duty demanded from her, the fact **that she was a minor does not alter the general rule** of law upon the subject of employees taking upon themselves the risks which are patent and incident to the employment.
8. **Where** the **injury** to the employee **occurred,** not on account of any act done or omitted on her part because of any want of knowledge or appreciation of the dangers of the machine, but **from** an **accident** which no human being would have thought of as possible to occur, **resulting from an apparently safe act,** the **employer** is **not liable.**

(Decided March 8, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Kings Circuit on a verdict for plaintiff for $3,300 damages in an action against an employer for personal injury received in operating a machine. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **Esek Cowen,** for appellant:

It does not appear that a case had ever before occurred where the finger of an operator, on one of these machines, has been caught in a collar or cuff; and in several cases this court has held that such want of previous experience was conclusive as to the absence of negligence in the defendant.

Dougan v. *Champlain Trans. Co.* 56 N. Y. 1; *Sutton* v. *N. Y. Cent. etc. R. R. Co.* 66 N. Y. 243; *De Graff* v. *N. Y. Cent. etc. R. R. Co.* 76 N. Y. 131; *Burke* v. *Witherbee*, 98 N. Y. 562.

Mr. **Patrick Keady,** for respondent:

Defendant was guilty of gross negligence in putting plaintiff, a fourteen year old child, without a word of warning, caution or advice, to work at a machine which was dangerous and unsafe, was out of order and had no proper means of stopping or starting it at the time of the injury.

1 Add. Torts, Wood's ed. note p. 607; *Corcoran* v. *Holbrook*, 59 N. Y. 517; *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 585; *Larmore* v. *Crown Point Iron Co.* 2 Cent. Rep. 409, 101 N. Y. 391; Whart. Neg. § 222; *Fuller* v. *Jewett*, 80 N. Y. 46; Beach, Cont. Neg. 350, 352; *Painton* v. *Northern Cent. R. Co.* 83 N. Y. 7.

Defendant violated the original contract of employment by taking plaintiff from "bunching" collars and cuffs, where she was safe, and putting her to work at a dangerous machine, by which she was injured.

Benzing v. *Steinway*, 2 Cent. Rep. 491, 101 N. Y. 547: Wood, Master & S. § 17, p. 25.

It was the duty of defendant to caution and instruct this infant plaintiff as to the dangerous character of the machine. Having failed to do this he was guilty of negligence, which entitled the plaintiff to recover.

Wood, Master & S. §§ 349, 350, 352; *Finnerty* v. *Prentice*, 75 N. Y. 615; *Grizzle* v. *Frost*, 3 Fost. & Fin. 623; *Clarke* v. *Holmes*, 7 Hurl. & N. 937; *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 572; Whart. Neg. § 222.

It was the duty of defendant to furnish safe, sound and suitable tools, implements, appliances and machinery for the use of the plaintiff. If he failed to do this, he was guilty of negligence.

Benzing v. *Steinway*, 2 Cent. Rep. 491, 101 N. Y. 547; *Laning* v. *N. Y. Cent. etc. R. R. Co.* 49 N. Y. 521; *Corcoran* v. *Holbrook*, 59 N. Y. 517; *Slater* v. *Jewett*, 85 N. Y. 61; *Pantzar* v. *Tilly Foster Mining Co.* 99 N. Y. 368; *Larmore* v. *Crown Point Iron Co.* 2 Cent. Rep. 409, 101 N. Y. 391, 394; *Kain* v. *Smith*, 80 N. Y. 468.

There was no negligence on the part of plaintiff, which contributed to the injury. The law does not expect or require the same maturity of judgment or the same degree of care in a child of tender years as in an adult.

Byrne v. *N. Y. Cent. etc. R. R. Co.* 83 N. Y. 620; *Thurber* v. *Harlem Bridge M. & F. R. R. Co.* 60 N. Y. 326; *Barry* v. *N. Y. Cent. etc. R. R. Co.* 92 N. Y. 289; *Reynolds* v. *N. Y. Cent. etc. R. R. Co.* 58 N. Y. 248, 252; *O'Mara* v. *Hudson River R. R. Co.* 38 N. Y. 445; *Mowrey* v. *Central City R. Co.* 51 N. Y. 666; Shearm. & Redf. Neg. 59; *Crispin* v. *Babbitt*, 81 N. Y. 516; *Voak* v. *Northern Cent. R. Co.* 75 N. Y. 320.

The forewoman who put plaintiff to work at the machine, was not a fellow servant, but had power to employ and discharge the operatives. She stood in the place of the defendant, the master.

Brick v. *Rochester etc. R. R. Co.* 98 N. Y. 211; *Crispin* v. *Babbitt*, 81 N. Y. 516; *McCosker* v. *Long Island R. R. Co.* 84 N. Y. 77; *Gunter* v. *Graniteville Mfg. Co.* 18; *S. C.* 44 Am. Rep. 578; *Benzing* v. *Steinway*, 2 Cent. Rep. 491, 101 N. Y. 547; *Ellis* v. *N. Y. L. E. & W. R. R. Co.* 95 N. Y. 546; *Slater* v. *Jewett*, 85 N. Y. 61; *Corcoran* v. *Holbrook*, 59 N. Y. 517.

Where the master or his representative directs the doing of an act, the servant is not, in a legal sense, liable for negligence for the injury resulting from obedience.

Benzing v. *Steinway, supra*; *Gibson* v. *Erie R. Co.* 63 N. Y. 449; *Kain* v. *Smith*, 25 Hun, 148; *Miller* v. *Union Pac. R. Co.* 12 Fed. Rep. 600; *Bucher* v. *N. Y. Cent. etc. R. R. Co.* 98 N. Y. 128; *Salter* v. *Utica & Black River R. R. Co.* 88 N. Y. 49; *Morrison* v. *Erie R. Co.* 56 N. Y. 302; *Filer* v. *N. Y. Cent. R. R. Co.* 49 N. Y. 52; *Stringham* v. *Stewart*, 1 Cent. Rep. 779, 100 N. Y. 516.

The motions for a nonsuit were properly denied. There were controverted questions of fact which were properly submitted to the jury to decide.

Probst v. *Delamater*, 1 Cent. Rep. 507, 100 N. Y. 266; *Stackus* v. *N. Y. Cent. etc. R. R. Co.* 79 N. Y. 464; *Thurber* v. *Harlem Bridge etc. R. R. Co.* 60 N. Y. 327, 331; *Barry* v. *N. Y. Cent. etc. R. R. Co.* 92 N. Y. 289; *McGovern* v. *N. Y. Cent. etc. R. R. Co.* 67 N. Y. 417; *Byrne* v. *N. Y. Cent. etc. R. R. Co.* 83 N. Y. 620; *Hays* v. *Miller*, 70 N. Y. 112; *Maher* v. *Cent. Park etc. R. R. Co.* 67 N. Y. 52.

Plaintiff may recover at common law, independent of any right of action given her by statute.

Hickey v. *Taaffe*, 99 N. Y. 204.

This court is not at liberty to review the questions of fact presented by the evidence upon the trial; and the verdict of the jury is conclusive in regard to them.

Hallahan v. *N. Y. etc. R. R. Co.* 2 Cent. Rep. 924, 102 N. Y. 194, 199; *Kenney* v. *Cohoes*, 22 Week. Dig. 370.

Peckham, *J.*, delivered the opinion of the court:

The plaintiff was a young girl employed by defendant in his laundry. At the time of her first coming there in April, 1882, she was fourteen years and four months old, and was employed by the sister of defendant, who superintended the department of the work, to "bunch" collars and cuffs which was a perfectly safe employment. Before going to the laundry she had never worked nor seen machinery used in a steam laundry. She remained at this employment until June 16 of the same year, when defendant's sister came to her (as she says) and after telling her that the person who fed the machine in question was absent asked her to go over to it and take her place, which she did; and she was there shown how to put the collars and cuffs through and was told to be careful and not let any laps go through, any ears that is, so that no part of the collars should lap over another part.

This machine had a platform in front of it, upon which the feeder sat in a chair and placed the collars and cuffs which were to be put through the ironing process on a flat desk in front of her. There were two rollers at the further edge of the desk, one on top of the other; the lower one was hot enough to iron the collars as they passed through, while the upper pressed down upon it with a pressure of about 200 pounds. The collars were fed to these rollers by the feeder, and as one collar was started in on the left side of the machine and "gripped" by the rollers another was placed in position by the side of it; and so on until the sixth would just be taken by the rollers as the first one disappeared and the space left vacant for another collar.

There was a belt by which the machine was operated, which however could not be reached by the person feeding; but there was a girl at the rear or other end of the machine where the collars came out who started and stopped it. The heated roller is hollow and revolves around gas jets, and is heated to such a heat that if a collar stopped on it for a minute it would have been scorched brown or burned. If a person's hand were caught between these rollers it could not be dragged out, and the machine would have to be stopped and the weights which pressed it down would have to be removed from the upper roller. This machine would iron about 600 dozen pieces in the course of a working day. There were no guards in front of the rollers for the purpose of preventing anything from being drawn between them.

The defendant, on his examination, said that at one time he had himself placed a lever or shifter on this machine by which to start and stop it; it was overhead on the ceiling, and it could not be reached from where the plaintiff sat, but could be handled by a cord. That lever had been off about two months at the time when the accident occurred for which this action is brought.

Defendant says he found that the lever was not convenient, and that the old way was the easiest and safest. He says he did not take it off as a matter of economy, because the girls used to take too much time in stopping that lever. There never was at any time a lever or shifter within reach of the platform where the feeder sat. The machine as it existed on the day of the accident was in perfect repair and condition, according to the plan upon which it was built; and it did not appear from the evidence that there was in use any machine moved by steam for ironing collars which had any other or better or safer means for stopping it or for guarding the person who fed it.

On the 16th of June, when plaintiff went to work at this machine, she had never used any of the machines in the laundry. She says that no one in the factory ever instructed her as to the dangers of this machine; neither defendant nor any body else ever gave her any such instructions Before the plaintiff, no operator or feeder of the machine had ever been hurt, although there were several such machines in the laundry and they had been in use several years. One person had been injured, but she was not an operator and had no proper business at the machine when in operation.

For six weeks, or from June 16 to July 26, the day she was injured, the plaintiff worked constantly on the machine in feeding the collars and cuffs. During this time she says defendant had talked to her about her hair being loose or too long, and he told her to keep her hair up in front because it might get caught in the roller and be burned off. She also said she knew the rollers were so close together that they would, if they caught the hair, either draw it out of her forehead or burn it off by the heat, and she knew that this did once occur. She got her own hair caught once, four or five days after she was first employed on it, and she knew then that the rollers were hot enough to iron a collar, and she had always been told that there was a pressure of the upper roller on the lower. She also said she knew that if her hand was caught between the rollers of that machine that it would be burned and crushed, and she knew that other girls had had their hair caught and burned off on the machine.

As to the weight of the pressure of the upper roller upon the lower, she knew it was pressed upon or weighted with weights which she saw; and she saw the upper roller raised by means of a lever which was operated by stooping down and making great pressure with the body of the lever, which would then raise the roller. For six weeks she had had the experience of working at and feeding this machine, and had obtained the knowledge above stated, when on the 26th of July the accident in question happened. She gives this account of the manner of its happening:

"I commenced on the left hand side and commenced to put it (the collar) through the machine. I caught a collar with an ear on it. I put my finger out to pull it out and my hand was caught and drawn right through; the way it got caught, it was an old collar; my finger got caught in the buttonhole and I could not get it out; the machine went quite fast; there was a lap in the ear of a stand up collar, gentleman's collar; the buttonhole part was lapped back on the collar. I put my finger out to pull it out and my hand was caught and drawn right through; I tried to get it out; I put out my foot to push off the belting and could not reach it."

The girl at the other end of the machine heard the cries and stopped the machine. The plaintiff's hand was then taken out, the upper roller having been raised, and she was taken home. She was most terribly burned and bruised, and suffered an injury of a permanent nature and which may result in the entire loss of her hand, and perhaps arm up to the elbow.

The plaintiff commenced this action to recover for the injury, and in her complaint alleged that the defendant "carelessly and unlawfully set the plaintiff to work on machinery which was dangerous to her life and limb, without informing her of such danger, and of which she was entirely ignorant, * * * and that defendant well knew that said machinery was dangerous and unsafe; that through the gross negligence, carelessness, and wrong doing of the defendant, * * * and without any negligence on the part of plaintiff, plaintiff's right hand was caught in defendant's machinery," etc.

The plaintiff had a verdict which was affirmed at the general term, and the defendant appealed to this court.

The counsel for defendant upon the argument here, very properly, as we think from the testimony, conceded that there was no question of contributory negligence in the case.

The right of the plaintiff to maintain this recovery was placed by her counsel upon three grounds: 1, the duty of defendant to furnish safe, sound and suitable tools and machinery for the use of the plaintiff; 2, the negligence of defendant in failing to warn the plaintiff of the character of the machine and its dangers from lack of proper appliances to stop it by the person feeding it; 3, the defendant's violation of the original contract of employment, by taking her from "bunching" the collars and placing her at work feeding this dangerous machine.

First. The duty to furnish safe machinery means of course machinery that is safe, considering the use for which it is designed; for otherwise very little machinery could be operated. A steam engine may be built in the best manner, of the best materials, etc., and yet there is the possible danger inherent in the nature of the machine itself as operated by such an element, which may lead to an explosion that could not be foreseen or guarded against. Nor does the duty of furnishing a safe machine oblige an employer to furnish the best possible appliances. His duty is discharged when he furnishes a machine which is reasonably safe and suitable. *Burke* v. *Witherbee*, 98 N. Y. 562.

We are of opinion that the defendant in this case fully complied with all his legal obligations in this behalf. The machine that he furnished was in perfect repair at the time of the accident. There was but one way to stop it, and that was by taking the belt off at a point in the rear of the rollers in front of which the plaintiff sat. The machine was built on that plan, and was one of a large number of the same kind, and used for the same purpose. There was no evidence that a machine for this purpose had ever been built which could be stopped in any other manner.

The defendant, it is true, some time before the plaintiff came to the machine to work it, had himself provided other and additional means of stopping the machine; but as he says in his testimony, which upon this point is wholly uncontradicted, it was found not to work as well as the old way, and these additional means had been removed before the plaintiff was placed as a feeder at the machine. But even if the means had remained, the plaintiff (after her hand was caught) could not have reached the lever to stop the action of the machinery. The defendant could remove these things, which he had placed upon the machine by way of experiment to test their usefulness and convenience, without being, under the circumstances of this case, guilty of any negligence.

The same observations apply with added force to the fact that there were no guards in front of the rollers. The defendant had never himself placed any there, and none had been known to have been placed on any such machine in any other factory where used. Indeed, it could not be expected that such guards should be placed there; for it is plain that they would materially interfere with the working of the machine.

But the plaintiff, in accepting this work and entering upon the employment about this machine, assumed the usual risks and perils of the employment, and such as were incident to the use of this machine in its then condition, so far as such risks were apparent. I speak of this as the general rule; and whatever exceptions there may be to it on account of the youth of the plaintiff will be spoken of hereafter. But upon the general proposition as to the use of machinery there is no doubt that an employee in accepting service with a knowledge of the character and position of the machinery, the dangers of which are apparent, and from which he might be liable to receive injury assumes the risks incident to the employment; and he cannot call upon the defendant to make alterations to secure greater safety. *Gibson* v. *Erie R. Co.* 63 N. Y. 449; *Powers* v. *N. Y. etc. R. R. Co.* 98 N. Y. 274; *Shaw* v. *Sheldon*, 5 Cent. Rep. 41, decided by this court, not yet reported in regular series.

We see no failure of defendant to comply with his legal obligations as to the first ground of liability maintained by plaintiff's counsel.

2. *As to the second.* There is no doubt that in putting a person of immature years at work upon machinery which in some aspect may be termed dangerous, an employer is bound to give the employee such instructions as will cause him to fully understand and appreciate the difficulties and dangers of his position, and the necessity there is for the exercise of care and caution. Merely going through the form of giving instructions, even if such form include everything requisite to a proper discharge of his duties by such employee, if understood, would not be sufficient. In placing a person of this description at work upon dangerous machinery, such person must understand in fact its dangerous character and be able to appreciate such dangers and the consequences of a want of care, before the master will have discharged his whole duty to such an employee. *Sullivan* v. *India Mfg. Co.* 113 Mass. 396–399; *Finnerty* v. *Prentice*, 75 N. Y. 615 manuscript opinion by Andrews, *J.*, where such rule is recognized as existing in this State.

If a person is so young that even after full instructions he wholly fails to understand them and does not appreciate the danger arising from a want of care, then he is too young for such employment, and the employer puts or keeps him at such work at his own risk.

Assuming the plaintiff's statement in this case to be true: that she had no instructions as to the danger of the machine and that she had never worked at any machinery before, if under such circumstances this accident had happened within a short time of her employment and because of her unfamiliarity with and lack of appreciation of the dangers attendant upon the working of the machine, the defendant may well have been liable for the damages sustained by her on account of such ignorance. But the case discloses wholly different facts; it is conclusively shown from her own evidence already quoted that she was aware of and fully appreciated and understood the dangers to be apprehended from working the machine; and it is equally clear and from the same source of information, that she was perfectly competent to discharge this duty of feeding the machine, long before the accident occurred.

She had not, it is true, received any instructions as to its dangers from the defendant or his agents as she says; but she had acquired the information in fact from the best of all teachers, that of practical experience. She knew, therefore, all that the instructions of the defendant would have imparted to her. This was enough. Being of an age to appreciate and having full knowledge of the danger, and at the same time being competent to perform the duty demanded from her, the fact that she was a minor does not alter the general rule of law upon the subject of employees taking upon themselves the risks which are patent and incident to the employment. *DeGraff* v. *N. Y. Cent. etc. R. R. Co.* 76 N. Y. 125; *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 572, 585; *Sullivan* v. *Indian Mfg. Co.* 113 Mass. 396–398; *King* v. *Boston & M. R. R. Co.* 9 Cush. 112.

The learned judge in delivering the opinion at general term, while stating that the case was a border one, observed that "It may well be that there were methods of performing the duties which, if duly communicated to the plaintiff, would have avoided the risks of accident." But the plaintiff in her own evidence says she was instructed as to the methods of performing the duties which she was placed there to discharge; it is only as to the dangers to be apprehended from the machine which she says were never imparted to her.

There seems to be still another answer to this part of the plaintiff's claim; and that is the injury did not occur on account of any act done or omitted on her part because of any want of knowledge or appreciation of the dangers of the machine.

She attempted to straighten out a "lap" in a collar, the further end of which was caught by the machine. Her hand was distant from the roller, the whole length of the collar; and but for the unfortunate and not to be foreseen accident by which her finger was caught in the button hole and from which she could not extricate it in time, the plaintiff's hand would not have been caught by the rollers. In the act of trying to straighten out this "lap" at the time she did, it is impossible to hold that such act was the least evidence of a lack of appreciation of or a familiarity with the dangers of the machine;

and it would have been error to submit such proposition to a jury.

Prima facie it was a perfectly safe act, and would have so resulted, but for this accident which no human being would have thought of as possible to occur; and it is not admissible, therefore, to say that the injury to the plaintiff arose from any lack of knowledge on her part, even though she had received no instructions from the defendant.

Third. The third proposition is not borne out by the facts.

There is no evidence that the father of plaintiff knew that she was going to the defendant's laundry when she first went, or that he knew the character of the service she performed there. It is plain from her own evidence that she went there to obtain employment such as the defendant or his agents might place her at; and she took her turn at this machine, so far as appears, willingly, and kept it safely for six weeks before she was injured. As there is no basis in fact for the plaintiff's claim, it is unnecessary to discuss its correctness as a statement of the law.

These are the chief grounds made by plaintiff's counsel for an affirmance of this judgment; and we have examined all that he has urged with very great care and attention. The case is a most important one certainly to plaintiff, who has, without any fault of her own, sustained a most terrible and painful and permanent injury; and her case is one that appeals most strongly to the sympathies of everyone. But we do not see how this judgment can stand, without overthrowing well settled and healthful principles of law.

We think the motion for a nonsuit should have been granted; and for that reason the judgment is reversed and a new trial ordered; costs to abide event.

All concur, except **Ruger,** *Ch. J.*, and **Danforth,** *J.*, dissenting.

Catharine TAYLOR, *Appt.*,
v.
City of COHOES, *Respt.*

It is not essential to the recovery of **costs** by plaintiff in an action **against a municipal corporation** for damages for injuries sustained through the negligence of its servants, commenced before the Code of Civil Procedure went into effect, and therefore governed by chapter 262 of Laws of 1859, that the **claim** should have been **presented** to the chief fiscal officer of the corporation **before suit** brought.

(*Baine* v. *Rochester*, 85 N. Y. 523, distinguished.)

(Decided March 8, 1887.)

APPEAL from an order of the Supreme Court at General Term in the Third Department, reversing an order of the Albany Special Term denying a motion for retaxation of costs. *Reversed.*

This action was brought for injuries sustained by plaintiff through a fall upon a defective sidewalk in the City of Cohoes.

A copy of the summons and complaint was served upon the mayor of the City, August 21, 1880. A copy of defendant's answer was served in September, 1880 and the action was tried in December, 1885, resulting in a verdict for plaintiff for $2,000. Exceptions were ordered to be heard in the first instance at the general term, where a judgment was directed to be entered in favor of plaintiff, upon the verdict, with costs. Plaintiff presented to the county clerk of Albany County two bills of costs, one for costs of the circuit and the other for costs of affirmance on appeal.

On the hearing before the county clerk, the taxation of said costs was opposed by defendant, upon the ground that the complaint in this action demanded judgment for the payment of a sum of money only, and that no claim for the cause of action stated in the complaint had been presented to or filed with the chief fiscal officer of defendant, for payment by the plaintiff. The county clerk overruled the defendant's objections, and taxed the plaintiff's several bills of costs in the amount claimed; to which the defendant excepted, and thereafter moved the special term for a retaxation, which motion was denied; and on appeal by the defendant to the general term the order of the special term was reversed and plaintiff appealed to this court.

Mr. **James Lansing,** for appellant:

This action having been brought prior to the first day of September, 1880, and before section 3245 of the Code of Civil Procedure took effect must be governed, in regard to costs, by section 2, chapter 262 of the Laws of 1859.

Code Civ. Proc. § 3356.

The construction given to that Act was that actions arising out of claims *ex delicto* were not required to be presented to the chief fiscal officer of municipal corporations for payment, in order to recover costs, where it appeared that such corporations had no power or authority to audit and pay such claims.

McClure v. *Supervisors of Niagara*, 50 Barb. 594; 3 Abb. App. Dec. 83; *Child* v. *West Troy*, 23 Hun, 68; *McGaffin* v. *Cohoes*, 74 N. Y. 387.

The same construction was given to similar provisions, in regard to costs in the charters of various municipal corporations.

Howell v. *Buffalo*, 15 N. Y. 512; *Quinlan* v. *Utica*, 11 Hun, 217; affirmed in 74 N. Y. 603; *McGaffin* v. *Cohoes*, 74 N. 387.

Mr. **P. D. Niver,** for respondent:

I. The proper remedy for the defendant is by motion under the Code of Civil Procedure, section 3265.

II. The plaintiff was not entitled to costs, because no claim was filed by the plaintiff, with the chief fiscal officer of the defendant, before the commencement of the action.

Laws 1859, chap. 262, § 2; *Dressel* v. *Kingston*, 32 Hun, 526; *Judson* v. *Olean*, 24 N. Y. Week. Dig. 55.

Section 2 of chapter 262 of the Laws of 1859 reads as follows:

"No costs, fees, disbursements or allowances shall be recovered or inserted in any judgment against municipal corporations, unless the claim upon which such judgment is founded shall have been presented for payment to the chief fiscal officer of said corporation before the commencement of an action thereon."

Under section 3245 of the Code of Civil Procedure (like in substance and nearly identical in language to Laws of 1859) it has been held that unless the claim has been presented to the chief fiscal officer a plaintiff cannot have costs. *Dressel* v. *Kingston* and *Judson* v. *Olean*, *supra*.

In *Dressel* v. *Kingston* taxation was urged, on the ground that the chief official officer had no power to audit the claim if presented to him. The court, however, in disposing of the question, says: "Hence under *Baine* v. *Rochester*, 85 N. Y. 523, it is of no consequence that this officer was not authorized to adjust the claim. That case decides this."

Baine v. *Rochester* came up under section 3245 of the Code and not under the Laws of 1859; but as before said, the substance is the same in section 3245.

Section 3245 is as follows; "Costs cannot be awarded to the plaintiff in an action against a municipal corporation, in which the complaint demands a judgment for a sum of money only; unless the claim, upon which the action is founded, was, before the commencement of the action, presented for payment to the chief official officer of the corporation."

Per Curiam:

This action was brought before the new Code went into effect; and hence the section in regard to costs (3245) has no application here. The case must be decided under the Act of 1859, chapter 262, § 2, Laws 1859.

Under that section of the law this court substantially held that cases for the recovery of damages for injuries sustained by reason of the negligence of the servants of a municipal corporation were not within its purview. *McClure* v. *Supervisors of Niagara*, 3 Abb. App. Dec. 83; *Howell* v. *Buffalo*, 15 N. Y. 512; *McGaffin* v. *Cohoes*, 74 N. Y. 387.

All of these cases did not arise under the Act of 1859 but the principle decided in them is as stated.

The general term in this case and in *Dressel* v. *Kingston*, 32 Hun, 526, decided differently upon the authority of *Baine* v. *Rochester*, 85 N. Y. 523. That case we think does not go to the extent assumed by the general term.

In the first place it arose under the section of the Code above cited, and also the cause of action was *ex contractu*. It was held that in such an action it was not an answer to the requirement of that section of the Code to show that the city treasurer, the chief fiscal officer of the City, was not authorized to adjust or pay the claim upon presentation. It is true that in the opinion in the *Baine Case* it is not specially stated that the action arose on contract; yet, this was its character, and the decision was made with such fact existing.

Nothing was said in the opinion as to those other cases above cited, and it cannot be supposed that with reference to actions which were commenced while the Act of 1859 was in force the court meant to overrule them without making any reference to them whatever.

The *Baine Case* is authority for just what was therein decided; and it has not yet been decided that under the section of the Code (3245), in an action of this nature a presentation of the claim must be made in accordance with its provisions before the commencement of the action, on pain of being deprived of costs, even if the plaintiff be successful.

The order of the General Term should be reversed, and that of the Special Term affirmed, with costs in both courts.

All concur.

PEOPLE of the State of New York, *Respts.*,
v.
James MEEGAN, *Appt.*

1. Where, on the trial of an **indictment for burglary,** the "breaking," which constitutes the essential element of the crime of burglary, stands as an uncontradicted fact, it is **proper** for the court **to decline to charge** the **jury** that they **may convict of a misdemeanor** under section 505 of the Penal Code.
2. A request so to charge is properly denied when no modification of the indictment, by striking out the characteristics of burglary, would leave an adequate **description of a misdemeanor under section 505 of** the **Penal Code.**

(Decided March 1, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Court of Sessions of Queens County on a conviction of burglary in the first degree. *Affirmed.*

The case is stated in the opinion.

Mr. **James W. Covert,** for appellant.

Mr. **John Fleming,** for respondents.

Finch, *J.*, delivered the opinion of the court:

The prisoner was indicted for burglary in the first degree. The evidence showed that with two or three confederates he broke into an inhabited dwelling house, and held or aided in holding one of the inmates while one of his companions attempted to commit a rape upon a female therein residing. The defendant himself testified, admitting his presence in the house and practically denying nothing.

The trial court was asked to charge the jury that they might convict the prisoner of a misdemeanor, under section 505 of the Penal Code. The request was refused, and an exception was taken. The jury found the defendant guilty of burglary in the first degree.

The learned trial judge read to the jury the definitions of burglary in each of its three degrees, after having told them that if they doubted as to the greater offense they might convict as to the lesser. He called their attention then to the provisions of section 505, adding:

"I have now called your attention to all the provisions of the statute which relate to the offense charged in the indictment, and to the particular degrees of that offense."

It would seem from his language that he treated section 505 as a lesser degree of the offense charged, and gave to the prisoner the benefit of the doctrine which his counsel invoked. But if his subsequent refusal to charge imports the contrary, he committed no error. Nothing in the facts proved warranted a conviction for the misdemeanor. The proof, without contradiction, established all the elements of burglary in the first degree.

There was no room for any possible conclusion upon the evidence that any opening to the house was unclosed, or that the entrance was effected without a "breaking." The defendant makes no such pretense. He only says that he was in such a state of intoxication that he did not know how entrance to the house was effected.

The "breaking" which constitutes the essential element of the crime of burglary stood, therefore, in the case an uncontradicted fact; and since, under section 505, the lesser offense of a misdemeanor could only exist where the entry into the building was "under circumstances, or in a manner not amounting to a burglary," the trial court was certainly authorized to decline a charge to the jury that they might convict of a misdemeanor. That would have been to tell them that they might disregard clear and definite testimony not only unimpeached but entirely without contradiction.

It may be added also that no modification of the indictment by striking out the characteristics of burglary in any or all of its degrees would have left an adequate description of the misdemeanor. That offense involves an intent to commit a felony or a larceny or malicious mischief accompanying the entry. The only allegation of intent in the indictment is "to commit some crime." Code Crim. Proc. §§ 444, 445; *Dedien* v. *People*, 22 N. Y. 178.

It is clear, therefore, that the exception was unfounded.

No other questions require discussion.

The judgment should be affirmed.

All concur.

PEOPLE, *ex rel.* Lucy ALLEN, *Respt.*,
v.
William H. ALLEN, *Appt.*

The **relator and defendant** were **married in Illinois,** where they resided and had children. The relator brought **suit in that State for** an absolute **divorce** from the defendant on the ground of cruelty and (the defendant having been personally served with process) obtained a final **decree dissolving** the **marriage and awarding** her the care and **custody of** the **children.** Thereafter she sued out a writ of **habeas corpus in** the State of **New York,** where the defendant had taken the children and then had them, to obtain the custody of the children, and, under that writ, the courts below awarded the custody of the children to her, and defendant appealed. *Held*, that the appeal should be dismissed, for the reason that the courts below, in awarding the custody of the children to the mother, exercised their discretion upon the facts and did **not give** the **Illinois decree** the force of an estoppel or the **conclusive effect of a judgment.**

(Decided March 25, 1887.)

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APPEAL from an order of the Supreme Court at General Term in the Fifth Department, affirming an order of the Monroe Special Term awarding the custody of certain minor children to their mother, the relator, in a proceeding by *habeas corpus*. *Appeal dismissed.*

The writ of *habeas corpus* was issued by a justice of the supreme court on the relator's petition; and upon its return, a reference was ordered to S. D. Bentley, Esq., to take such testimony as might be material to the issues raised, and to report the same, with his opinion thereon.

The facts sufficiently appear from the referee's opinion, which was as follows:

This matter comes up before the supreme court upon *habeas corpus*. The material facts, as disclosed by the proofs and admissions of the parties and counsel before me, are as follows:

The petitioner and the defendant were married in Illinois, July, 1874. They were then both residents of that State, and continued to reside there until after the commencement of the suit for divorce hereinafter referred to. The petitioner still resides in that State, but the defendant came to this State soon after the suit for divorce was commenced, upon a visit, intending to return, but has remained here and now expresses his intention to make his residence in this State.

Four children were born of the marriage; Mary aged nine years, Thomas aged seven, John aged five, and a son born in February last. The first three are the subjects of this controversy and are living with their father at the house of his mother in Rochester, N. Y. The babe that was born after the judgment in the action for divorce has always remained with its mother. The husband and wife did not live happily together; but in view of the decree in the suit for divorce and what was thereby established, I will not consider the causes of that unhappy controversy.

So far as concerns the matters professed, by that judgment, to be decided, as well as those matters which it was necessary to decide, and so much of the pleadings and evidence as must necessarily have been considered by the court in proceeding to judgment, the defendant is estopped by that judgment from calling them in question here. *Tuska* v. *O'Brien*, 68 N. Y. 446; 8 East, 346; 4 Cow. 562.

On October 11, 1884, the petitioner began a suit for divorce in the Circuit Court of Tazewell County, Illinois, upon the ground of cruel treatment, and in her bill of complaint alleged that the defendant was not a fit person to have the care, custody and education of the children of the marriage, or to keep them in the hands of others in the absence of the mother's care over them; and alleged that she was a fit person to have their care, control and education, and prayed for absolute divorce, and that the care, control, custody and education of the children be committed to her by the court.

Defendant, in his answer, denied the facts alleged for cause of divorce, made counter charges against his wife, alleged that she was unfit and he fit to have the care, custody, control and education of the children.

The summons was personally served upon him in Illinois on the 11th day of October, 1884, by the sheriff of Tazewell County, and at the same time an injunction or restraining order, which has been granted by the court upon the bill filed, was personally served restraining the defendant from "keeping or having said children kept out of the State of Illinois" and "requiring him to retain them and keep them and educate said children in the said county and State of Illinois until the further order of the court in the premises."

The bill of complaint was verified by the plaintiff and alleged that the defendant had taken the three children to Rochester, N. Y., in violation of an agreement that he would not take them out of Illinois without her consent, and that they were so taken out of Illinois upon a pretense of visiting relatives. It also charged that defendant was keeping said children with his relatives in Rochester, with the purpose of having them there permanently kept and reared by his relatives in the State of New York, away from her and where she seldom, if ever, could see them again or enjoy their society.

The defendant's answer denied making any agreement to keep the children in Illinois; and denies that he ever "threatened or intended to keep said children permanently beyond the limits of this State (Illinois)."

It would seem from this brief summary of the bill and answer that the children, at the time of the commencement of that suit and of the rendition of judgment therein, were temporarily sojourning in Rochester, and that it was not until after the entry of judgment therein that defendant determined to change his residence to Rochester or to keep the three children permanently there. That such are the facts fully appears by oral evidence taken before me.

It also appears that the court in the suit in Illinois did consider, and of necessity must have considered, the charges of unfitness to have the care of the children made by each party against the other. Evidence was taken upon the part of complainant, tending to sustain her charge that defendant was an unfit person to have the custody of these tender infants; and that evidence must necessarily have been considered by the court in proceeding to judgment. The jury only passed upon the fact of cruelty. The court not only decided the question of fitness against the defendant, but, upon the pleadings, it was necessary to decide it one way or the other. The evidence in the record of proceedings, and, unexplained, in my opinion fully justifies the conclusion reached by the Illinois Court.

But it is to be said that for reasons to be alluded to hereafter, the defendant gave no evidence in that suit to sustain the allegations of his answer, or to contradict or break the force of the evidence given by the plaintiff.

The reason for such failure to make defense was that the defendant was in contempt; and the court refused, for that reason, to allow his attorney to call any witnesses. It seems that an order directing the defendant to pay $100 alimony *pendente lite* had been made in the cause, which order had not been obeyed or excuse shown for failure to obey it. It does not appear whether this order came to defendant's knowledge; but his attorney was present in court when it was granted, and opposed the motion; and from the whole evidence before me I am satisfied that defendant knew of it and was so circumstanced that he could have paid the money. I am not satisfied from the proofs that his attorney was at fault. He was shown to have attended upon the trial and to have done all that could have reasonably been expected of him, to protect his client. Defendant does not satisfactorily explain his failure to give his proper attention to the protection of his own rights and interests.

Notwithstanding all this, were the question an open one I should have great hesitancy in reaching a conclusion, upon the oral evidence before me, that either the father or the mother of these children is unfit or an improper person to have their care, custody and education. But within the authorities I think the defendant is concluded and estopped from calling up the question of fitness here, and that, as evidence against him, the record from the Illinois Court must outweigh all the oral evidence and be treated as establishing the fact that the defendant is not a fit person to have the care, custody and control of these infants. His right as a father must yield to the judgment and decree had against him. *Ahrenfeldt* v. *Ahrenfeldt*, Hoff. Ch. 497; *Peck* v. *Callaghan*, 95 N. Y. 73; *Krekeler* v. *Ritter*, 62 N. Y. 372.

The evidence very clearly establishes that no reasonable objection exists as against any member of the family of the defendant's mother. Indeed it is conceded that the children's aunts are well qualified and willing, not to say desirous, to undertake the care, nurture and education of these infants. On the other hand, I think the proofs established with equal certainty, that no reasonable objection exists against any member of the family of the petitioner's father; and there is nothing to indicate that the influence and example of her father or any of his family, with whom these children would there come in contact, would be bad.

The charges against Mr. Reisinger, growing out of whisky troubles, I do not consider of any significance; he seems rather to have been unfortunate than dishonest; and all these matters are shown to have occurred before defendant married Mr. Reisinger's daughter, and before the defendant took his wife and children into her father's house to reside. After a careful consideration of all the evidence I am satisfied that the influences which would surround these children in the home of their grandfather and under the eye of their mother would be wholesome, and that they would there have the advantages of secular and religious instruction, equally as good as they would have with their aunts in Rochester.

As to pecuniary expectations I do not think there is any shown upon either side, to weigh very heavily in the balance. Money enough seems to be assured upon either side to insure their comfortable maintenance; and although their custody and place of abode should be with their mother, that fact would not relieve their father from the duty and legal obligation to support them. By the decree of the court, to which reference has been had, he is directed to pay the plaintiff $100 quarterly until further order of the court.

Another consideration, which had weight with me in recommending to the court to award the children to their mother, is that they may be reared in one family with their infant brother.

It is of advantage to all the children of one family to be reared together, at least until early associations shall so strengthen the ties of blood as to fix deep the roots of an abiding interest in each others' future welfare. Because of the tender age of this infant brother, born since the father brought the three older children to this State, the only way in which the children of the family can be reared at all as a family, is to award the other children to the mother.

The father, from necessity, because of his profession as a physician, can be but little with his children. Their care, nurture and instruction must be given over almost wholly to their aunts and their teachers. A mother's love, because she is the mother, is tenderer than any other's. No other tie binds so closely. Her care is more solicitous for the welfare of its object, and her eye more watchful over the daily wants of her offspring in their helpless infancy than any other person's. And I think, from the evidence, these children may be safely committed to the love and care of their mother until they reach years of discretion; then they can choose for themselves.

I have been cited to but two adjudged causes in which a mother has come into the courts of one of the United States with a decree of a court of a sister State of competent jurisdiction of the persons and subject matter, granting her a divorce from her husband for his fault, and adjudging him to be unfit to have the care and education of their minor children, and awarding the children to her, and has sued out a writ of *habeas corpus* to obtain possession of them from their father. These cases are *Wakefield* v. *Ives*, 35 Iowa, 240; *Kline* v. *Kline*, 57 Iowa, 386.

I have searched with a good deal of care, but I find no other case.

In *Wakefield* v. *Ives* the mother had obtained a divorce in the court of Minnesota upon the service of the summons by publication, and had a decree awarding her the custody of the child, a daughter. The father, who went to Iowa, in some way got possession of the child. The mother went to the latter State, obtained a writ of *habeas corpus*, and the court awarded her the child, holding that the decree obtained in Minnesota was binding and conclusive upon the parties until it was modified, reversed or set aside for cause shown to the jurisdiction of the court which rendered the judgment. This was on appeal to the highest court of the State.

Kline v. *Kline* was in the same court upon *habeas corpus* between the parents. A judgment had been obtained in the courts of Wisconsin, upon service by publication. The children were residents of Iowa at the rendition of the Wisconsin judgment, which, nevertheless, awarded custody of the children. The Iowa court held that that part of the decree which awarded custody of the children was void for want of jurisdiction, putting its decision expressly upon the ground that the children were nonresidents of the State whose court assumed to make a decree disposing of their custody. The court does not allude to the prior case of *Wakefield* v. *Ives;* but it would seem that the cases are distinguishable upon the ground that in *Wakefield* v. *Ives* the child was a resident within the jurisdiction of the court which rendered the judgment, while in *Kline* v. *Kline*, the children were nonresidents.

However that may be, I think it clear by reason of the Illinois Statutes (R. S. Ill. chap. 40, § 18) and of the residence of the children within the State, that the court which pronounced the decree, between the relator and defendant, had jurisdiction to make it.

In *Wilkinson* v. *Deming*, 80 Ill. 342, it was held by the highest court of the State that a decree of divorce granted for fault of the husband, and giving custody of the children absolutely to the mother, takes away *ipso facto* all control of the father over the children until it is restored by the action of the proper court; and in *Miner* v. *Miner*, 11 Ill. 42, the same court held that where the aid of the court is once invoked the children become the wards of the court, and it will not permit them to be removed beyond its jurisdiction, or either parent to alienate the affections of the infant from the other. The doctrine of the courts which held that where the children are residents of the State and the parents invoke the aid of the court, the court has jurisdiction to award their custody to either parent, would seem to be sound beyond controversy.

As between the parties, relator and defendant, the courts of this State are bound to give the judgment of the Illinois Court the same force and effect that would be given to it by the courts of the State where it was rendered. *Mills* v. *Duryee*, 7 Cranch, 481 [11 U. S. bk. 3, L. ed. 411]; *Hampton* v. *M'Connel*, 3 Wheat. 234 [16 U. S. bk. 4, L. ed. 378]; *Shumway* v. *Stillman*, 6 Wend. 447; *Dobson* v. *Pearce*, 12 N. Y. 156; Act of Congress, May 26, 1790; U. S. Const. art. 4, § 1.

The judgment is controlling between the parties and cannot be disregarded in the courts of the same State where it was granted in any subsequent proceeding by *habeas corpus* to obtain possession of the children. *Hoffman* v. *Hoffman*, 15 Ohio, 427; *Williams* v. *Williams*, 13 Ind. 523; *Cocke* v. *Hannum*, 39 Miss. 433; *Miner* v. *Miner*, 11 Ill. 42.

These considerations establish that as between themselves the relator has the better right in this case to the custody and control of these infants than has the defendant. But it has long been the rule of action of the courts of this State that upon *habeas corpus* for possession and custody of infants, the permanent good of the infants is the controlling principle governing our courts in their decision. It has repeatedly been held that the courts of this State will not try the rights of the parents upon *habeas corpus*, but will remove all illegal restraint, and permit the infants to choose for themselves with whom they will go, in case where the infants are of sufficient age and understanding to choose discreetly; and that when they are not able to choose, the court will decide for them and award the custody to the person, be it father, mother or stranger, where and as the best interest of the infant demands. Hurd, Habeas Corpus, 2d ed. p. 500, *et seq.*

Chancellor Kent, in *Re Wollstoncraft*, 4 Johns. Ch. 79, says, p. 82: "The course and practice of the courts in these cases was only to deliver the party from illegal restraint; and if competent to form and declare an election, then to allow the infant to go where she pleased; and if the infant be too young to form a judgment, then the court is to exercise its judgment for the infant." *People* v. *Chegaray*, 18 Wend. 637; *Re Gregg*, 5 N. Y. Legal Obs. 265.

In the latter case Oakley, *J.*, says:

"The question as to the alleged superior right of the father can only arise when the child cannot, as in the present case, choose for itself. * * * It would seem then that the real question in these cases is not what are the rights of the father and mother to the custody of the child, or whether the right of the one is superior to that of the other, but what are the rights of the child? * * * The true view is that the rights of the child are alone to be considered, and those rights clearly are to be protected in the enjoyment of its personal liberty, according to its own choice, if arrived at the age of discretion, and if not, to have its personal safety and interests guarded and secured by the law, acting through the agency of those who are called upon to administer it."

In the case now at bar the eldest child is a girl of nine years, and the others are boys still younger. It seems to me that children of such tender age cannot discreetly choose for themselves; and that in view of the decree of the Illinois Court and the evidence before me, I must recommend the court to award the custody of these children to their mother, until such time as they shall reach years of discretion, when they can choose for themselves; and that the father must be sent to the Court in Illinois for a modification of its order and the determination of the rights between him and this relator, or remitted to his action in chancery.

The opinion of the General Term, per HAIGHT, *J.*, was as follows, after stating the facts:

The first question which we are called upon to consider upon this appeal pertains to the effect that is to be given to the judgment in the divorce action; for it is undisputed that in that action the court had jurisdiction of the parties; that an issue was raised as to the fitness of the parties to have the care, custody and control of the children, and that the court in that action adjudged that the defendant was not a proper and suitable person to have the custody of the children; that the complainant was a fit and proper person to have their custody and control, and that it would be for the best interests of the children to be given to their mother.

It is contended on the part of the respondent that this judgment is conclusive upon the defendant and that he is now estopped from calling it in question; while on the part of the appellant it is contended that the courts of this State are not bound by this judgment, but that it is the duty of the court to now determine the proper person or persons to have the care, custody and control of the children. No claim is made that there has been any change in the circumstances of the parties, or that there have been any new facts discovered since the judgment in the divorce action.

Article 4, section 1 of the Constitution of the United States provides that "Full faith and credit shall be given in each State to the public Acts, records and judicial proceedings of every other State."

Under this provision of the Constitution we are required to give full faith and credit to the judicial proceedings of the courts in the State of Illinois; and if the courts of that State had jurisdiction of the parties and of the subject matter, in the absence of fraud, its judgment is conclusive as between the parties or their privies on all questions litigated and decided in that court. As to those questions, the judgment constitutes an estoppel. *Dobson* v. *Pearce*, 12 N. Y. 156; *Kinnier* v. *Kinnier*, 45 N. Y. 535; *Patrick* v. *Shaffer*, 94 N. Y. 423-430; *Embury* v. *Conner*, 3 N. Y. 511-522; *Kerr* v. *Hays*, 35 N. Y. 331.

But it is contended that while the parties may be bound by a prior judgment, the infant children are not, and that it is the duty of the court to determine the question anew, independent of the conclusion reached by the Illinois Court.

In the case of *Thorndyke* v. *Rice*, 24 Law Rep. 1920, it was held that a decree of a tribunal as to the custody of a child was never final; but that the same tribunal, or another where the child was either temporarily or permanently staying, might consider the case upon the facts then existing, and (looking at the welfare of the child) should determine whether any and what change should be made in regard to its custody.

In the case of *Woodworth* v. *Spring*, 4 Allen, 321, it was held that the appointment in Massachusetts of a guardian over a child whose legal domicil is in another State, who has a guardian appointed under the laws of that State, does not deprive the court of Massachusetts of the power in its discretion to decree the custody of the child to a foreign guardian.

In the case of *Williams* v. *Williams*, 13 Ind. 523, it was held that where, upon granting a divorce, the court, in its judgment, assigns the custody of the child to one of the parties, such disposition of the child will control until the judgment making it is modified by the court upon proper application, and cannot be disregarded in a subsequent proceeding by *habeas corpus* to obtain possession of the child.

In the case of *Wilkinson* v. *Deming*, 80 Ill. 342, it was held that where the divorce had been granted for the fault of the husband, giving the custody of the children absolutely to the mother, it takes away *ipso facto* all control of the father over the children until it is restored by the action of the proper court.

In the case of *Miner* v. *Miner*, 11 Ill. 43, it was held that in case of separation the father has the legal right to the custody and control of his children, unless he had forfeited it by misconduct; next to the right of the father, that of the mother must be recognized, but these rights are subject to the control of the court of chancery, and when its aid is invoked the best interests of the children should be primarily considered; the paramount right of the father to the children will not be recognized where a divorce has been granted for his fault or misconduct; when the aid of the court is once invoked to provide for the guardianship of infants in case of separation of the parents, such infants become the wards of the court, and it will not permit them to be removed beyond its jurisdiction.

In the case of *Wakefield* v. *Ives*, 35 Iowa, 238, it was held that where a decree of divorce of a court of general jurisdiction in any other State is regularly rendered, although on service by publication, giving the custody of a minor child to the applicant, such decree will be regarded as binding and conclusive upon the parties until reversed, modified or set aside for cause shown to the jurisdiction.

In the case of *Kline* v. *Kline*, 57 Iowa, 386, it was held that a decree of divorce rendered in another State on service by publication so far as it attempted to fix the custody of minor children who were then residents of the State of Iowa, is without jurisdiction and void.

In the *Matter of the Petition of Frank B. Bort*, 25 Kan. 308, for a writ of *habeas corpus*, it was held that it was the duty of the court, whenever the possession and custody of a minor child is sought by *habeas corpus*, to make such order for their care and custody as the best interests of the children may require; and to that end it may commit them to the custody of other than a parent; and this, notwithstanding the fact that in a decree of divorce they were committed to the care and custody of their father or mother; that such decree may bind the parties *inter sese*, but does not conclude the court as to the best interests of the children. We have thus briefly called attention to such authorities as we have been able to find that bear upon the question under consideration.

It will be observed that in the case of *Thorndyke* v. *Rice*, *supra*, the decree of a tribunal as to the custody of a child was never considered final, but that the same tribunal, or any other, might consider the question upon the facts then existing, looking at the welfare of the child.

This decision proceeds upon the theory that the circumstances of parties to whom the custody of children may have been awarded may change, rendering it fit and proper that the court should change the custody of the children. We do not, however, understand the court in this case to have gone to the extent of holding that it was the duty of the court to go back of the former decree and try over and determine anew the facts established by that decree.

In the case of *Woodworth* v. *Spring*, 4 Allen, 321, the question pertained to the rights of guardians, and its chief bearing upon the question under consideration lies in the fact that a judgment of another State becomes an important element in determining to whom the custody of the children should be awarded.

The cases in Indiana and Illinois, to which we have referred, appear to go to the extent of holding that a judgment once fixing the custody of children becomes binding upon the parties so long as that judgment remains in force unmodified.

And to the same effect is the case of *Wakefield* v. *Ives*, 35 Iowa, 238. In this case it appears that Mary Wakefield Ives brought an action for divorce against her husband in the District Court of Hennepin County, Minnesota, where she then resided; that a summons was issued against the defendant and served by publication, the defendant's residence being unknown. The service of the summons having become complete by publication, a default was entered against the defendant, and the case sent to a referee to take the testimony and report to the court; that upon the testimony so reported the court rendered a decree of divorce to the plaintiff, and awarded her the care and custody of Alice H. Ives, an infant daughter. The defendant having obtained custody of the infant in the State of Iowa, a writ of *habeas corpus* was sued out by the mother. It was held that the District Court of Minnesota, by which the decree was pronounced, being a court of general jurisdiction, was by the statute expressly clothed with the power to grant the divorce and make the order respecting the care and custody of the child; that she was within the jurisdiction of the court at the time the decree was rendered; that the decree was regularly obtained and still remains in full force and binding upon the parties to it; that under the Constitution of the United States, full faith and credit shall be given to it in the State of Iowa; that it is binding and conclusive upon the parties until it is modified, reversed or set aside, and that the mother was entitled to the custody of the child.

In the case of *Kline* v. *Kline*, 57 Iowa, 386, a different result was reached, and that upon the ground that the children did not reside in the State in which the action of divorce was granted, which attempted by its decree to fix the custody of the children. The decision in that case, however, proceeded upon the theory that the children being nonresidents of the State, the court had no jurisdiction over them, and is clearly distinguishable in that regard.

In the *Matter of Frank B. Bort*, 25 Kan. 308, the parents were divorced by a decree of the Circuit Court of Sauk County, Wisconsin. The decree awarded the custody of the children to the father. The mother, having taken the children to Leavenworth, Kansas, to reside with her parents, the father procured a writ of *habeas corpus* to be issued seeking to recover the possession of the children. The petitioner invoked the decree of the court of Wisconsin and the clause of the Federal Constitution to which we have referred; but the court refused to award him the custody of the children, but instead awarded them to a Mrs. Powers, a grandmother of the children. The court, in delivering its opinion, seemed to be of the impression that the Constitution referred to had reference to property rights, and that it had no application for the reason that parents had no property rights in the possession of their children, but it refused to place its decision upon that ground; on the contrary, for the purpose of the decision, it conceded as between the parents the decision of the Wisconsin Court was final. The court then proceeds to state reasons why it would be for the best interests of the children to be awarded to their grandmother and not to either of the parents.

It will thus be observed that, from a careful examination of the authorities to which we have referred, there is no substantial conflict. We cannot adopt the intimation suggested in the *Bort Case:* that the Federal Constitution had reference to property interests only, and that full faith and credit was to be given to the judgment of the courts of other States only in cases where the judgment affected property rights. No such limitation appears in the Constitution, and we do not believe that any such was intended. If it was, then a decree of divorce dissolving the marriage contract between a husband and wife residing in the State in which the decree was issued, the parties being subject to the jurisdiction of the courts of that State, would be of no binding force or effect in either of the other States of the Union, for the reason that the decree did not pertain to property and consequently would not be entitled to full faith and credit under the Constitution.

To our mind the Constitution covers the question under consideration, and it is our duty to give full faith and credit to the decree of the Illinois Court. We do not, however, regard the decree of that court as binding upon the infants, but it is binding upon the parents, the parties to the action. The infants at the time, being of such tender years as to be unable to choose for themselves as to their custodian, became the wards of the court, and it was the duty of the court to choose for them. The court, in choosing for them, was required to consider the best interests and welfare of the children. Its decision became binding upon the children only for the time being: and as soon as the circumstances of the custodian changed or other circumstances arose which would make it for the best interests of the children that there should be a change, it would be the duty of the court in which the decree was originally made, or of any other court having jurisdiction, to make such change. But as between the parties to the action, the parents of the children, they are bound by the matters adjudged and determined in the action, and cannot again retry the questions therein determined.

In the case under consideration, the question is narrowed to a contest between the father and mother for the possession of the children. They are of that age that they cannot choose for themselves. The father was a party to the divorce action, duly served with a summons, and had an opportunity to defend. Instead, he had violated the decree of the court, was adjudged guilty of contempt, and thereby forfeited his right to defend the action. The decree, nevertheless, is binding upon him, and had the same force and effect as if he had defended. It was adjudged upon the issues raised by the pleadings in the action that he is an unfit and improper person to have the custody and control of the children. That judgment is binding upon him, and full faith and credit must be given to it. He surreptitiously, and without the consent of the mother, removed the children from that State into this State. If the judgment of the Illinois Court is not binding upon him, the judgment of this court would not be in any other State of the Union. If, therefore, he should again surreptitiously remove the children to another State, she might again be compelled to litigate the same question in any State to which he saw fit to remove them. Such a rule would be unreasonable and unjust and, we think, ought not to prevail.

Upon the merits the relator's claim stands upon the testimony of herself and her sister, who has accompained her here from Chicago. As against them, there is voluminous evidence tending to show that the appellant is an educated man of good moral character, and a proper and fit person to have the care, custody and control of the children; that she was not a fit and proper person; that she had neglected them and allowed them to go ragged and dirty; that her father, years ago, used to be a man of wealth and standing, but that fifteen or sixteen years ago he was arrested at the instance of the government, charged with having defrauded the government in the manufacture of whisky, and had his property confiscated, and that because of that he was no longer regarded as a man of good character.

The referee, however, evidently believed the testimony of the relator and her sister, and has found as a fact that she was a fit and proper person for the custody of the children; that their surroundings would be wholesome if given into the custody of their mother and removed to the house of her father. He evidently took into consideration the fact that the appellant was born and brought up in the City of Rochester; that his mother, two brothers and three sisters still reside there; that he was surrounded by his relatives and friends, and that the relator had been compelled to follow her children from the State of Illinois, where they were born and reared, and where all of her own relatives and friends resided, to the City of Rochester, among strangers, accompanied only by her sister.

We have carefully read the entire evidence appearing in the appeal book, and we have discovered no reason why we should differ with the referee in the conclusion reached by him as to the facts.

We are, therefore, of the opinion that the order should be affirmed, both upon the law and the facts, with costs.

Mr. **Theodore Bacon,** for appellant:

"The welfare of the children, and not the technical legal right, is the criterion by which to determine to whom the custody of the child shall be awarded."

Hurd, Habeas Corpus, § 462; *Re Gregg,* 5 N. Y. Legal Obs. 265, 267; *People* v. *Brown,* 35 Hun, 324; *Re Maurer,* 18 N. Y. Week Dig. 568.

Upon this question the Illinois decree not only is not conclusive, but it does not even profess to pass upon it; still further, the question was not before the court to be passed upon; and further yet, if the question had been before the court, and the court had assumed to pass upon it, its judgment could not have concluded the persons who are the subject of it who were infinitely more interested in its determination than all the world besides, and who nevertheless were not parties to the decree.

The utmost extent to which, even in the State of New York, the courts have ever gone in holding that the question of custody of a child is not always open for determination, is where a determination has been had upon direct proceedings by *habeas corpus* to determine that question, proceedings in which the child itself is both constructively and actually in court, and its rights and welfare are the sole subject for consideration. And then only while the material facts relating to the circumstances of the parties remain unchanged.

People v. *Mercein,* 3 Hill, 399.

The present case, however, is not only not one in which the Illinois decree pretended to pass upon the welfare of the children; it is not one in which any Illinois Court had any jurisdiction to pass upon the welfare of the children.

That the court of first instance wholly ignored the real issue for its determination, the welfare of the children, sufficiently appears from the referee's express statement that he has "not personally examined the said children, or inquired with whom they desire to live."

"The welfare of the child, then, being the object to be attained, no consideration calculated to influence the decision of the question should be overlooked; hence, the wishes of the child are consulted, not because it has a legal right to demand it, but because it is material for the court to understand them, that it may be the better prepared to exercise its discretion wisely. It is not the whim or caprice of the child which the court respects, but its feelings, its attachments, its reasonable preferences, and its probable contentment."

Hurd, Habeas Corpus, p. 529; *Re McDowles*, 8 Johns. 328; *People* v. *Chegaray*, 18 Wend. 637; *People* v. *Pillow*, 1 Sandf. 672; *Re Doyle*, Clarke, Ch. 154; *People* v. *Weissenbuch*, 60 N.Y. 385; *Re Wollstonecraft*, 4 Johns. Ch. 80.

Upon this issue, the burden is upon the relator to show that, for whatever reason, the existing custody of the child ought to be changed.

Thorndyke v. *Rice*, 24 Law Rep. 19.

The Illinois judgment in nowise determined this issue.

1. The children were not in Illinois, but were lawfully in New York, and under the protection of New York laws, equally with those born here.

Lemmon v. *People*, 20 N. Y. 563, 602–608; *Woodworth* v. *Spring*, 4 Allen, 321, 323.

2. The children were not parties to the Illinois action or in privity with either party.

3. The judgment did not pretend to adjudicate upon the welfare of the children, but only upon the rights of the parents.

4. Even an adjudication as to what their welfare required, in November, 1884, in Pekin, Illinois, would not determine what their welfare required in November, 1885 (still less in March, 1887), in Rochester, New York.

The question, What is for the children's welfare? circumstances having changed, is always open.

Thorndyke v. *Rice*, 24 Law Rep. 19.

The courts in America and in England have repeatedly upheld the welfare of the children against the rights of others to the children, however fixed by covenant or by judgment.

Re Besant, L. R. 11 Ch. Div. 508; *People* v. *Erbert*, 17 Abb. Pr. 395; *Woodworth* v. *Spring*, 4 Allen, 321; *Thorndyke* v. *Rice*, 24 Law Rep. 19; *Kline* v. *Kline*, 57 Iowa, 386.

Mr. **John M. Davy**, for respondent:

Article 4, section 1, of the Constitution of the United States provides that:

"Full faith and credit shall be given in each State to public Acts, records and proceedings of every other State; and Congress may by general laws prescribe the manner in which such Acts, records and proceedings shall be proved and the effect thereof."

Congress has exercised that power, and in effect has provided that the judicial records in one State shall be proved in the tribunals of any other, by the attestation of the clerk under the seal of the court, with the certificate of the judge that the attestation is in due form.

Second: "That such records so authenticated shall have such faith and credit given to them in every other court in the United States as they have by law and usage in the courts of the State from whence the said records were or shall be taken."

Hampton v. *McConnell*, 3 Wheat. 234 (16 U. S. bk. 4, L. ed. 378); *Kinnier* v. *Kinnier*, 45 N. Y. 544.

The courts of this State have repeatedly held that a judgment or decree of a court of a sister State possessing competent jurisdiction is final, not only as to the subject thereby determined, but as to every other matter which the parties might have litigated in the case, and which they might have had decided, and that the judgment can only be impeached on the ground of fraud or want of jurisdiction.

Dobson v. *Pearce*, 12 N. Y. 156; *Embury* v. *Conner*, 3 N. Y. 522; *Kinnier* v. *Kinnier*, 45 N. Y. 540; *Ruger* v. *Heckel*, 85 N. Y. 483; *Kamp* v. *Kamp*, 59 N. Y. 213, 216; *Price* v. *Price*, 55 N. Y. 656; *Patrick* v. *Shaffer*, 94 N. Y. 430.

The petitioner has a constitutional right to have the same effect given to the Illinois decree by the courts of this State that would be given to it in that State, if she had there instituted similar proceedings by *habeas corpus* to obtain the custody of her children.

Chew v. *Brumagen*, 13 Wall. 663 (80 U. S. bk. 20, L. ed. 663).

The Court of Illinois had the legal right, under the laws of that State, to award the custody of the children to the mother when it granted the divorce.

Wilkinson v. *Deming*, 80 Ill. 342; *Miner* v. *Miner*, 11 Ill. 40; *Burge* v. *Burge*, 88 Ill. 164; R. S. of Ill. chap. 40 § 18.

The Illinois decree has not been reversed or modified by the courts of that State. The decree, therefore, should be treated as *res judicata*.

Barber v. *Barber*, 21 How. 582 (62 U. S. bk. 16, L. ed. 226); *Wakefield* v. *Ives*, 35 Iowa, 240.

The Illinois, Ohio and Indiana Courts have held that where a divorce is granted the court in its judgment may assign the custody of the minor children to one of the parties; and such disposition of the children is binding between the parties and will control until the judgment is modified, upon a proper application to the court having jurisdiction, and that such judgment cannot be disregarded in a subsequent proceeding by *habeas corpus* to obtain possession of the children.

Hoffman v. *Hoffman*, 15 Ohio, 427; *Williams* v. *Williams*, 13 Ind. 528; *Miner* v. *Miner*, 11 Ill. 43.

The question as to the mother not being a proper person to have the custody of the children, was tried and decided in the divorce action; and that question must be regarded as settled and disposed of in accordance with the well settled principle of law that where it appears, as it clearly does by the records in that case, that the identical questions involved have been tried and passed upon, it is an estoppel which concludes the defendant in this proceeding.

Kerr v. *Hays*, 35 N.Y. 331; *Patrick* v. *Shaffer*, 94 N. Y. 430; *Wilder* v. *Case*, 16 Wend. 583; *Cromwell* v. *County of Sac*, 94 U. S. 351, 352 (Bk. 24, L. ed. 195); *Peck* v. *Callaghan*, 95 N. Y. 73; *Krekeler* v. *Ritter*, 62 N. Y. 372.

Per Curiam:

We dismiss this appeal for the reason that the courts below, upon a view of all the existing facts relating to the welfare and interests of the infants, exercised their discretion in awarding to the mother the custody of the children; and, in so doing, gave to the Illinois decree not the force of an estoppel, or the conclusive effect sometimes due to a judgment, but simply regarded it as a fact or circumstance bearing upon the discretion to be exercised, without dictating or controlling it.

Appeal dismissed, with costs.

All concur.

PEOPLE of the State of New York, *Respts.*,
v.
Emil H. BRIE, *Appt.*

1. **An Act of** the State of **Missouri provided** that **certificates** of indebtedness for war claims of the militia should be issued and **countersigned by** the acting **paymaster general**, but the prescribed **form** of such certificates contained in the Act provided for their being **countersigned by** the acting **quartermaster general**. *Held*, that it appeared from the whole Act that it was intended that such **certificates** should be **countersigned by** the acting **paymaster general**, and hence that such a certificate so countersigned was not a void instrument, but was capable of being the **subject of forgery.**
2. Such **certificates of indebtedness**, creating a conditional obligation on the part of the State to pay the same only when it should have received the money from the United States, are **not bills of credit**, the issuance of which by the States is prohibited by the Federal Constitution.

(Decided March 8, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Court of General Sessions on conviction of defendant under an indictment for forgery. *Affirmed.*

The defendant was convicted of uttering a forged certificate under an indictment drawn in pursuance of part 4, article 3, section 32 of the Revised Statutes. The certificate so uttered was as follows:

No. 2676. $347 $\frac{16}{100}$

It is hereby certified that the State of Missouri is indebted to Sanford Tunicliff in the sum of $347.16, on account of services in Co. B, 5th Regiment, E. M. M. This certificate is not payable by the State until after the claim of said Sanford Tunicliff for his services has been presented to the United States Government, and the amount allowed and paid to the State, and then only for the actual amount received from the United States Government.

City of Jefferson, Mo., Aug. 19, 1874.
Silas Woodson,
Governor of Mo.

J. D. Grafton,
Act'g Paymaster Gen'l.
(Indorsed) "S. Tunicliff."

By the Act of the Legislature of Missouri, approved March 19, 1874, it was provided, among other things, as follows:

Sec. 10. That, for the purpose of settling the claims of officers of the enrolled Missouri militia and Missouri militia for services rendered during the war, the acting paymaster general is hereby authorized to examine the claims of all officers and soldiers whose names appear as not paid, on the record of unpaid claims on file in his office; and if he finds such claims correct and just he shall allow the same and indorse said allowance on said claim; and if not correct he shall indorse such fact on the claims and return the same for correction; *Provided, however*, That whenever a person is reported on the record of unpaid claims as absent without leave, the acting paymaster general shall not audit and allow said claim until he has presented sufficient proof that he was not absent without leave or had not deserted.

Sec. 13. That the duplicate of all claims passed upon by the acting paymaster general shall be filed in his office—those rejected with the cause of their rejection, and those allowed with the amount allowed thereon; and the originals of all claims, with the indorsement of their allowance or rejection, shall be returned to the party filing the same; and on presentation of the original of any claim allowed as aforesaid to the acting paymaster general, he shall issue a certificate of state indebtedness for the amount allowed thereon, which certificate shall be signed by the Governor and countersigned by the acting paymaster general, and shall read as follows:

No. ——. $ ——.

It is hereby certified that the State of Missouri is indebted to in the sum of on account of services in company Regiment. This certificate is not payable by the State until after the claim of said for his services has been presented to the United States Government and the amount allowed and paid to the State, and then only for the actual amount received from the United States Government.

City of Jefferson, Missouri, 18 .
Governor of Missouri.

Countersigned:
Acting Quartermaster General of Missouri.

On appeal by defendant to the general term, the judgment and conviction was affirmed in the prevailing opinion delivered by DANIELS, J., as follows:

The certificate, for the uttering of which the defendant was convicted, was dated in August, 1874. It was issued under a law of the State of Missouri, enacted on the 7th of January of the same year, and it obligated the State of Missouri to pay the sum of $347.16, on account of services in Company B, Fifth Regiment of the Enrolled Missouri Militia, after the claim of the person therein named for his services had been presented to the United States Government, and the amount allowed had been by it paid to the State, and then only for the actual amount received from the United States Government. This was an evidence of debt, or engagement for the payment of money upon a contingency, the forging and uttering of which was made a crime under the statute of the State upon which the indictment was found. 3 R. S. 6th ed. 944, § 33, subd. 1.

That the contingency was a remote one, upon which the payment was to be made, did not exclude the certificate from the operation and effect of this statute. It was still an engagement for the payment of money upon a future contingency. The statute of the State of Missouri, under which it was issued, provided for the auditing and allowance of two classes of claims: the first included claims on file in the office of the quartermaster general, or which should be there filed up to the first of August, 1874, and were denominated irregular claims, including generally quartermaster's supplies. The other provisions of the statute included claims of officers and soldiers of the enrolled Missouri militia and the Missouri militia, for services rendered during the war; and the claim, for which the certificate set forth in the indictment and for the uttering of which the defendant was convicted was issued, was of this description. The statute, by its tenth section, authorized and empowered the acting paymaster general to examine such claims on file in his office, and provided when he should find them correct and just that he should allow the same, and indorse his allowance on the claims; and by the thirteenth section of the Act it was further provided that a duplicate of each claim allowed should be filed in the office of the paymaster general. And it was then directed that "He shall issue a certificate of state indebtedness for the amount allowed thereon, which certificate shall be signed by the Governor, and countersigned by the acting paymaster general, and shall read as follows:" A form of the certificate was then given which at its foot contained on the left side the word "countersigned," followed by a space for the name, and that, in completing the line, is further followed by the words "Acting Quartermaster General of Missouri."

As the statute was enacted, therefore, it in its language directed the certificate to be issued by the acting paymaster general; while the form prescribed dispensed with his authentication of the certificate and provided for that being done by the quartermaster general. In this manner a direct conflict was created between the mandatory provision of the Act, and the form prescribed for carrying it into effect; and the question presented on this part of the case is, Which was the paramount authority? And its solution depends upon the intent and design of the Act as that has been disclosed; and that seems to be consistent only with the construction that the certificate should be signed and authenticated by the officer whose duty it was made to examine the claim upon which it should be issued.

This construction is sustained by the general purposes and objects of the Act; for the officers who were to examine, audit and allow the claims provided for were those in whose offices they were at the time, or should afterwards be filed. Those relating to the quartermaster general's department were filed, and were directed to be filed. He was the person who in the ordinary course of the exercise of his authority would be best acquainted with the merits of that description of claims, while he could not reasonably be expected to be familiar with the other class, including only the claims of the officers and soldiers in the militia. Those claims appertain to, and were especially within the province of the paymaster general, and it was to his audit and allowance that they were committed by the Act,

The Act further provided that when the claims subjected to the commission of which the quartermaster general was a member should be allowed, that they should be certified by a certificate authenticated in the form consistent with that allowance, by the acting quartermaster general of the State. He had no duty whatever to perform, concerning the claims made for the services rendered by the officers and soldiers of the militia, and could not be familiar with them, as he would be with the other class of claims; and it would not reasonably be expected that he should certify, as correct claims, those he was not required to examine or investigate and of which he could practically have no knowledge.

But what the Legislature designed by the Act was that the claims of each class should be certified by the officer knowing the fact of the truth of the certificate required to be made. And that intention is further disclosed by the thirteenth section of the Act directing the acting paymaster general to issue the certificates of state indebtedness for the amounts allowed for the services of the officers and soldiers; and he could not do that without authenticating them, as the law intended that to be done; and from that fact, as well as the general scope and tenor of the Act, it is quite manifest that in giving the form of the certificate in the Act, to be issued by the acting paymaster general, a mistake was made in omitting his official designation, and in place of it inserting the word "quartermaster." And as this was evidently a mistake it is required to be rejected, for the intent of the Act is clearly to that effect, and that intent is required to be followed in its construction.

That has not only been manifested by its general object and purpose, but in addition to that by the explicit direction that the paymaster general should be the officer who with the Governor should issue the certificate. This certificate must, accordingly, be held to have been issued in compliance with the authority contained in the Act, inasmuch as it was certified by the Governor and by the acting paymaster general. Upon its face, therefore, it was not a void instrument issued under the statute, and accordingly incapable of being the subject of a forgery within the principle supported by the cases of *Cunningham* v. *People*, 4 Hun, 455; and *Fadner* v. *People*, 2 N. Y. Crim. Rep. 553, and by 2 Bish. Crim. Laws, 553.

Neither was it invalidated by anything contained in section 52 of article 4 of the Constitution of the State of Missouri adopted in 1875; for that merely prohibited an appropriation of money by the Legislature of the State to pay these certificates until after the claims audited had been presented to and paid by the Government of the United States to the State of Missouri. This section of the Constitution leaves the certificates precisely as they were allowed to be made and issued under the Act of 1874.

The obligation expressed in them, as that was provided for by the Act, was in no manner changed or intended to be changed by the Constitution, and indeed it could not have been, as the Constitution of the United States restrained the State of Missouri from passing any Act impairing the obligation of its contracts. But it left the certificates as they had been issued, creating an obligation against the State to pay over the money whenever it should be received from the Government of the United States.

These instruments, being merely certificates of indebtedness to be paid by the State when the money should be received from the Federal Government, were not designed to be used or circulated in any form as money, but only to exhibit the obligation incurred by the State to the person named in each certificate; and they were accordingly not bills of credit, which the State was forbidden to issue by the Federal Constitution.

That was held in *Craig* v. *Missouri*, 4 Pet. 410-432 [29 U. S. bk. 7, L. ed. 903], not to include "contracts by which a State binds itself to pay money at a future day for services actually received or for money borrowed for present uses." And as a certificate of indebtedness it was capable of being sold and transferred by the person to whom it is stated to have been issued for evidence of an indebtedness, not restricted in the right to transfer it, may be assigned by the holder to any other person or persons, and a delivery of the instrument intending to pass the title to it is in judgment of law equivalent to its formal assignment, giving the assignee the right to demand and receive the money mentioned in it.

Upon neither of the grounds which have been considered, nor for any other reason presented by the case, does the conviction appear to have been unwarranted. It was, on the contrary, legal and regular, and the judgment should be affirmed.

Messrs. **Alexander S. Bacon** and **Abraham Suydam,** for appellant:

An instrument, to be the subject of forgery, must have upon its face some legal validity or efficacy. If it be legally null, void or invalid, it cannot be the subject of forgery.

Bish. Crim. Law, § 523; *People* v. *Harrison*, 8 Barb. 560; *Moffat's Case*, 2 East, P. C. 954; *Cunningham* v. *People*, 4 Hun. 455; *People* v. *Shall*, 9 Cow. 788; *People* v. *Wilson*, 6 Johns. 320; *People* v. *Galloway*, 17 Wend. 540; *People* v. *Stearns*, 21 Wend. 409; *Brown* v. *People*, 86 Ill. 239; *Fadner* v. *People*, 2 N. Y. Crim. Rep. 558.

A forgery may be "of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability."

Bish. Crim. Law, § 523.

"It is not alone sufficient that there be a writing and that the writing be false; it must also be such as, if true, would be of some legal efficacy, real or apparent, since otherwise it has no legal tendency to defraud."

Bish. Crim. Law, § 533.

It is claimed that the certificate in question is not "an evidence of debt or engagement for the payment of money absolutely or upon any contingency."

Rev. Stat. § 32.

It has no "legal efficacy, real or apparent," and is not "the foundation of a legal liability."

Bish. Crim. Law, § 523.

The certificate in question is invalid on its face, because it does not conform to the requirements of the statute.

"A writing invalid on its face cannot be the subject of forgery, because it has no legal tendency to effect a fraud."

"If a statute authorizes an instrument not known to the common law, and so prescribes its form as to render any other form null, forgery cannot be committed by making a false statutory one in a form not provided for by the statute, even though it is so like the genuine as to deceive most persons."

Bish. Crim. Law, § 538; *Cunningham* v. *People*, 4 Hun, 455.

There is a fatal variance between the statutory form and the alleged forgery, and the certificate is, therefore, invalid.

Cunningham v. *People*, 4 Hun, 455; *People* v. *Shall*, 9 Cow. 778; *People* v. *Wilson*, 6 Johns. 320; *People* v. *Harrison*, 8 Barb. 560; *People* v. *Galloway*, 17 Wend. 540; *People* v. *Stearns*, 21 Wend. 409.

Mr. **DeLancey Nicoll,** *Asst. Dist.-Atty.*, for the People, respondents.

Per Curiam:

Judgment affirmed on prevailing opinion below.

Clandius SHATTUCK *et al.*, by Guardian, *Respts.*,
v.
George BASCOM, *Appt*

1. **After land** had been **sold for taxes** and the comptroller's deed given therefor, the original **owner executed** to a third person an instrument which purported to be a deed of the land but which was in reality **a mortgage,** and the **grantee** therein **sued** the **holder of** the **comptroller's deed** to remove the same as a cloud on title, which suit resulted in a judgment in favor of the holder of the comptroller's deed; thereafter the plaintiff in that suit reconveyed the land to the original owner. *Held*, that the original **owner** was **not estopped by** said **judgment** in the suit brought by his mortgagee, **from** afterwards **questioning** the validity of the **comptroller's deed,** in an action against him by the holder of such deed.
2. Where the statute prescribes the **form of oath to be taken by** the **assessors** and attached to the assessment roll, that form must be followed; and an assessment will be invalid if there is any material departure therefrom.
3. The **substitution of "hereof" for "of proof,"** in the clause "value of the said

real estate has been changed by reason of proof produced before us" **in the assessors' oath** prescribed by chapter 176 of the Laws of 1851, will **render** an **assessment** under that Act wholly **void.**

4. When a **tax sale is for** the aggregate **taxes of several years,** the entire sale will be rendered illegal and **invalid** and the comptroller's deed void, **if** the **tax for** any **one of the years** included **is invalid.**

(Decided March 8, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Fifth Department, affirming a judgment of the Cattaraugus Circuit on a verdict directed for plaintiffs in an action to recover for hemlock bark cut and peeled from trees on premises alleged to be owned by plaintiffs. *Reversed.*

The facts and questions appear from the opinion.

Mr. **E. D. Northrup,** for appellant:

Every person may peaceably take possession of his own real estate.

Bliss v. *Johnson,* 73 N. Y. 529; *Johnson* v. *Elwood,* 53 N. Y. 431; *Wood* v. *Phillips,* 43 N. Y. 152; *Benson* v. *Bolles,* 8 Wend. 75.

The acts of the defendant amounted to actual possession and occupation at the time the taxes were assessed and levied, and also at the time the bark was taken.

Thompson v. *Burhans,* 79 N. Y. 99, 100; *Miller* v. *Long Island R. R. Co.* 71 N. Y. 383, 384.

The defendant was not a party to the action of *Colman* v. *Shattuck.*

The fact that Colman mistook his remedy and assumed to own the title under the mortgage, because it was in form a quitclaim deed, cannot prejudice the rights of the defendant, who was then a powerless debtor in the hands of Colman.

Otis v. *Williams,* 70 N. Y. 211.

The cases of *bona fide* purchasers for value of the mortgagee, whose mortgage is in form an absolute deed, do not apply to this case.

Berdell v. *Berdell,* 20 N. Y. Week. Dig. 81; *McBurney* v. *Wellman,* 42 Barb. 390.

The rules that apply to any other mortgage apply to the one in this case.

Clark v. *Angell,* 17 N. Y. Week. Dig. 29; *Pardee* v. *Treat,* 82 N. Y. 385; *Miller* v. *McGuckin,* 20 N.Y. Week. Dig. 429; *Dodd* v. *Neilson,* 90 N. Y. 243; *Bond* v. *Collins,* 18 N. Y. Week. Dig. 90; *Gross* v. *Wellwood,* 90 N. Y. 638.

The subsequent payment of this mortgage by the defendant left the full unincumbered title in the defendant.

Bond v. *Collins, supra.*

No instrument of any kind was needed, to accomplish this, and the quitclaim deeds from Colman to the defendant were in effect only satisfaction pieces made for the purpose of formally clearing up the record in the clerk's office.

Becker v. *Howard,* 47 How. Pr. 428; *Same* v. *Same,* 66 N. Y. 5; *Pardee* v. *Treat,* 82 N. Y. 385; 4 Hun, 359.

The following cases also show the law to be well settled that there is no distinction between the mortgage in the case at bar and any other mortgage.

Carr v. *Carr,* 52 N. Y. 251; *Stoddard* v. *Whiting,* 46 N. Y. 627; *Genet* v. *Davenport,* 56 N. Y. 676; *Decker* v. *Leonard,* 6 Lans. 264; *Payne* v. *Wilson,* 74 N. Y. 348; *Morris* v. *Budlong,* 78 N. Y. 543; *Murray* v. *Walker,* 31 N. Y. 399; *Ford* v. *Belmont,* 3 Jones & S. 135.

The plaintiffs not being *bona fide* purchasers under Colman, the mistaken action of *Colman* v. *Shattuck* cannot operate as an estoppel upon Bascom, who was not a party to it or a privy in any manner.

Murray v. *Walker,* 31 N. Y. 401.

For this reason the defendant's exception to the direction of the verdict was well taken.

Adams v. *Filer,* 7 Wis. 306; *Carney* v. *Emmons,* 9 Wis. 114; 1 Buller, *N. P.* 232; *Chicago* v. *Robbins,* 4 Wall. 657 (71 U. S. bk. 18, L. ed. 427); *Campbell* v. *Hall,* 16 N. Y. 575.

A mortgage is not an estate in lands.

Power v *Lester,* 23 N. Y. 533.

This action of replevin was improperly brought and cannot be maintained.

Barrett v. *Warren,* 3 Hill, 348.

Trespass (and therefore replevin) cannot be maintained for an injury to land committed by a person in actual possession, except for the original trespass (if any) of his entry.

Stockwell v. *Phelps,* 34 N. Y. 363; *Wohler* v. *Buffalo etc. R. R. Co.* 46 N. Y. 686; *Wood* v. *La Fayette,* 68 N. Y. 181, 190; *Beals* v. *Stewart,* 6 Lans. 408; *Rich* v. *Baker,* 3 Denio, 79; *Holmes* v. *Seely,* 19 Wend. 507; *Houghtailing* v. *Houghtailing,* 56 Barb. 194.

The plaintiffs' title being, as we shall see, void, the oldest possession would control; and the defendant was in actual possession as early as 1854, and has ever since remained in possession as fully as such premises can be possessed, claiming under the original title thereto.

Wood v. *La Fayette, supra*; *Kellogg* v. *Vollentine,* 21 How. Pr. 226; *Rowland* v. *Fuller,* How. App. Cas. 629; *Haley* v. *Wheeler,* 8 Hun. 569; *Edwards* v. *Noyes,* 65 N. Y. 125.

In order to recover, the plaintiffs must show title to the land in controversy, under the comptroller's tax sale of 1866. The said tax sale and consequently said tax deed are void. The land was sold for the accumulated taxes of three different years.

Thatcher v. *Powell,* 6 Wheat. 119 (19 U. S. bk. 5, L. ed. 221); *Nat. Fire Ins. Co.* v. *McKay,* 5 Abb. Pr. N. S. 445.

The case of *Colman* v. *Shattuck,* 62 N. Y. 348, does not in any manner decide this point. That case only decided that section 33, chapter 427, Laws of 1855, was directory as to the time that the comptroller should proceed to advertise and sell.

One erroneous tax vitiates the whole sale.

Blackwell, Tax Titles, 160, 161, *et seq.* and cases cited; *Hayden* v. *Foster,* 13 Pick. 492; *Re Willis,* 30 Hun, 13; *Hall* v. *Kellogg,* 16 Mich. 135.

The evasion of the plain command of the statute in making a proper oath to the assessment roll of 1856 is a fatal error.

Van Rensselaer v. *Witbeck,* 7 N. Y. 517; *Westfall* v. *Preston,* 49 N. Y. 349; *People* v. *Fowler,* 55 N. Y. 252.

Where the interest of another is to be affected by an order which a statute says shall be drawn up in certain words, giving the form, by a schedule, this must be exactly pursued, or the order is void.

Atkins v. *Kinnan*, 20 Wend. 249.

The form of the assessor's oath is prescribed by the statute.

3 Edmonds, Stat. at Large, 350, § 8.

Messrs. **Cary & Rumsey,** for respondents: The judgment record in *Colman* v. *Shattuck*, 62 N. Y. 348, is conclusive.

Smith v. *Smith*, 79 N. Y. 634; *Bennett* v. *Couchman*, 48 Barb. 73.

Every judgment shall be conclusive as to the title established in the action against the party and all persons claiming under him.

Laws 1862, chap. 485; *Cagger* v. *Lansing*, 64 N. Y. 417.

The precise question which the defendant seeks to litigate in this action is the question whether the tax deeds under which plaintiffs hold were regularly issued and are valid. That was the precise question litigated in *Colman* v. *Shattuck*. There is no material difference in the facts presented in each case.

Smith v. *Smith*, 79 N. Y. 634.

Earl, *J.*, delivered the opinion of the court: The plaintiffs commenced this action to recover a quantity of hemlock bark which the defendant had peeled and taken from the trees standing on lot No. 54, containing 150 acres of land, situated in the Town of Portville, in the County of Cattaraugus. The defendant in his answer denied the plaintiffs' title to the land, and averred that he owned the land, consequently the bark taken therefrom.

Upon the trial it appeared that the plaintiffs claimed title under a deed executed by the comptroller of the State, pursuant to a sale of land in 1866, for arrears of taxes for the years 1856, 1858 and 1860. It is undisputed that the defendant has good title to the land unless it has been defeated by the tax sale and the deed of the comptroller.

The defendant claims that there were certain defects in the imposition of the taxes, and in the subsequent proceedings which rendered the comptroller's deed invalid. But the plaintiffs claim that he is estopped from assailing the comptroller's deed by certain facts which will now be mentioned:

In 1869 the defendant executed a quitclaim deed of the land to one Colman, which was duly recorded in the proper clerk's office, and while he held that deed and the apparent title to the land in 1873, Colman commenced an action against the father of the plaintiffs, under whom they claim, to set aside the comptroller's deed as a cloud upon his title, on the ground that the tax sale was void and the deed given in pursuance thereof invalid.

That action was tried and resulted in a judgment in favor of the defendant therein, which was finally affirmed in this court. *Colman* v. *Shattuck*, 2 Hun, 497, affirmed in 62 N. Y. 348.

Subsequently to the entry of that judgment, and before the commencement of this action, Colman reconveyed the land to this defendant; and upon the trial of this action it was undisputed that the deed by this defendant to Colman was given as security and was in fact a mortgage.

The trial judge directed a verdict in favor of the plaintiffs, upon the ground that this defendant was bound and estopped by that judgment. Upon appeal by the defendant to the general term, the judgment of the trial term was affirmed, as appears by the opinion there pronounced, upon the ground that the plaintiffs' tax title was valid. But the court there further held that the defendant was not estopped by the judgment between his mortgagee and plaintiffs' father.

Although the conveyance from the defendant to Colman was in form a deed, it was in fact a mortgage and had all the incidents of a mortgage. Colman could not, upon that deed, have maintained an action of ejectment against his grantor or any other person. All that he acquired by the deed was a lien upon the land for the security of his debt; and upon payment of the debt his interest in the land and his lien thereon would absolutely cease. Reconveyance by him to this defendant was not necessary to reinvest him with the absolute title, and was necessary only to clear up the record title; *Murray* v. *Walker*, 31 N. Y. 399; *Horn* v. *Keteltas*, 46 N. Y. 605; *Carr* v. *Carr*, 52 N. Y. 251; *Morris* v. *Budlong*, 78 N. Y. 543; therefore the defendant did not in any sense take his title from Colman, but his title was anterior to any interest which Colman had in the land; and the legal title was in him at the time of the pendency of the action of *Colman* v. *Shattuck*. He was not a party to that action, and it was not carried on at his instance or for his benefit; and therefore he is not bound or estopped by the judgment rendered therein.

It would be quite a novel doctrine to hold that a mortgagor is bound and estopped by a judgment rendered in an action by the mortgagee against some other person to which he was not a party. It was, therefore, open to the defendant upon the trial of this action to assail the title of the plaintiffs.

The Act, chap. 209, Laws 1860, made the comptroller's deed presumptive evidence that the sale and all proceedings prior thereto were regular according to the provisions of law directing the same or in any manner relating thereto. But as the Act made the deed only presumptive evidence, a party against whom a tax title is asserted still has the right to show by any competent evidence that the proceedings for the assessment and collection of the taxes were illegal and defective, and that the comptroller's deed is in fact invalid.

Upon the trial of this action, and upon the argument of the appeal in this court, the counsel for the defendant pointed out various defects and irregularities, on account of which he claimed that the comptroller's deed is invalid. But we deem it important now to consider but one of the alleged defects, and that relates to the taxes of 1856.

The law in force at that time (chap. 176, Laws 1851) prescribed the form of oath which the assessors or a majority of them should take and attach to the assessment roll, and that, so far as pertains to real estate, is as follows:

"We, the undersigned, do severally depose and swear that we have set down in the foregoing assessment roll all the real estate situated in the (town or ward as the case may be) according to our best information; and that, with the exception of those cases in which the value of the said real estate has been changed by reason of proof produced before us, we have estimated the value of the said real estate at the sums which a majority of the assessors have decided to be the full and true value thereof, and at which they would appraise the same in payment of a just debt due from a solvent debtor."

This oath is intended to secure a just valuation of property to be taxed, and is thus for the protection of taxpayers and no assessment can be valid unless it has the sanction of the oath. The Legislature having prescribed the precise form of oath to be taken, that form must be followed; and an assessment will be invalid if there is any material departure therefrom; and so it has been held. *Van Rensselaer* v. *Witbeck*, 7 N. Y. 517; *Parish* v. *Golden*, 35 N. Y. 462; *Bellinger* v. *Gray*, 51 N.Y. 610; *Westfall* v. *Preston*, 49 N. Y. 349; *Merritt* v. *PortChester*, 71 N.Y. 309.

In the oath upon the assessment roll for 1856 a fatal defect appears. Instead of the language "value of the said real estate has been changed by reason of proof produced before us," the word "hereof" was inserted instead of the words "of proof;" so that the language is: "with the exception of those cases in which the value of the said real estate has been changed by reason hereof produced before us we have estimated the value of said real estate at the sums which a majority of the assessors decided to be the full and true value thereof."

The purport of that is simply that they had estimated the value of the real estate at the sums which a majority of the assessors decided to be the full and true value thereof, except in those cases in which the value had been changed for some reason undisclosed. That oath could have been truthfully taken by the assessors, even if they had overestimated or underestimated real estate and had thus made their assessment entirely unequal and unjust. Thus the entire value of the oath was lost, and it answered no purpose whatever so far as it pertained to the assessment of real estate, and might as well have been entirely omitted. Its form was such that it could not have laid the foundation for an indictment for perjury, no matter how grossly the assessors had violated their duty.

It must be presumed that the form of the oath prescribed by the statute was before the assessors at the time the oath was written; and we may assume that the material departure from the words of the statute was probably intentional, to accomplish some purpose not allowed by the letter of the law. We, therefore, entertain no doubt that this defect in the oath rendered the assessment of 1856 wholly void; and as the tax sale was made for the aggregate taxes of 1856, 1858 and 1860, the entire sale was illegal and invalid, and the deed given in pursuance thereof void. Blackwell, Tax Titles, 160; *Riverside Co.* v. *Howell*, 113 Ill. 256; *Re Willis*, 30 Hun, 13; *People* v. *Hagadorn*, 36 Hun, 610, recently affirmed in this court, 6 Cent. Rep. 658.

The invalidity of the comptroller's deed, on account of the defect in the oath of the assessors, did not come under consideration in *Colman* v. *Shattuck*. In that case there was no allegation of such a defect, and the record by some inadvertence, showed that the oath was correctly transcribed from the statute.

Therefore, without considering other alleged defects in the tax proceedings to which our attention has been called, we are of opinion that the judgment of the General and Special Terms should be reversed, and a new trial granted; costs to abide event.

All concur.

Re FINAL ACCOUNTING OF James P. KERNOCHAN *et. al.*, Exrs. of John R. Marshall, Deceased.

1. Under a **provision in a will empowering** the **executors to "receive** the rents, interest and **income,"** and to apply the net amounts of such rents and income to the use of the widow of the testator during her life, and after her death to divide the remaining estate among his heirs, a **dividend declared upon railroad stock,** assets of the estate, **before** the **death of** the **testator but payable after** his **death, belonged to** the **executors.** As soon as the profits on shares of the stock are ascertained and declared, they cease to be the property of the company, and the owner of the shares becomes entitled to the dividend; the fact that they are made payable at a future time is immaterial.
2. Prior to the death of the testator the railroad company, beyond its dividends earned and paid out, accumulated securities, money, and other assets, from earnings over and above expenses and dividends, and some two months after the testator's death it had on hand $1,102,000, as a sinking fund for the redemption of outstanding obligations; and at that time an agreement was entered into between certain stockholders, among them the executors, and a canal association, for the sale of their stock to the canal association for $250 for each share, and providing that the canal association should have the sinking fund, but that the stockholders should be paid a ratable portion of this surplus, which amounted to $15.74 per share. *Held*, that the **price paid for** the **shares, although increased by** this **prospective advantage, belonged** altogether **to** the **remaindermen** and was properly carried to **principal** and **not income.**
3. A **dividend declared** upon the stock by the railroad company **after** the **death of** the **testator, from accumulated** net **earnings** of the company running back for a considerable period of time, went to the widow as **income** under the provision of the will. Payments in respect to profits accruing and properly divisible as such, are income, and belong to the tenant for life, if the sum payable is ascertained and declared after the death of the testator.
4. A **privilege** or option **to subscribe for** and take at par, one or more **bonds or shares of stock** for a certain number

of shares of stock before held by the estate, if accepted, operated as **a change in** the manner of **investment** of so much of the estate; **and** the value **belonged to** the **estate** and **not to** the **life tenant.**

5. Where the **testator** had held the principal moneys in hand for the purpose of investment and reinvestment, but **mingled** them with his own **funds**, it was not improper in settling with the life tenant whose funds were so held, to **charge** the testator **with interest upon interest,** as he forebore investment and used the moneys for his own convenience.
6. Under a **provision in** the **will** in these words: "It is also my request that all persons herein named as executors will consent to act as such executors and trustees; and that each **executor** and trustee, **other than my wife,** do also **receive** and take the **full** rate and **commissions** provided by law for each executor, intending thus to provide suitable compensation for their services in addition to the duties herein devolved upon them," the **intention** of the testator **was to exclude** his **wife from compensation.** Substantially the whole income of the estate, the result of the management of the executors, of whom she was one, is given to her, and it was not intended that she should be paid for caring for it.

(Decided March 8, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a decree of the Surrogate of the County of New York on a judicial settlement of the account of executors. *Decree and judgment modified and affirmed.*

The facts and questions raised appear from the opinion.

Mr. **M. W. Divine,** for John Duer, executor of Eveline G. Marshall, the widow, appellant:

In this State the rule has never been questioned that cash dividends declared during a life tenancy from accumulated earnings, or profits, belong to the life tenant, whether such dividends be large or small.

Woodruff's Est. 1 Tucker, 58: *Clarkson* v. *Clarkson*, 18 Barb. 646; *Simpson* v. *Moore*, 30 Barb. 627; *Goldsmith* v. *Swift*, 25 Hun, 201; *Riggs* v. *Cragg*, 26 Hun, 103; *S. C.* 89 N. Y. 487; *Hyatt* v. *Allen*, 56 N. Y. 553; *Janes* v. *Terre Haute etc. R. R. Co.* 57 N. Y. 196; *Cogswell* v. *Cogswell*, and *Clapp* v. *Astor*, 2 Edw. Ch. 240, 379; *Scovel* v. *Roosevelt*, 5 Redf. 121.

The question suggested but not passed upon in *Riggs* v. *Cragg*, 89 N. Y. 487, relates to the distribution as between capital and income of stock dividends, not of cash dividends.

The rule which now prevails in England on this subject is stated in the case of *Sproule* v. *Bouch*, L. R. 29 Ch. Div. 653, as follows:

"When the testator or settlor directs or permits the subject of his disposition to remain as shares of stock in a company which has the power either of distributing its profits as dividends or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him (the testator or settlor) in the shares, and, consequently what is paid by the company as dividend goes to the tenant for life; and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock of the concern, inures to the benefit of all who are interested in the capital. In a word, what the company says is income shall be income; and what it says is capital shall be capital."

Barclay v. *Wainewright*, 14 Ves. 67; *Price* v. *Anderson*, 15 Sim. 473; *Preston* v. *Melville*, 16 Sim. 163; *Bates* v. *Mackinley*, 31 Beav. 280; *Clive* v. *Clive*, Kay, 600; *Johnson* v. *Johnson*, 15 Jur. 714; *Murray* v. *Glasse*, 17 Jur. 816; *Plumbe* v. *Neild*, 6 Jur. N. S. 529; *Cogswell* v. *Cogswell*, 2 Edw. Ch. 331; *Ware* v. *M'Candlish*, 11 Leigh, 595; *Reed* v. *Head*, 6 Allen, 174; *Macclaren* v. *Stainton*, 3 DeG. F. & J. 202.

These cases qualify or reverse the former decisions in *Brander* v. *Brander*, 4 Ves. 800; *Paris* v. *Paris*, 10 Ves. 184; *Witts* v. *Steere*, 13 Ves. 363.

In 2 Perry on Trusts, 3d ed. § 544, the rule is stated as follows: "Thus cash dividends, extra dividends or bonuses, declared from the earnings of corporations are now held to be income, and to belong to the tenant for life. So also dividends and bonuses earned before the testator's death, but declared afterwards, are held to be income and to belong to the tenant for life."

In Massachusetts the rule is well settled that cash dividends, however large, are income.

Minot v. *Paine*, 99 Mass. 108; *Daland* v. *Williams*, 101 Mass. 573; *Leland* v. *Hayden*, 102 Mass. 550; *Reed* v. *Head*, 6 Allen, 174; *Heard* v. *Eldredge*, 109 Mass. 258; *Gifford* v. *Thompson*, 115 Mass. 478.

The same rule as to cash dividends prevails in Pennsylvania, New Jersey, Rhode Island, New Hampshire and Connecticut.

Wiltbank's App. 64 Pa. 256; *Earp's App.* 28 Pa. 368; *Van Doren* v. *Olden*, 19 N. J. Eq. 176; *Lord* v. *Brooks*, 52 N. H. 72; *Peirce* v. *Burroughs*, 58 N. H. 302; *Re Brown*, 14 R. I. 371; *Phelps* v. *Farmers' & M. Bank*, 26 Conn. 272; *Vail* v. *Vail*, 49 Conn. 52; *Brinley* v. *Grou*, 50 Conn. 75.

Until declared as a dividend, profits belong to the corporation; and when a distribution is made it must be among those who, at the time of the distribution, are owners of the stock.

Jones v. *Terre Haute etc. R. R. Co.* 57 N. Y. 196; *Brundage* v. *Brundage*, 65 Barb. 397; *Granger* v. *Bassett*, 98 Mass. 462; Perry, Trusts, § 545, p. 87 and cases there cited, and cases above cited.

The stock options or dividends were properly classed as income; and the rulings of the referee and surrogate, holding them to be principal, should be reversed.

Clarkson v. *Clarkson*, 18 Barb. 646; *Simpson* v. *Moore*, 30 Barb. 637; *Riggs* v. *Cragg*, 26 Hun, 102; *Wiltbank's App.* 64 Pa. 256; *Atkins* v. *Albree*, 12 Allen, 359; *Gray* v. *Portland Bank*, 3 Mass. 364; *Minot* v. *Paine*, 99 Mass. 101; 11 C. E. Green, 11; affd. 29 N. J. Eq. 625.

The sinking fund dividend of $15.74¼ per share should have been carried to the credit of the income account.

Bates v. *Mackinley*, 31 Beav. 280; *Re Hopkins' Trusts*, L. R. 18 Eq. 696.

The dividend declared April 14, 1881, payable May 2, 1881, should have been treated as income and credited to the income account. The dividend was payable, and was paid after testator's death, and belonged to Mrs. Marshall.

Cogswell v. *Cogswell*, 2 Edw. Ch. 231; *Clive* v. *Clive*, Kay, 600.

It makes no difference when the dividend was earned.

Woodruff's Est. 1 Tucker, 59; *Riggs* v. *Cragg*, 26 Hun, 89-102; *Bates* v. *Mackinley*, 31 Beav. 280: *Re Hopkins' Trusts*, L. R. 18 Eq. 696.

The allowance of commissions to the executrix was proper.

Code Civ. Proc. § 2736. See also *Re Van Nest*, 1 Tucker, 130: *Eager* v. *Roberts*, 2 Redf. 247; *Re Pike*, 2 Redf. 255.

Mr. **Edward S. Dakin,** as special guardian for Marshall R. Kernochan, an infant, grandson of John R. Marshall, appellant and respondent:

I. Compound interest should never be calculated, except by special agreement made on consideration after the simple interest has become due.

Young v. *Hill*, 67 N. Y. 162; *Connecticut* v. *Jackson*, 1 Johns. Ch. 13.

The statute providing for the award of commissions by the surrogate, on the settlement of an executor's accounts, is not mandatory; it only furnishes a definite rule as to amount when any such rule is to be applied. It does not restrict a testator from fixing a compensation to the exclusion of statutory commissions, nor from forbidding any compensation whatever.

Secor v. *Sentis*, 5 Redf. 570; *Re Gerard*, 1 Demarest, 244.

II. The day when a dividend is declared determines its ownership, without reference to the day of payment.

Hyatt v. *Allen*, 56 N.Y. 553; *Hall* v. *Newichawanick Co.* 8 Hun, 459; affirmed in 71 N. Y. 593.

The amount which was admitted to be the value of the options and privileges, which the decree adjudged must be paid back by Eveline G. Marshall to the estate, was properly so adjudged to be paid back. The value of all such options and privileges were in all cases, capital.

Riggs v. *Cragg*, 89 N. Y. 479; *Hill* v. *Newichawanick* Co. 8 Hun, 459; affd. 71 N. Y. 593. *Sproule* v. *Bouch*, 52 L. T. N. S. 366; *S. C.* L. R. 29 Ch. Div. 653; *Minot* v. *Paine*, 99 Mass. 108; *Daland* v. *Williams*, 191 Mass. 571; *Leland* v. *Hayden*, 102 Mass. 542; *Brinley* v. *Grou*, 50 Conn. 66; *VanDoren* v. *Olden*, 19 N. J. Eq. 176; *Atkins* v. *Albree*, 12 Allen, 359.

Mr. **William Jay**, as special guardian for Marie Marshall, daughter of John R. Marshall, appellant and respondent:

The ownership of a dividend is determined on the day when it is declared, without reference to the day when it is actually paid.

Hyatt v. *Allen*, 56 N. Y. 553; *Hall* v. *Newichawanick* Co. 8 Hun, 459; affirmed in 71 N. Y. 593; *Goldsmith* v. *Swift*, 25 Hun, 201.

By the custom of the street, dividends remain attached to the ownership of the stock until the books of transfer are closed. In this case the books closed before the testator died.

The contention of Mrs. Marshall's executors: that the value of the options to subscribe for other stock was properly classed by the executors as income, and that the learned surrogate erred in allotting this sum to principal, is untenable. The fact that options to subscribe for stock at par have any value shows of itself that the corporate property must have advanced in value. The giving, by the corporation, of a privilege to each of its stockholders to subscribe for stock at less than its market price is, after all, only another way of making a new issue of stock to represent increased value of the corporate property.

Atkins v. *Albree*, 94 Mass. 359; *Boardman* v. *Lake Shore etc. R. Co.* 84 N. Y. 157; *Moss' App.* 83 Pa. 364; *Minot* v. *Paine*, 99 Mass. 101; *Re Barton's Trust*, L. R. 5 Eq. 238; *Brinley* v. *Grou*, 50 Conn. 66.

The rule upon the best settled authorities seems to be as follows: 1, a stockholder has no claim to the surplus until divided by the directors: 2, every dividend which increases the capitol stock of a corporation, whether in stock, scrip, or stock purchasing checks, is capital.

This last rule seems to be followed by the latest English cases, and also in Massachusetts, Connecticut, New Hampshire, Pennsylvania and New Jersey.

The interest paid to Mrs. Marshall on her money in the testator's hands is excessive, in that interest is calculated upon interest; whereas, if the estate of the testator is liable for interest at all, simple interest only can be recovered.

Connecticut v. *Jackson*, 1 Johns. Ch. 13; *Young* v. *Hill*, 67 N. Y. 162, and cases cited; *Ackerman* v. *Emott*, 4 Barb. 626; *Lansing* v. *Lansing*, 45 Barb. 182; *Smith* v. *Velie*, 60 N. Y. 106.

Mr. **J. Frederic Kernochan,** for accounting executors of John R. Marshall, respondents:

Until a dividend is declared, the earnings pass with the transfer of the stock as a portion of the capital of the company.

Boardman v. *Lake Shore etc. R. Co.* 84 N. Y. 177.

When, however, a dividend is declared the amount represented by the dividend becomes entirely severed from the stock and will not pass to a purchaser of the stock, even though it is not payable until a subsequent date.

Hyatt v. *Allen*, 56 N. Y. 553; *Hill* v. *Newichawanick Co.* 8 Hun, 459; 71 N. Y. 593.

Every dividend which proceeds from a sale of corporate property is *prima facie* capital, no matter what form it takes. Every dividend which increases the capital stock of a corporation, whether in stock, scrip, or stock purchasing checks, is *prima facie* capital. Every dividend of cash, which neither directly nor indirectly (as in the case of checks empowered to purchase new stock) increases the capital stock of the corporation, is *prima facie* income. In every case evidence should be received to show when the dividend (whether in stock or cash) was earned, and the allottment must be made on this basis, the burden of proof, however, being always on the one claiming against the above rules. The principle of such apportionment is recognized.

In Pa. *Earp's App.* 28 Pa. 368; N. J. *Van Doren* v. *Olden*, 19 N. J. Eq. 176; Conn. *Brinley* v. *Grou*, 50 Conn. 66; N. H. *Lord* v. *Brooks*, 52 N. H. 72; N. Y. *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231; Laws 1875, chap. 542.

The options or privileges are in no sense a dividend of the earnings, profit or income of the corporation.

Atkins v. *Albree*, 12 Allen, 359.

Danforth, *J.*, delivered the opinion of the court:

This is an appeal from a judgment of the supreme court affirming a decree of the surrogate of the County of New York, on a judicial settlement of the account of the executors of John R. Marshall, deceased.

The account was objected to by several of the parties interested, and with the objections, sent to a referee to hear and determine. Upon the coming in of his report, it was in substance confirmed by the surrogate, and upon appeal to the general term, his decision was affirmed.

All parties claim under the will of Mr. Marshall; and the principal questions now raised, concern the rights of the donee for life and the remaindermen, and depend for an answer upon the true construction of so much of the will as empowers the executors "to receive the rents, interest and income" of so much of the estate as was given to them in trust, to apply the net amounts of such rents or income to the use of the widow of the testator during her life, and after her death to divide the remaining estate among his surviving daughters and the issue, if any, of such as may have died.

Among the items of personal property left by the testator was one of 5,000 shares of the capital stock of the Panama Railroad Company. This was inventoried by the executors, at $100 per share, as its par value, and $275, as its market value, and $1,375,000 as its assessed value. On the 14th of April, 1881, a dividend of $25,000 (No. 90) was declared upon this stock, payable May 2, 1881.

The testator died during the night of April 20, at ten minutes past 11 o'clock. The executors treated this dividend as principal, and charged themselves with it in these words.

"Panama dividend declared April 14, 1881. Books closed for transfer April 20, 1881, 2 P. M., and payable May 2, 1881." Mrs. Marshall, the widow and executrix of the testator, objected to this in both characters, alleging that no such amount as the said sum of $25,000 formed any part of the estate of John R. Marshall at the time of his death, and that said statement and item and said amount of $25,000 should be stricken from said inventory and from said account, and added to the items of income and as such received by the executors.

The decision of the surrogate was against her contention, and we think properly. As soon as the profits on shares of stock are ascertained and declared, they cease to be the property of the company, and the owner of the shares becomes entitled to the dividend. It at once forms part of his estate. The fact that they are made payable at a future time is immaterial.

The dividend to which the life tenant may be entitled, as income, can only be that which the company may declare after that relation is acquired. In this case the dividend represented profits, or income, but had become a debt before the will took effect. Mrs. Marshall was entitled to income merely.

In *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231, cited by the appellant, the testator directed that his wife be permitted "to take the interest or dividends" on certain stock, and the question submitted was "as to the time from which she would be entitled to dividends," and the vice chancellor said, "from the death of the testator, * * * that is to say," he adds, "the dividends which may accrue, or be declared, or become payable at any time after" that event.

The terms of the will and the question were unlike those before us. The will in one case gives income or profits, in the other, dividends, that is the share of income or profits already ascertained and declared. The first gives that to which the testator had no legal title. The other might include that of which he became the legal owner on the day when the dividend was declared, although it remained unpaid. *Hyatt* v. *Allen*, 56 N. Y. 553; *Hill* v. *Newichawanick Co.* 8 Hun, 459; affirmed in 71 N. Y. 593.

Second. It is stated in the account that the 5,000 shares of Panama Railroad stock were sold to the Panama Canal Company for $265.74⅞ per share, making $1,328,714.82. The life tenant objected to the account in this respect, alleging that in fact the stock was sold at $250 per share only and not $265.74⅞, as in the account stated.

The facts, so far as they are deemed material in presenting this question, and as found by the referee, show that prior to the death of the testator, the Panama Railroad Company had not only earned and paid dividends, but had accumulated securities, money and other assets from earnings over and above expenses and dividends, and on the 10th of June, 1881, had on hand $1,102,000 as a sinking fund for the redemption of outstanding obligations.

On the day last named an agreement was entered into between certain stockholders of the Railroad Company and the Universal Inter-Oceanic Canal Association for the sale of their stock to the Canal Association for $250 for each share, and also providing that the Canal Company should have the sinking fund, but that the stockholders should be paid by the Canal Company a sum equal to a ratable proportion of the $1,102,000 sinking fund above named, which was equivalent to $15.74 per share of the capital stock. This makes the sum of $78,714.84, and in the account of the executors is merged in the price at which the stock was sold to the Canal Company and credited to principal.

This was sustained by the referee and surrogate, the life tenant excepting thereto and claiming that it should have been carried to income. We think the exception cannot stand. The money was not paid as a dividend, nor was it distributed among stockholders, but only to such as sold their shares to the new company, the Canal Association. Indeed as stockholder, no one received any part of it. It was paid as a price to the seller.

The Panama Railroad Company was not dissolved; and its stockholders who did not sell have continued to receive dividends, and the Canal Company which purchased the shares once owned by the testator have received in like manner dividends on the shares so purchased.

Had the shares been retained by the executors, the money in question would not have been received by them. It is true that the sale in effect carried with it the interest which each shareholder as a member of the company had in the sinking fund, so that as to that the new shareholder was substituted for the old. The fund was the accumulation of profits and may properly be regarded as part of the capital of the company. But it still remained pledged for the bonds for the payment of which it was created, and its possible value only enhanced the value of the shares.

The price paid for the shares, although increased by this prospective advantage, belonged altogether to the remaindermen, and was properly carried to principal and not income.

Third. It was also provided, in the same agreement of June 10, that all earnings of the Railroad Company to and including June, 1881, and all moneys and other effects not by that agreement to be left with the Railroad Company, should be transferred by the Railroad Company to a trustee "for the benefit of all the existing stockholders," and belong to, and be divided among the shareholders "who are such at the time of the declaration of such dividend" or transfer of the Railroad Company. This was not carried out; but before June 30 the assets so referred to were sold and transferred by the Railroad Company to a syndicate for the sum of $1,698,200, and this was paid to the Railroad Company June 30, 1881. It amounted to $24.26 on each share of the capital stock of the Railroad Company, and on the same day the Railroad Company on the report of its treasurer that the amount of funds on hand "subject to distribution was sufficient to authorize a dividend of $24.26 upon each share of the capital stock of the company, adopted the following resolution:

"*Resolved*, That a dividend of $24.26 on each share of the capital stock of this company be, and the same is, hereby declared payable on and after Monday, the first day of August next, to the stockholders of record or their legal representatives. That the books of transfer be closed on the afternoon of the 30th instant, and be reopened on the morning of the second of August, 1881."

This dividend was numbered "91" in regular order, and was payable and paid at the time the usual quarterly dividends were paid. It appeared also that the assets, which formed the consideration of the payment by the syndicate, were accumulated net earnings, represented by cash or securities calling for cash.

The executors credited to income the above amount of $24.26 per share, making $121,300. It was objected, in behalf of the remaindermen, that the above credit to income was wrong, and that the sum of $121,300 should have gone into the principal of the estate.

The referee finds and reports that of this sum only $22,442.85 should be regarded as income belonging to the life tenant, and the residue, $98,857.15 should be regarded as a portion of the corpus of the estate. To so much of this finding as apportions any part to principal, exception was taken in behalf of the life tenant.

The referee made the apportionment in question by ascertaining how much was earned before and how much after the death of the testator; and so doing applied a rule which may be founded on general equity, viz.: that when a fund is given for life to one beneficiary, and remainder over, the first shall have its earnings after his life tenancy begins, and the remainderman the balance.

I find nothing in the will which indicates that the testator intended any such investigation or division, or that any other than the ordinary rule, which gives cash dividends declared from accumulated earnings or profits to the life tenant, should be applied. His direction to his executors is to receive the rents, interest and income of his estate and apply the net amount of such rents or other income (with certain exceptions not now material) to the use of his wife.

From the shares in question no income could accrue, no profits arise to the holder, until ascertained and declared by the company and allotted to the shareholder; and that act should be deemed to have been in the mind of the testator, and not the earnings or profits as ascertained by a third person, or a court upon an investigation of the business and affairs of the company, either upon an inspection of their books or otherwise. This was held in *Clapp* v. *Astor*, 2 Edw. Ch. 379, in construing a contract relating to "net profits or dividends," and by this court in *Hyatt* v. *Allen*, 56 N. Y. 553; and the principle stated was said to be founded in good sense and applied in construing an agreement made August 11, 1871, which provided that "All profits and dividends of and upon" certain "stock," up to the first of January, 1872, should be paid to defendant. No dividends were declared or distribution of profits made prior to that time, but in April, 1872, a dividend of $15 per share was declared and was received by defendant. Plaintiff sued to recover it, and a referee found that $250 of this dividend was earned between August 11, 1871, and July 1, 1872, and gave judgment for that amount. This court reversed the judgment, saying that there were profits earned by the corporation up to January 1, 1872, but they were not the profits of the stockholders in any legitimate sense. "There were no profits accruing to the stockholders until they were set apart by the corporation for their use."

The same principle is to be applied in determining the relative rights of a tenant for life and a remainderman. Payments in respect of profits accruing, and properly divisible as such are income and belong to the tenant for life, if the sum payable is ascertained and declared after the testator's death.

In *Re Hopkins' Trust*, L. R. 18 Eq. 696, a holder of shares bequeathed his personal estate to trustees in trust, to permit his wife to receive the dividends, interest and income thereof for her life, remainder over. He died in December, 1870. In January, 1873, an extraordinary dividend was declared on part of the shares for five years previously; and in July, 1873, a special dividend was declared on others for the half year previous. It was held that the life tenant was entitled to both; that although the company might have capitalized the earnings, they by resolution treated the money as dividends and not capital; and their decision was conclusive.

The same effect was given to the determination of the company in characterizing its earnings in *Re Barton's Trust*, L. R. 5 Eq. 238, 245; and the rule is a reasonable and proper one, which limits the right of a stockholder to profits by the action of the managers of a corporation or company. It is their sole and exclusive duty to divide profits and declare dividends, whenever in their judgment the condition of the affairs of the corporation renders it expedient; and it would lead to great embarrassment and confusion if a court should undertake to interfere with their discretion so long as they do not go beyond the scope of their powers and authority.

In this case no portion of the earnings which entered into the dividend had been capitalized by the company, and therefore the inquiry when the profits were earned out of which it was to be paid was immaterial. It is not claimed that the declaration of the dividend as dividend from profits was *ultra vires*, and whenever earned, they were not profits until the directors so declared.

In *Hyatt* v. *Allen*, *supra*, it was thought by the learned judge who spoke for the court that "A gift of the profits and dividends of stock for life, would not be held to carry dividends declared after the death of the beneficiary although made from profits accrued during his life," making the act of the company conclusive and giving the earnings to the time of the declaration of the dividend.

Sproule v. *Bouch*, L. R. 29 Ch. Div. 635, 653, sustains this view. "The general principle applicable to these inquiries may in our opinion," says the court in that case, "be thus stated: When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividend, or of converting them into capital, and the company validly exercised this power, such exercise of its power is binding on all persons interested under him (the testator or settlor) in the shares, and consequently what is paid by the company as dividend goes to the tenant for life; and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, inures to the benefit of all who are interested in the capital. In a word what the company says is income, shall be income, and what it says is capital, shall be capital."

I think therefore the executors properly carried the whole of this dividend, 91, to income; that the referee and surrogate erred in making an apportionment, and, therefore, that the exception of the life tenant should prevail.

Fourth. The executors classed as income certain options or privileges given by the various companies in 1881, to subscribe for stocks and bonds, in all of the value of $44,478. This was objected to by the remaindermen and the objection sustained by the referee and surrogate.

The privilege or option was to subscribe for and take at par one or more bonds or shares of stock for a certain number of shares of stock already held by the estate. The right to subscribe belonged to the trust estate and accrued upon condition that the estate chose to pay for or purchase the bonds or stock. If the option was accepted, the purchase operated to increase the capital or change its manner of investment, and if not accepted the life tenant could neither complain of the choice of the trustees nor in any way control their discretion. We think the value did not belong to her and that the decisions of the referee and surrogate in regard thereto were correct.

Fifth. The guardian of Marie Marshall (a person of unsound mind) and the guardians for Kernochan (an infant) also appeal against: 1, allowance of compound interest on moneys found due to Mrs. Marshall from the testator; 2, commissions to Mrs. Marshall.

1. Both referee and surrogate were against the objectors as to the first. As to the second the referee sustained the objection, but the surrogate overruled it and allowed $15,000 to Mrs. Marshall, as commissions. As to the first: The testator had the principal moneys in hand for the purpose of investment and reinvestment, but mingled them with his own funds. It was not improper, therefore, under the circumstances of this case, to charge him with interest upon interest, as if received in the usual manner, for he forebore investment and used the moneys for his own convenience.

As to commissions: The referee found that Mrs. Marshall "duly qualified as executrix of the last will and testament of John R. Marshall, deceased, on the 8th day of October, 1881, and has been at all times since that date, ready and willing to take part, and has taken part in the management of the estate."

The objection raised in behalf of the remaindermen hangs upon the request of the testator contained in the will in these words:

"It is also my request that all persons herein named as executors will consent to act as such executors and trustees, and that each executor and trustee other than my wife, do also receive and take the full rate of commissions provided by law for each executor, intending thus to provide suitable compensation for their services in and attention to the duties herein devolved upon them."

We think the intention of the testator was to exclude his wife from compensation. Substantially the whole income of the estate, the result of the management of the executors of whom she was one, is given to her, and it cannot be supposed that he intended she should also be paid for caring for it.

The decree of the Surrogate and judgment of the Supreme Court should be modified according to the above opinion and, as so modified, affirmed, without costs in this court to either party.

Ruger, *Ch. J.*, **Rapallo** and **Finch**, *JJ.*, concur; **Earl**, *J.*, concurs except as to allowance of compound interest, and as to that item he dissents; **Andrews**, *J.*, dissents as to the $24.26 a share, on the ground that it was in substance a closing out of the sale of the stock and a distribution of capital.

De Lancey NICOLL, Receiver, etc., *Appt.*,
v.
John J. SPOWERS, Jr., *Respt.*

1. Under the Assignment Act of 1877, a **general assignment** for the benefit of creditors **takes effect from the time of**

its **acknowledgment and delivery,** and not only from the time of its record in the proper county. (*Warner* v. *Jaffray*, 96 N. Y. 248, followed.)

2. A **general assignment,** made **by a person living in one county and having his place of business in another,** was acknowledged and delivered, and recorded only in the county in which the assignor resided; subsequently a **receiver** was appointed **in supplementary proceedings** against the assignor in the county wherein was the assignor's place of business, and thereafter the assignment was recorded in that county also, and not until after such recording was a copy of the order appointing the receiver filed in the county where the assignor resided. *Held* (applying the equity doctrine of relation), that the **title of the assignee** to the assignor's property, perfected by recording the assignment in the county in which was the assignor's place of business, **related back to the delivery of the assignment, and gave the assignee priority over the receiver,**—no rights of *bona fide* purchasers being affected.

(Decided March 8, 1887.)

APPEAL from a judgment of the General Term of the Superior Court of New York City, overruling plaintiff's exceptions, heard at General Term in the first instance, to the ruling of the Trial Term dismissing the complaint and also ordering judgment for defendant in an action to recover the price of certain property sold by defendant. *Affirmed.*

Reported below, 20 Jones & S. 559.

The facts and questions raised appear from the opinion.

Mr. **Eugene H. Lewis,** for appellant:

The title with which the receiver was vested, by filing of the order appointing him in the county of the debtors' residence, related back to dates prior to the 14th day of November, the day the debtors made an assignment; hence, unless the judgment debtors had, by a valid legal assignment, disposed of their property before the 14th day of November, 1883, the plaintiff became vested with title to it, and is entitled to sue for its recovery.

Code Civ. Proc. § 2469; *Clark* v. *Gilbert*, 10 Daly, 316; *Campbell* v. *Foster*, 35 N. Y. 364; *Wright* v. *Nostrand*, 94 N. Y. 31.

The right to assign one's property, in trust, for the benefit of creditors, existed at common law, and was not hampered or restricted by statutory provisions until 1860.

Thrasher v. *Bentley*, 1 Abb. N. C. 43.

The Act of 1860 is a statute not of creation but of direction; it recognizes the existence of the power in the citizen to make an assignment of his property to trustees for the benefit of his creditors, and does no more than prescribe the mode in which the power shall be used, and furnish some safeguards against abuse. *Id.*

That Act prescribed certain requisites which must be preserved in every conveyance or assignment of his estate made by a debtor, to an assignee in trust for the creditors of such debtor.

Juliand v. *Rathbone*, 39 Barb. 99; *Fairchild* v. *Gwynne*, 16 Abb. Pr. 30.

It was repeatedly held while the Act of 1860 was in force that the provisions of section 1 were mandatory, and that unless those requisites were complied with, as therein set forth, an assignment was void.

Juliand v. *Rathbone*, 39 N. Y. 369; *Hardmann* v. *Bowen*, 39 N. Y. 196; *Britton* v. *Lorenz*, 45 N. Y. 51.

The sixth section of the Act of 1860 provided that every conveyance or assignment made by any debtor under the provisions of that Act should be recorded in the clerk's office of the county in which the debtor resided at the date thereof, and that every inventory of the property of such debtor made under the provisions of that Act should be filed in the same office where such assignment was recorded. The word "shall" was used as in the first section.

The conflict of decisions under the Act of 1860 existed almost entirely with reference to the construction to be placed upon those sections of the Act which followed section one.

It was argued that those sections related to things which were to be done after the assignment took effect, and were therefore not prerequisites to the validity of the assignment, but that the provisions in regard to them were simply directory.

The result of the judicial examination of those provisions relating to the filing of the inventory and bond was reached in the cases of *Thrasher* v. *Bentley*, 1 Abb. N. C. 39, and *Brennan* v. *Wilson*, 71 N. Y. 502, in which cases the doctrine was laid down that the vesting of title in an assignee did not depend upon a compliance with the requirements of those provisions.

Syracuse etc. R. R. Co. v. *Collins*, 1 Abb. N. C. 51.

This led to the passage of the Act of 1877, chap. 466, and its amendment of 1878, chap. 318, which together constitute the system under which debtors' estates, voluntarily assigned for the benefit of creditors, may be administered.

Section 25 of the Act of 1877 supplies an omission which existed in the Act of 1860, by expressly declaring at what stage in the history of a general assignment the equitable jurisdiction of the county court over the trust arises. The last clause of that section reads:

"And after the filing or recording of an assignment under this Act, the court may exercise the powers of a court of equity in reference to the trust and in the matters involved therein."

It cannot reasonably be assumed that the Legislature omitted from section 2 of the Act of 1877 the provision that the certificate of acknowledgment by the assignor should be indorsed upon the assignment before delivery, because it designed that the law in that particular should be changed, and meant to provide that no such certificate should any longer be a requisite of a valid legal assignment; but rather; 1, because it had in mind the fact that under the decisions of the court as they then existed, no such explicit provision was necessary to accomplish that result; and 2, because it wished to rebut the inference contained in the words "before delivery" that the delivery of an assignment was intended to be sufficient to vest title in an assignee.

If, as the court stated in *Juliand* v. *Rathbone*, 39 N. Y. 369, and as has since been held, the retention of the words "before delivery" was not necessary to require a mandatory construction of the provision as to acknowledgment, because that provision was found in the section which described the requisites of an assignment, that reasoning will, under the Act of 1877, apply equally to the provision as to recording an assignment. If the reasoning of that case is unsound, and the word "shall" is not, under section 2 of the Act of 1877, to be construed as mandatory, because the words "before delivery" have been omitted, then there is no reason why an unacknowledged assignment should not be delivered and vest title.

The only conclusion which can reasonably follow from the foregoing reasoning is that the provision that the assignor shall acknowledge the assignment is mandatory, because it holds a place in that section of the statute (Laws 1877, § 2; Laws 1860, § 1) which describes the essentials of a completed assignment.

Under the Act of 1860 the provision as to recording an assignment was found in section 3. While holding its place there, suspicion was cast upon it by the opinion of *Mr. Commissioner* Earl in the case of *Syracuse etc. R. R. Co.* v. *Collins*, *supra;* and it was then transferred by a wise Legislature to that section of the new statute, the provisions of which had, by uniform judicial sanction, acquired the dignity of mandates.

A sociis noscitur is the rule which was justly relied on by the law-making power, as the rule of construction which should give full effect to the provision.

Warner v. *Jaffray*, 96 N. Y. 253.

Mr. **P. Q. Eckerson,** for respondent:

The order appointing the receiver not having been made or filed in Kings County until long after the title to all the property had passed from the debtors to this defendant, their assignee, and hence beyond the reach of this plaintiff, it is clear that the title to this property never vested in the receiver, and this action cannot be maintained.

Dubois v. *Cassidy*, 75 N. Y. 301.

It was held under the Act of 1860 that although an assignment was never recorded or filed it was valid, to place the property of the assignors out of their control and out of the reach of their creditors.

Syracuse etc. R. R Co. v. *Collins*, 1 Abb. N. C. 51; *Hardimann* v. *Bowen*, 39 N. Y. 200; *Brennan* v. *Wilson*, 71 N. Y. 502.

The Act of 1877 did not change in any respect the requirement as to recording assignments, except if it be made by copartners it "shall be recorded in the county where the principal place of business of such copartners is situated."

Warner v. *Jaffray*, 96 N. Y. 248: *McBlain* v. *Spellman*, 35 Hun, 263.

The plaintiff as receiver seeks to get possession of all the property of the assignors. This he could not do, even if the assignment was void. The most he could get would be the amount of the judgment in the case in which he was appointed receiver.

Bostwick v. *Menick*, 40 N. Y. 383; *Payne* v. *Becker*, 87 N. Y. 153; reversing, 22 Hun, 28.

Rapallo, *J.*, delivered the opinion of the court:

The general assignment for the benefit of creditors made by Stephens & Kellam to the defendant, was executed, acknowledged and delivered on the 27th of September, 1883, and was on the same day recorded in the office of the clerk of the County of Kings, where the assignors resided. Their place of business, however, being at the time of the assignment in the City of New York, section 2 of chapter 466 of the Laws of 1877, required that it should be recorded in that county. This was not done until November 14, 1883, and in the meantime the plaintiff was, under supplementary proceedings against Stephens & Kellam, appointed receiver of their property.

It is conceded by the appellant that if the assignment took effect at the time of its delivery, September 27, 1883, this action cannot be maintained. But he contends that it did not take effect until the 14th of November, 1883, when it was recorded in the City of New York, and that his title, as receiver, to the property of Stephens & Kellam, the assignors, had then attached.

The question in the case therefore is whether, under the Assignment Act of 1877, a general assignment takes effect from the time of its acknowledgment and delivery, or only from the time of its record in the proper county.

This precise question was decided in the case of *Warner* v. *Jaffray*, 96 N. Y. 248, which related to an assignment executed in 1881.

It is claimed on the part of the appellant that the point was not decided in that case; that what was said upon the question in the opinion of the court was *obiter dictum*, and that the case turned upon another point; that considering the question as an open one it should be held that the recording of the assignment was essential to its validity, and that his title as receiver, having accrued before the recording of the assignment in the County of New York, should prevail over that of the assignee; and he has presented an able argument in support of his contention.

But we think that that point was decided in *Warner* v. *Jaffray*. There was, it is true, another point involved and decided in that case, the contest being between the assignee and certain creditors of the assignor, residents of this State, who had attached his personal property situated in the State of Pennsylvania, after the delivery of the assignment, but before it had been recorded in Pennsylvania, and the attaching creditors having had no actual notice of the assignment.

The assignee having first demanded the attached property of the sheriff in Pennsylvania who had levied the attachments, commenced an action in the supreme court of this State against the attaching creditors to restrain them from further proceeding under their attachments in Pennsylvania. It was contended on the part of the defendants in that action that the lien of their attachments was superior to the title of the plaintiff under the assignment.

The question, therefore, was whether the title to the personal property of the debtors situate in Pennsylvania, had passed to the assignee before the levy of the attachments there.

It is evident that the first question presented was whether the plaintiff had any standing in court to restrain interference with the assigned property of the debtors anywhere. If he had not, it was unnecessary to go any farther with the case or to inquire into the validity of the lien of the defendants.

The question of the plaintiff's title lay at the threshold; and until that was passed the subsequent questions could not arise. It was held that the plaintiff, as assignee, acquired title to the personal property of the assignor generally. This would, on general principles, have been sufficient to entitle the assignee to claim the personal property of the assignor, wherever situated, being a title acquired by the voluntary act of the owner. But there was a statute in the State of Pennsylvania which provided that where a person residing out of that State made an assignment for the benefit of creditors, of property situated within the State, such assignment might be recorded in any county where the estate real or personal might be, and should take effect from its date, provided no *bona fide* purchaser, mortgagee or creditor having a lien thereon before the recording in the same county, and not having previous actual notice of the assignment, should be affected or prejudiced.

It was, therefore, further held in *Warner* v. *Jaffray* that the title of the plaintiff, as assignee, must yield to the law of the State where the property was actually situated, and that the defendants having obtained their lien by their attachments, before the assignment was recorded in the counties where the property was situated, and before they had any notice thereof, those liens were, under the Pennsylvania Statute referred to, saved from the operation of the assignment.

It is evident that this point could not have been reached and decided without first passing upon the general effect of the assignment on the property of the assignor. It would have been quite immaterial to determine whether the Pennsylvania Statute saved the property there from the operation of the assignment, if the assignment had no effect or operation anywhere. We must, therefore, regard the point now before us as having been adjudicated in the case of *Warner* v. *Jaffray*, and not open for discussion at this time.

There is still another view of the case, which leads to a conclusion adverse to the plaintiff. His title rests upon his appointment as receiver, made in proceedings supplementary to execution instituted subsequently to September 27, 1883, at which date the assignment to the plaintiff was delivered and recorded in Kings County; so that the defendant's title was in fact, in point of time, prior in its origin to that of the plaintiff and, except for the failure to record in New York also, would, even on the plaintiff's theory, be prior in all respects.

But the Statute in relation to receiverships required (Code Civ. Proc. § 2468) that "Where the judgment debtor, at the time the order is filed," referring to the order appointing a receiver, "resides in another county of this State, his personal property is vested in the receiver only from the time when a copy of the order, certified by the clerk in whose office it is recorded, is filed with the clerk of the county where he resides." Now the orders appointing the plaintiff receiver were entered in the City of New York, the judgment debtors residing in the County of Kings; and a certified copy was not filed in the last named county until February 1, 1884, which was long after the assignment to the defendant was made perfect, even according to the plaintiff's theory, by being recorded in the County of New York, viz.: November 14, 1883.

Therefore the title to the debtors' property had passed to the assignee before (under § 2468) any title thereto had vested in the plaintiff. To obviate this otherwise conclusive answer to the plaintiff's claim, he is obliged to resort to the doctrine of relation, which is recognized in section 2469, and by that means to make the title which he acquired by the filing of February 1, 1884, relate back to the institution of the proceedings under which he was appointed receiver, which proceedings were instituted after the delivery of the assignment but before it was recorded in New York, and thus to devest the title of the general assignee and secure a preference for the creditors whom he represents.

But why should not the assignee be allowed to invoke the same doctrine of relation? It is one which was originated by courts of equity and is resorted to by them whenever necessary to effect justice. Suppose that it was necessary to the taking effect of the assignment that it should be recorded in the proper county. That record was made on the 14th of November, 1883. Did not the title, thus perfected in the assignee, relate back to the time of the delivery of the assignment, and thus preserve his priority over the receivership?

I think that every equitable consideration requires that it should be so held. No rights of any *bona fide* purchaser would in this case be affected by so holding; but on the contrary the effect would be to secure the fund for distribution according to the terms of the assignment, which was earlier in its origin than any proceedings even, under which the plaintiff's title originated, and practically when the assignment comes to be carried into effect, it will have to be treated as having been made at the time it was delivered, and not as of the time when it was recorded in New York, even if the law were as contended for by the plaintiff.

It is, in my judgment, a proper case for the application of the familiar doctrine of relation, on general principles of equity, independently of any statutory enactments.

The judgment should be affirmed, with costs.

All concur.

Richard PANCOAST *et al.*, *Appts.*,

v.

John J. SPOWERS, *Respt.*

Mr. **Roger A. Prior,** for appellants.
Mr. **P. Q. Eckerson,** for respondent.

Order of General Term affirmed on opinion in Nicoll v. Spowers, and judgment absolute for defendant.

S. Hatch GOULD *et al.*, Constituting Board of Health of the Town of Brighton, *Appts.*,

v.

CITY OF ROCHESTER, *Respt.*

Where the **City** of Rochester **caused** a **nuisance within** the **Town** of Brighton, **by** the **discharge of sewage,** after it was collected in the sewers, into open drains constructed by the City across lands in the Town of Brighton, and continued this discharge after it was prohibited by an order of the Board of Health of the Town, and continued also to use the ditches it had constructed in the Town, *held,* that the **order of** the **Board of Health of** the **Town** related to a matter within the Town and within the jurisdiction of the Board; and that although the Board could not execute its order by going within the City to close the sewers, yet as the order was made in a special and individual case under the last clause of subdivision 6, § 3, chap. 351, Act of 1882, which does not require the order to be served within the town or jurisdiction where the nuisance exists, but authorizes it to be served on the "occupant or occupants" of the premises on which the nuisance exists, "or by posting" the same on the premises, and the City being, within the Act, the occupant of the premises in the town on which the nuisance existed, it could be **properly served with** such **notice; and** that the **Board of Health could maintain** an **action against** the **City, to enforce** its **regulation and** to **restrain** a continuance of the **nuisance.**

(Decided March 8, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Fifth Department, affirming a judgment of the Monroe Special Term, dismissing an action to enforce a regulation of a Board of a Health of a Town to restrain the continuance of a nuisance. *Reversed.*

Reported below, 39 Hun, 79.

The facts and questions raised appear from the opinion.

Mr. **Walter S. Hubbell,** for appellants:

The action was properly brought in the names of the individual members of the Board, with the corporate name of the Board attached.

See Acts relating to boards of health, 2 R. S. 7th ed. p. 1081; *Haight* v. *Benson*, 18 How. Pr. 302; *Winchester* v. *McKee*, 4 Alb. L. J. 138; *Pomroy* v. *Sperry*, 16 How. Pr. 211.

Sections 1926 and 1929 of the Code do not affect the question, as boards of health are not enumerated or referred to in either section.

The sole authority under which the resolution in question was passed is derived from sections 2 and 3, subdivisions 3 and 6, of the Act constituting boards of health in the various towns of this State. 2 R. S. 7th ed. p. 1081.

The authority thus conferred is plain and explicit. The Act reads as follows:

Sec. 2. "They shall have cognizance of the causes of injury or danger to the public health."

Sec. 3. "The several boards of health * * * shall have power and it shall be their duty. * * * Sub. 3. "To make orders and regulations, in their discretion, concerning * * * suppression and removal of nuisances, and all such other orders and regulations as they shall think necessary and proper for the preservation of the public health." And Sub. 6. "To publish such orders and regulations," etc.

There is no limitation as to the character of the nuisances, nor as to the residence of the party causing the nuisance, nor as to the place where the nuisance originates. The power conferred is as broad as the subject of which it treats. Whatever is detrimental to the health of the town may be the subject of the board's action.

The plain rules of statutory construction are in favor of this position.

Mead v. *Stratton*, 87 N. Y. 493; *Re Will of O'Neil*, 91 N. Y. 516; *People* v. *Lacombe*, 99 N. Y. 43; *Buffalo* v. *Webster*, 10 Wend. 99; 1 Dill. Mun. Corp. 2d ed. pp. 390, 391, § 304.

The statute authorizes two things: 1. The removal of nuisances. 2. The making of such other orders as the Board shall deem necessary.

This proves that it was intended to give remedies in two classes of cases, viz.: 1. Where nuisances existed in the town, and could be removed. 2. Where the ultimate cause of the nuisance was not in the town, and the nuisance could only be abated by injunction.

Mr. **Ivan Powers,** for respondent:

Local boards of health possess the power and can exercise the authority conferred upon them by the statute and none other.

People v. *Supervisors*, 18 Barb. 567, 569.

The Act under which the Brighton Board of Health is organized confers upon local boards of health no power or authority with reference to the removal or suppression of a condition of things existing outside of the limits of the town for which the local board acts, by reason of which nuisances are created within the limits of the town.

Laws 1882, chap. 351, § 3, subds. 3, 6, 7.

The orders made by the Brighton Board of Health being void as against the defendant, the complaint was properly dismissed.

Andrews, *J.*, delivered the opinion of the court:

The City of Rochester adjoins on the east the Town of Brighton. It constructed sewers which discharged into ditches near the boundary between the City and town, which carried the sewage upon and over lands in Brighton and ultimately into Thomas Creek, a small stream running through the town and having its outlet at Irondequoit Bay. The ditches were constructed by the City, under a general legislative authority to acquire land outside of the city limits and open ditches thereon to carry off the drainage of the City.

It is found that the discharge of the sewage through the ditches and into Thomas Creek created a nuisance in the Town of Brighton, dangerous to the public health.

On the first day of August, 1884, the plaintiffs, constituting the board of health of the town, enacted a rule or regulation prohibiting any person or corporation from discharging or causing to be discharged upon any of the lands, or into any of the streams in the Town of Brighton, the contents of any sewer in which is drained the contents of any privy, watercloset, or urinal, under a penalty.

On the same day the board passed a resolution declaring that the discharge of the sewage of the City of Rochester from the Monroe Avenue sewer and East Avenue sewer upon lands in the Town of Brighton, and from thence into Thomas Creek, was a nuisance, the suppression and removal of which was necessary for the preservation of the public health, and ordering that the nuisance be suppressed, and imposing a penalty for the violation of the regulation, and also authorizing the prosecution of any person or corporation violating the same, or the commencement of an action to restrain such violation, or otherwise to enforce the regulation.

By direction of the board a copy of the regulation was posted in the town and served upon the City of Rochester, by there delivering it to the proper authorities of the City.

It is sufficient to state, without entering into details, that the discharge of the filth from the sewers into the open ditches, and from them into Thomas Creek, created an offensive and dangerous nuisance in the town. The sole question here presented is whether the Board of Health of the Town of Brighton is authorized to maintain an action against the City, to enforce its regulation, and to restrain the continuance of the nuisance.

It is clear that there is a remedy by indictment, and also by civil action at the suit of persons sustaining special injury by the unlawful acts of the defendant. The right of the Board of Health of the Town of Brighton to maintain the action is challenged, on the ground that it has no general capacity to sue, but only such as is specially conferred by the law under which boards of health are organized, and that the circumstances of this case do not bring it within the authority conferred.

It would seem that an action by the body representing all the inhabitants of the town, invoking the equitable power of the court to restrain the continuance of a wrong so vitally affecting the interests both of individuals and of the public at large would be most appropriate. But it is undoubtedly true that the power to maintain the action, if it exists, must be found in the statute; and it is therefore necessary to ascertain what statutory powers are conferred upon boards of health, and whether they include an authority to maintain an action under the circumstances existing in this case.

The original statute (chap. 324, Laws 1850), entitled "For the Preservation of the Public Health," and providing for the organization of health boards in cities, villages and towns, conferred upon such boards, among other things, the power to make and publish rules and regulations for the "suppression and removal of nuisances" (§ 3, sub's 3, 6), and prescribed a penalty for the willful violation of any regulation "so made and published." Sec. 4.

But the Act conferred no power upon boards of health to maintain any action to enforce their regulations; and it was held that actions could not be maintained by the board. *People* v. *Supervisors of Monroe Co.* 18 Barb. 567.

The powers of boards of health were, however, subsequently enlarged by amendments to the original Act, and the powers of boards of health as they now exist, are declared in the supplementary Act, chap. 351, Laws of 1882. By the third section they are empowered "to make orders and regulations in their discretion (among other things) for the suppression and removal of nuisances, and all such other orders and regulations as they shall think necessary and proper for the preservation of the public health," and to enter upon any place or premises where conditions dangerous to the public health are known or believed to exist, for the purpose of inspection, and also "to receive and examine into the nature of complaints made by any of the inhabitants concerning causes of danger or injury to the public health, within the limits of its jurisdiction."

Subdivision 6 of the same section confers the power and makes it the duty of the boards of health "To publish from time to time all such orders and regulations of general obligation as they shall have made, in such manner as to secure early and full publicity thereto, and to make, without publication thereof, such orders and regulations in special or individual cases, not of general application, as they may see fit, concerning the suppression and removal of nuisances, and concerning all other matters in their judgment detrimental to the public health, and to serve copies thereof upon any occupant or occupants of any premises whereon any such nuisances or other matters aforesaid shall exist, or by posting the same in some conspicuous place on such premises."

The power of boards of health to impose penalties and to maintain actions is declared in subdivision 9 as follows: "To impose penalties for the violation of, or noncompliance with their orders and regulations, and to maintain actions in any court of competent jurisdiction to collect such penalties, not exceeding $100 in any one case, *or to restrain by injunction such violations, or otherwise to enforce such orders and regulations.*"

The power to maintain an action for an injunction, given by subdivision 9 above quoted, is, as will be observed, auxiliary only. It is not a general power to maintain actions for the suppression or removal of nuisances. It is a right of action limited to the special purpose of enforcing orders made by the board, or to restrain their violation. It presupposes, therefore, as a condition of its exercise, the existence of a lawful order, duly made, which has been violated or disregarded.

The courts below, while uniting in denying the right of the plaintiffs to maintain the action, differ in the grounds of their decision. The learned judge at special term, after asserting the proposition that the jurisdiction of the Board of Health of the Town of Brighton over nuisances was limited to nuisances existing within the territorial limits of the town, put his decision upon the ground that the order or regulation of August 1, 1884, was ineffectual and in excess of the power conferred upon boards of health, because the nuisance in question was created and had its origin in the City of Rochester, and that the town board could make no valid regulation in respect thereto, because, in the language of the court, its powers "are confined to the abatement of nuisances within the town, and the regulations they make have no force outside of the town lines."

It seems to us that this is quite too narrow a view of the situation. It is undoubtedly true that the authorities of Brighton could not go into the City of Rochester and interfere with its sewers. But the collection of foul substances in the sewers was not the immediate cause of the nuisance. The immediate cause was the discharge by the City, of the sewage after it was collected in the sewers, into open drains constructed by the City across lands in the Town of Brighton. This discharge was prohibited by the order of August 1, 1884. The City, notwithstanding the order and in violation of it, continued the nuisance and permitted the sewers to continue to discharge their contents as before; and it continued also to use the ditches it had constructed in the town, to carry the offensive matter to the creek. In respect to the East Avenue sewer, the nuisance had its origin at Culver Street, the dividing line between the City and town, where the sewer terminated.

It seems to us that the order of the board of health related to a matter within the town and within the jurisdiction of the board.

We agree with the special term that the board could not execute its order by going within the City to close the sewers; but the fact that it had no power to enforce a summary jurisdiction of this kind does not justify the conclusion that it could not invoke the action of the court to enforce in an orderly way the abatement of the nuisance.

The case of *Regina* v. *Cotton*, 1 Ell. & Ell. 203, arose under the Nuisance Removal Act (18 and 19 Vic. chap. 121), and it was held that it did not authorize a summary proceeding before justices, at the instance of one parish, for the removal of a nuisance originating in another parish. The court said Erle, *J.*:

"It would be most dangerous to take away from the regular tribunals the investigation of such a question, often a most complicated and important one, and to transfer it to the jurisdiction of any two justices of the peace."

The general term as we understand its opinion, put its affirmance of the judgment on the ground that, under the Act of 1882, it is a condition precedent to the right of a board of health to maintain an action to restrain the violation of, or to enforce an order made by the board, that the order should have been served on the defendant, and that service under the Act must be made within the territorial jurisdiction of the board.

The order in question was served on the defendant by service on its proper officers within the City. It was, therefore, held that such service was not a compliance with the Act and was not a performance of the condition precedent. We are unable to concur in this conclusion. The order of August 1, 1884, was not a rule or regulation of general obligation, of which publication was required within the first clause of section 3 (subd. 6), but was an order made in a special and individual case, under the last clause of the subdivision, which is to be served on the occupant or occupants of the premises on which the nuisance exists, or by posting the same on the premises. But the statute does not in terms require the order to be served within the town or jurisdiction where the nuisance exists, and we see no reason for so construing it.

It is not necessary to determine whether the Board of Health of Brighton would have jurisdiction if the nuisance complained of was merely consequential; that is, if the nuisance having been created, and existing in the City, affected injuriously, by corrupting the air or otherwise, the Town of Brighton. But in this case the City of Rochester constructed and controlled the ditches in the town through which the sewage was carried, and used them for its purposes. We think the City was, within the Act, the occupant of premises in the town on which the nuisance existed, and was properly served with notice.

The claim that the City did no new act after the order was made, if material, is not well founded in fact. It continued to discharge the sewage on to the town as before. If it had refrained from using the sewers, the nuisance would have abated without further action.

The case of *Reed* v. *People*, 1 Park. Crim. Cas. 481, is not in point. That was an indictment for violating a regulation of a board of health, founded on the fourth section of the Act of 1850, before amendment, which made a willful violation of a regulation "read and published" by a board of health, a misdemeanor. The regulation claimed in that case to have been violated had not been published, and this was a complete answer to the indictment. The court also expressed its opinion that service of notice upon a nonresident out of the jurisdiction, although he owned the premises on which the nuisance existed, followed by a mere omission to act thereunder, would not render him liable to indictment.

We think the judgment in this case should be reversed. The statute should have a liberal construction in aid of the beneficial purpose of its enactment. The objections to the maintenance of the action are quite technical and ought not, we think, to prevail.

All concur.

Annie Cooke LAWRENCE, An Infant, etc.,
Respt.,
v.
Sara L. Cooke, *Appt.*

1. Where, **by one clause of** his **will a father devised** his **residuary estate to his daughter,** "to have and to hold the same, unto her heirs and assigns forever," **and in** the **following clause committed to her** the **guardianship of** his **grandchild,** the child of a deceased daughter, with the words "I enjoin upon her to make such **provision** for said grandchild **out of** my **residuary estate** now in her hands, in such manner, at such times, and in such amounts, as she may judge to be expedient and conducive to the welfare of such grandchild, and her own sense of justice and Christian duty shall dictate," and the general guardian of the grandchild, in a complaint, alleged that for more than two years after the will took effect the daughter had refused and neglected to make any provision for his ward, and

asked to have a trust in her favor declared and enforced, and the daughter answered, denying that a trust was created by the will, but admitted the force of the moral considerations in favor of the ward, and averred her intention fully and in good faith to comply with the same, the **judgment** of the general term **declaring and enforcing a trust was reversed** on appeal, and the judgment of the special term was affirmed, dismissing the complaint.

2. If by the clause the testator had enjoined the defendant to make a suitable provision out of the residuary estate for the support of the grandchild, the daughter would have taken it subject to a charge, the amount of which might be ascertained by a court of equity, and satisfaction decreed. But as the **provision** was drawn, it was **not intended to relieve** the **father of** the **grandchild from** his **legal obligation to support his own child.** It was the will of the testator that the daughter should be the sole judge of the manner in which provision for the grandchild should be made, at what time it should be made, and to what amount. It was beyond the power of any court to substitute its discretion for hers; and no trust was created which a court of equity could exclude, contrary to her judgment. The provision vested the **absolute title to** his **residuary estate in** his **daughter.**

(Decided March 8, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, reversing a judgment of the Special Term dismissing an action by a guardian to have a trust declared and enforced in favor of his ward. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **W. R. Darling,** for appellant:

The general term erred in holding that the seventh clause creates a trust for plaintiff. The preceding absolute devise of the whole residuary estate to the defendant stands clear, independent and alone.

Campbell v. *Beaumont*, 91 N. Y. 465; *Freeman* v. *Coit*, 96 N. Y. 63; *Roseboom* v. *Roseboom*, 81 N. Y. 356; *Parsons* v. *Best*, 1 Thomp. & C. 211; approved, 88 N. Y. 232; White & T. L. Cas. pt. 2, Am. note, p. 1859; 1 Perry, Trusts, 3d ed. § 115.

After an absolute devise no subsequent language less decisive than itself is sufficient to show an intent to cut it down or charge it.

Hopkins v. *Glunt*, 2 Cent. Rep. 63.

As to how full and clear such diminishing language must be, and that the rule admits of no exceptions, see: *Thornhill* v. *Hall*, 2 Clark & F. 22; approved, 81 N. Y. 359; 96 N. Y. 63; *Reid* v. *Atkinson*, 5 Irish Rep. 373, 377, 378-386.

The tendency of modern decisions is against raising a trust by mere inference from doubtful words.

Campbell v. *Beaumont*, 91 N. Y. 465; *Foose* v. *Whitmore*, 82 N. Y. 406; Lewin, Trusts, p. 173.

No expressions used in the seventh clause are sufficient to cut down or charge the absolute title given by the preceding clause. Only two are relied upon, viz.: "I commit my granddaughter," etc., and "I enjoin," etc.

In construing a residuary clause, courts will look at surrounding circumstances.

Kerr v. *Dougherty*, 79 N. Y. 327. See 99 N. Y. 74, 79.

The testator could not "commit the charge and guardianship" to the defendant, or have intended so to do; they were not his to give. Such an intent would be illegal and will not be imputed.

Dubois v. *Ray*, 35 N. Y. 162.

The word "enjoin" of the seventh clause, upon which alone the general term's judgment of reversal seems to be put, when read as qualified by the words with which it is coupled (*Meredith* v. *Heneage*, 1 Sim. 542, 556; *Hone* v. *Kent*, 11 Barb, 315; *Kane* v. *Astor*, 5 Sandf. 457; Hill, Trustees, p. 73), is shorn of all legal imperative force and reduced to merely precatory significance.

In the light of the testator's expression of personal confidence in defendant, his idea seems to have been to substitute the defendant's irresponsible discretion for what would have been his own if he had lived.

McCormick v. *Grogan*, L. R. 4 H. L. 95; *Meredith* v. *Heneage*, 1 Sim. 542, 556; *Lines* v. *Darden*, 5 Fla. 51, 72.

The phrase, "Out of my residuary estate, now in her hands," although a merely interjected and unnecessary parenthesis, is important as showing that in the seventh clause the testator understood and still intended the full, absolute gift of the previous clause, leaving the moral appeal as the basis and security of the seventh clause.

The main intent of the testator was for the defendant, his daughter. The previous clause shows this without doubt, and in construction the particular intent must yield to this.

Roseboom v. *Roseboom*, 81 N. Y. 356, 360; *Delaney* v. *Van Aulen*, 84 N. Y. 16, 26; *Giddings* v. *Seward*, 16 N. Y. 365, 367; *McDonald* v. *Walgrove*, 1 Sandf. Ch. 274; *Jackson* v. *Veeder*, 11 Johns. 169.

The words "such provision" and "as she may judge expedient," are to be considered. Where by judicial decisions words have been given a fixed meaning, that meaning prevails; and courts are bound by it, rather than by conjectural interpretation.

Lytle v. *Beveridge*, 58 N. Y. 598; *Myers* v. *Eddy*, 47 Barb. 263.

The words "as she shall think expedient," have been held to confer an absolute discretion to give or not to give, and how much.

White & T. L. Cas. pt. 2, Am. note, p. 1860; *Gisborne* v. *Gisborne*, 25 Week. Rep. 517; *S. C.* below, 23 Week. Rep. 410, 411; *French* v. *Davidson*, 3 Madd. Ch. 396; *Colton* v. *Colton*, 21 Fed. Rep. 594, 596, 597.

"An act," says *Lord* Cottenham, "which is to depend on the sense of justice of another must be discretionary."

Knight v *Boughton*, 11 Clark & F. 513, 553; *Mackett* v. *Mackett*, 2 Moak, Eng. Rep. 412; *S. C.* L. R. 14 Eq. 49; *Lambe* v. *Eames*, L. R. 6 Ch. App. 599, 607; 2 White & T. L. Cas. pt. 2, 1835, Am. note p. 1860; 1 Redf. Wills, 707, 708; *Pope* v. *Pope*, 10 Sim. 1; *Greene* v. *Greene*, 3 Irish Rep. Eq. 629, 635.

The word "enjoin," was itself held not imperative, in a direction to executors not to sell within three years.

Stewart v. *Hamilton*, 37 Hun, 19; Hill, Trustees, p. 73.

The words "my will and desire is," were held not enough to cut down or charge an absolute gift; and the court said that if it was so intended, it was void as repugnant.

Campbell v. *Beaumont*, 91 N. Y. 468; *Lines* v. *Darden*, 5 Fla. 51, 72.

"Earnestly conjure," held insufficient.

Winch v. *Brutton*, 14 Sim. 379.

A devise expressly made "subject to," etc., held to raise no trust.

Parsons v. *Best*, 1 Thomp. & C. 211; approved, 88 N. Y. 282; *Re Hutchinson*, L. R. 8 Ch. Div. 540.

An absolute devise to a wife, with the words "she is of course to charge herself," etc., held insufficient to cut down or charge the fee.

Spooner v. *Lovejoy*, 108 Mass. 529; *Webb* v. *Wools*, 2 Sim. N. S. 267; *Costabadie* v. *Costabadie*, 6 Hare, 410, 413; *Lambe* v. *Eames*, L. R. 6 Ch. App. 599. See also *Rose* v. *Porter*, 1 New Eng. Rep. 750.

The word "provision" qualified and coupled nearly as in this case has expressly been held too obscure to raise a trust.

Winch v. *Brutton*, 14 Sim. 379; *Abraham* v. *Alman*, 1 Russ. Ch. 509; *Macnab* v. *Whitbread*, 17 Beav. 299.

Another settled reason against construing a trust from the seventh clause is the uncertainty which would exist, as to its subject and its term.

Crouse v. *Frothingham*, 97 N. Y. 105, 112; *Colton* v. *Colton*, 21 Fed. Rep. 594, 596.

It is well settled that the subject will be held as too uncertain to raise a trust, when the amount given for the purpose is made to depend on the will of the first taker; and such uncertainty is treated by the court as evidence that the mind of the testator was not to create a trust.

2 Roper, Legacies, p. 1431; 2 White & T. L. Cas. pt. 2, p. 949; *Mackett* v. *Mackett*, L. R. 14 Eq. 49; 2 Moak, Eng. Rep. 412; Hill, Trustees, pp. 78, 117; 2 Story, Eq. Jur. § 1069; *Mills* v. *Newberry*, 112 Ill. 123; *Colton* v. *Colton*, 21 Fed. Rep. 594; *Lambe* v. *Eames*, L. R. 6 Ch. App. 607; *Curtis* v. *Rippon*, 5 Madd. Ch. 434; *Meredith* v. *Heneage*, 1 Sim. 556, 565; *Buggins* v. *Yates*, 9 Mod. 122, 123; *Cowman* v. *Harrison*, 10 Hare, 234; *Morice* v. *Bishop of Durham*, 10 Ves. 535, 536; *Wynne* v. *Hawkins*, 1 Bro. Ch. 179; *Palmer* v. *Simmonds*, 2 Drew. 221; *Parnall* v. *Parnall*, 25 Moak, Eng. Rep. 801; *Bernard* v. *Minshull*, 1 Johns. Eng. Ch. 276, 287; *Harper* v. *Phelps*, 21 Conn. 257, 269, 270; 1 Redf. Wills, 2d ed. p. 718, 719; Lewin, Trusts, p. 168, 169; Hawkins, Wills, Am. ed. 163.

This is precisely the fact in the case at bar, where the intent of the testator surely was that the defendant's own support was first to come out of the estate, and might take it all.

Perry v. *Merritt*, L. R. 18 Eq. Cas. 152.

It is not sufficient merely to point out the general fund out of which the portion is intended to be carved, as when this testator says; "out of my residuary estate," etc., but the extent of the portion itself must appear; and the greatest clearness as to this is required by all the cases.

Lines v. *Darden*, 5 Fla. 72, 75, 77; *Mills* v. *Newberry*, 112 Ill. 123; *Colton* v. *Colton*, 21 Fed. Rep. 594, 596; *Gilbert* v. *Chapin*, 19 Conn. 342, 346; *Harper* v. *Phelps*, 21 Conn. 257, 269, 270; *Bardswell* v. *Bardswell*, 9 Sim. 319; *Tolson* v. *Tolson*, 10 Gill & J. 159.

Directions involving a personal trust and discretion can only be exercised by the person named for that purpose.

Crooke v. *Kings Co.* 97 N. Y. 421, 453; *Beekman* v. *Bonsor*, 23 N. Y. 298, 304; *Hull* v. *Hull*, 24 N. Y. 647, 651. See also *Nichols* v. *Eaton*, 91 U. S. 724, 725 (Bk. 23, L. ed. 256); 2 Perry, Trusts, 28; *Costabadie* v. *Costabadie*, 6 Hare, 410, 413; *Gisborne* v. *Gisborne*, 25 Week. Rep. (Eng.) 517.

Where, all circumstances considered, it is more probable that the testator meant only to communicate a mere discretion, there would be (even under the old rule) no trust.

Lewin, Trusts, p. 172; Hill, Trustees, p. 117.

Nor do the words of the seventh paragraph raise a power in trust (within §§ 95, 96 of the R. S. chap. 1, pt. 4, title 2, "*On Powers*"), because the execution or nonexecution is made expressly to depend on the will of the defendant as to the "provision" itself and all details of it.

Lines v. *Darden* and *Bardswell* v. *Bardswell*, *supra*; *Delaney* v. *McCormack*, 88 N. Y. 174, 182.

For the same reason it fails as a power in trust, under the test of section 103.

Decker v. *Saltsman*, 1 Hun, 421; *Munsell* v. *Lewis*, 4 Hill, 641, 642.

In any aspect of the case, and admitting (for argument only) the existence either of a trust or a power, still this action is premature, since, even if some provision is imperative, the time and manner of it are left to defendant, and she may do it by will; in other words, "she has her whole life in which to perform it."

Mackett v. *Mackett*, L. R. 14 Eq. 49; *Meredith* v. *Heneage*, 1 Sim. 542, 551; *Gilbert* v. *Chapin*, 19 Conn. 342, 346; *Parsons* v. *Best*, 1 Thomp. & C. 211; approved in 88 N. Y. 282.

Even if the seventh clause of the will really raises a trust, still the interlocutory judgment of the general term was wrong, because it set aside the defendant, and substituted its own discretion and judgment for her's, without any admission in the pleadings or finding in the case that she had refused the trust, or by any bad faith or wrong exercise of its authority had forfeited the right to its administration.

Cuff v. *Dorland*, 57 N. Y. 560; *Purchase* v. *Matteson*, 25 N. Y. 211; *Thomas* v. *N. Y. Life Ins. Co.* 99 N. Y. 250; see also *Moores* v. *Townshend*, 3 Cent. Rep. 441, 102 N. Y. 387; Lewin, Trusts, p. 538, 539, 542; *Lines* v. *Darden*, *Bardswell* v. *Bardswell* and *Gisborne* v. *Gisborne*, *supra; Nichols* v. *Eaton*, 91 U. S. 716 (Bk. 23, L. ed. 256); *Hawes Place Congregational Society* v. *Trustees of the Hawes Fund*, 5 Cush. 454; *Costabadie* v. *Costabadie*, 6 Hare, 410, 413; *Hawley* v. *James*, 5 Paige, 435.

Mr. **Henry W. Johnson,** with *Mr.* **Luke A. Lockwood,** for respondent:

The question whether there was a trust created by the will in favor of plaintiff depends upon the intention of the testator, provided such intention can be fairly gathered from the language used in disposing of his property, and that it does not conflict with any statute or contravene any rule of public policy.

One of the best tests in arriving at the intention of the testator is to consider, in the first place, what he manifestly did not intend by his will.

Applying this test to the will in question, it is manifest that the testator did not intend to leave his granddaughter, the plaintiff, to the tender mercies of the world without any provision whatever for her support. This is indicated by the appointment of the defendant as guardian of his granddaughter; by pointing directly and unmistakably to his residuary estate, as the source from which the support of the ward is to come; by the use of language which signifies something more than a mere request that that residuary estate shall be used for the benefit of his grandchild.

The testator did not intend that the defendant should receive his residuary estate wholly exempt from any obligation or duty towards the plaintiff. This is indicated by his attempt to make the defendant the guardian of the plaintiff, as has already been stated; by mentioning his grandchild as a person for whom he intended some provision should be made out of his residuary estate; by requiring that such provision should be made out of his residuary estate as the defendant should deem expedient and conducive to the welfare of his grandchild. (Surely this language does not import that the testator ever contemplated that the plaintiff would not need any support. The most that can be claimed is that the extent of that support should be determined by the defendant; but it cannot be claimed that this language fairly implies that she may exercise her "sense of justice and Christian duty" in favor of the plaintiff or not as she pleases); by the use of language in reference to his residuary estate, which is mandatory in its character.

The testator enjoins something upon his donee. He does not beseech, he commands. It is the utterance of one having power to give or withhold—and to give absolutely or conditionally.

"Enjoin" is not precatory language. It is defined by Webster to mean "to charge;" to lay upon with, as an order or command; to put an injunction on; to give a command to; to direct with authority; to order. Worcester's definition is substatially the same, and both of them are more in accord with the legal meaning of the word than is Johnson's definition.

1 Bouv. Law Dic. p. 526, title "*To Enjoin*" citing 1 Hale, P. C. 587; 1 East, P. C. 298, 304; 2 Hawk. P. C. c. 12, § 13; Ry. & M. Cr. Cas. 93.

"Precatory" is defined by Worcester as "suppliant" "beseeching". He gives its derivation as "L., *precatorius, precor, precatus*, to beg, to ask." Precatory words are defined by Burrill to be "words of entreaty, request, desire or recommendation employed in wills as distinguished from direct and imperative terms.".

The distinction between precatory and mandatory language is pointed out by a well recognized authority on the subjects of trusts, in the following language: "However strong the language of recommendation or request may be, a trust will not be implied if the testator declares that such is not his intention; as, if he declares that the gift shall not be unfettered or unlimited, or if he recommends but does not enjoin."

Perry, Trusts, §115, citing *Meredith* v. *Heneage*, 1 Sim. 542; 10 Price, 230; *Hoy* v. *Master*, 6 Sim. 568; *Young* v. *Martin*, 2 Younge & Col. Ch. 582; *Huskisson* v. *Bridge*, 4 DeG. & Sm. 245; *Warner* v. *Bates*, 98 Mass. 277; *Whipple* v. *Adams*, 1 Met. 444; *Eaton* v. *Watts*, L. R. 4 Eq. 151.

Where precatory words are used, one of the rules of construction is that the presumption against a trust will not be overcome where the object, the property, or the way it shall go, are left at all in doubt. This rule finds abundant illustration in the authorities cited by the learned counsel for the defendant, on the argument below, and especially in the following:

Mackett v. *Mackett*, L. R. 14 Eq. 49; *Meredith* v. *Heneage*, 1 Sim. 542; *Lambe* v. *Eames*, L. R. 10 Eq. 267; *Reeves* v. *Baker*, 18 Beav. 372; *Winch* v. *Brutton*, 14 Sim. 379; *Greene* v. *Greene*, 3 Irish Rep. Eq. 629; *Morice* v. *Bishop of Durham*, 10 Ves. Jr. 535; *Wynne* v. *Hawkins*, 1 Bro. Ch. 179; *Bernard* v. *Minshull*, 1 Johns. Eng. Ch. 276; *Foose* v. *Whitmore*, 82 N. Y. 405; *Young* v. *Martin*, 2 Younge & Col. Ch. 582.

Another rule is that it must appear from the context that they are not used to invoke the exercise of a merely discretionary power; otherwise, a trust cannot be implied; in other words, it must appear from what follows that the wish, desire or recommendation is not left entirely to the caprice or discretion of the person to whom it is addressed. Some of the cases last above cited also illustrate this rule, but it is more clearly indicated in the following:

Harper v. *Phelps*, 21 Conn. 256; *Parsons* v. *Best*, 1 Thomp. & C. 211; 1 Perry, Trusts, § 115; 1 Story, Eq. Jur. § 1069.

Where imperative words are used, so that the court can see that the testator clearly intended to create a trust, the court will give such effect to the words used as is necessary to carry out the intention of the testator, if possible.

1 Perry, Trusts, § 114; 1 Jarm. Wills, p. 332; 2 Redf. Wills, 415, 421.

In the following cases, although precatory words were used by the testator, they were held to be imperative, and created a trust by reason of the manifest intent of the language following those words:

Harding v. *Glyn*, 1 Atk. 469; *Ware* v. *Mallard*, 16 Jur. 492; *Warner* v. *Bates*, 98 Mass. 277; *Forbes* v. *Ball*, 3 Meriv. 437.

The foregoing views, as to what the testator manifestly did not intend by his will, necessarily lead to the conclusion that he did intend to make some pecuniary provision for his grandchild.

Winch v. *Brutton* and *Lines* v. *Darden*, *supra*.

As it was urged on the trial below that the will did not create an express trust, within section 55 of title 2, chapter 1 of part 3 of the Revised Statutes, we submit that it is not important to determine that question now, inasmuch as that provision does not apply to personal property.

Kane v. *Gott*,* 24 Wend. 641; *Gott* v. *Cook*, 7 Paige, 521; *Savage* v. *Burnham*, 17 N. Y. 561; *Brown* v. *Harris*, 25 Barb. 134.

If a valid trust is created as to the personal estate, that is sufficient.

De Peyster v. *Clendining*, 8 Paige, 295; *Dupre* v. *Thompson*, 4 Barb. 279; *Vail* v. *Vail*, 7 Barb. 226; *Irving* v. *DeKay*, 9 Paige, 521; *Parks* v. *Parks*, 9 Paige, 107.

There is no uncertainty as to the nature or extent of the trust created by the will. It clearly points out: 1, the object, that is the person in whose behalf the trust is created; 2, the subject of the trust, and that is the testator's residuary estate; 3, the intention that some provision shall be made out of the subject of the trust.

On that point no discretion is conferred. The extent of the estate, or the interest of the donee of the power, does not affect its construction as a trust.

Pierson v. *Garnet*, 2 Bro. Ch. 38; *Harding* v. *Glyn*, 1 Atk. 469; *Brown* v. *Higgs*, 4 Ves. 708; 8 Ves. 561; *Parsons* v. *Baker*, 18 Ves. 476; *Prevost* v. *Clarke*, 2 Madd. Ch. 458; *Forbes* v. *Ball*, 3 Meriv. 437; *Burrough* v. *Philcox*, 5 Myl. & Cr. 72; *Dominick* v. *Sayre*, 3 Sandf. 555.

Rapallo, *J.*, delivered the opinion of the court:

The grandfather of the plaintiff (Chauncey L. Cooke) by the sixth and seventh clauses of his will, which took effect in December, 1878, devised and bequeathed his residuary estate, as follows:

"VI. The residue of my estate, both real and personal, of whatever name or kind, I give, devise and bequeath to my daughter Sara L. Cooke, to have and to hold the same, unto her heirs and assigns forever." "VII. I commit my granddaughter, Annie C. Lawrence, child of my daughter Annie, now deceased, to the charge and guardianship of my daughter Sara L. Cooke, in whose honesty, good will and integrity I repose the utmost confidence. I enjoin upon her to make such provision for said grandchild, out of my residuary estate now in her hands, in such manner, at such times, and in such amounts, as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and Christain duty shall dictate."

The complainant alleged that in the month of March, 1880, and in the month of January, 1881, the plaintiff, through her general guardian, who was her father, requested the defendant to make, out of the estate so devised and bequeathed to her, provision for the plaintiff, but that the defendant had neglected and refused so to do; and demanded judgment; that by the terms of the will a trust was imposed upon the defendant in favor of the plaintiff; that the defendant render an account of the residuary estate and the income thereof, and that the court should determine and make such provision for the plaintiff out of said residuary estate as should be conducive to the welfare of the plaintiff, and that a receiver should be appointed of such residuary estate, etc.

The defendant, by her answer, denied that any trust was created by the will, but also denied that she had refused to make provision for the plaintiff. She admitted the full force of the moral considerations in favor of the plaintiff, arising from the will, and averred that she intended and had always intended fully and in good faith, to comply with the same.

The action was tried at special term before Lawrence, *J.*, who held that no trust was created by the clause referred to, and that the defendant took, under the will of her father, an absolute title to his residuary estate; and he dismissed the complaint. His judgment was reversed at the general term; and a reference was ordered, to ascertain the amount of the residuary estate, and report what provision should be made for the plaintiff, out of such residuary estate.

The referee reported the proofs taken before him, and that in his opinion the sum of $1,080 per annum would be a proper provision to be made for the plaintiff, until she should attain the age of fourteen years. This report was confirmed by the court, and judgment was rendered that the defendant pay that sum to William H. Lawrence, the father and general guardian of the plaintiff, until the further order of the court.

Full and exhaustive opinions were delivered, both at special and general terms, in which the authorities bearing upon the question are reviewed at length. Without going over the ground covered by those opinions we deem it sufficient to say that we concur in that of Lawrence, *J.*, at special term, which was to the effect that the defendant took an absolute title to the residuary estate, and that the provision to be made for the plaintiff was left wholly to the discretion of the defendant.

The opinions at general term were by Brady and Daniels, *JJ.*, Davis, *P. J.*, delivering a brief dissenting opinion. The prevailing opinions rest upon the word "enjoin" used by the testator in clause VII. If the clause had been that the testator enjoined upon the defendant to make suitable provision out of the residuary estate for the support of the plaintiff, there would be force in the argument; not indeed that the defendant took the residuary estate in trust, but that she took it subject to a charge, the amount of which might be ascertained by a court of equity and satisfaction thereof decreed.

But such is not the language of the will. It is: "I enjoin upon her to make *such provision* for said grandchild, out of my residuary estate, *in such manner*, *at such* times and *in such amounts*, as she may judge to be *expedient* and conducive to the welfare of *said grandchild*."

She might, under the broad discretion thus conferred upon her, deem it best for the grandchild to wait until she should become of age, and then give her a portion of the estate, or otherwise provide for her. There was nothing in the will which required her to provide for the support of the grandchild during her minority. She was living with her father, out of the State. No obligation was imposed upon the defendant, by her father's will, to indemnify the father of the plaintiff for her support, or to furnish him with means therefor. The provision in the will was not intended for the benefit of the father of the plaintiff, nor to relieve him from his legal obligation to support his own child. All these matters were left wholly to the discretion of the defendant, uncontrolled by any consideration, except, to use the language of the testator, what "her own sense of justice and Christian duty shall dictate."

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*See classified citations on this subject at end of case in Lawyers' edition. [Ed.]

It was the will of the testator that the defendant should be the sole judge of the manner in which provision for the plaintiff should be made; at what time it should be made, and to what amount. It was beyond the power of any court to substitute its discretion for hers; and no trust was created which a court of equity could execute, contrary to her judgment.

The moral obligation imposed upon the defendant is very strong. The plaintiff is the representative of the deceased sister of the defendant; and if the testator had died intestate, the plaintiff would have been entitled to one third of his estate. For reasons of his own, however, the testator preferred not to permit any title to any part of his estate to vest in this grandchild, but to leave entirely to the discretion of the defendant what portion she would take, in what manner and at what time. He therefore vested the absolute title to his residuary estate in the defendant, enjoining upon her only the duty of exercising this discretion, and expressing his conviction that she would do so honestly and fairly. She recognizes this moral obligation and avers her intention of performing it.

It is not for the courts to repudiate the confidence which the testator chose to repose in the defendant, and to assume a power which was not intended to be exercised by them, by determining in what manner, at what time and to what amount, the provision shall be made.

The orders of the General Term and subsequent proceedings should be reversed, and the judgment of the Special Term dismissing the complaint affirmed, with costs.

All concur.

DECISIONS IN WHICH NO OPINIONS WERE WRITTEN.

(March 1, 1887.)

PEOPLE of the State of New York, *Respts.*,
v.
Alexander H. REAVEY, *Appt.*

Mr. **A. Suydam,** for appellant.
Mr. **McKenzie Semple,** for respondents.
Judgment affirmed.

William H. VAN OSTRAND, Infant, etc., *Respt.*,
v.
NEW YORK CENTRAL & HUDSON RIVER R. R. CO., *Appt.*

Mr. **W. H. Adams,** for appellant.
Mr. **Harold E. Hills,** for respondent.
Judgment affirmed, with costs.

John MURRAY, Infant, etc., *Respt.*,
v.
Henry A. SMITH, *Appt.*

Mr. **Edward C. Ripley,** for appellant.
Mr. **Charles J. Patterson,** for respondent.
Judgment affirmed, with costs.

Alfred TALLMAN, *Respt.*,
v.
Town of RAMAPO, *Appt.*

Mr. **Garrett Z. Snider,** for appellant.
Mr. **Cornelius P. Hoffman,** for respondent.
Judgment affirmed, with costs.

William H. DORAN, Infant, etc., *Appt.*,
v.
CITY OF TROY, *Respt.*

Mr. **R. A. Parmenter,** for appellant.
Mr. **William J. Roche,** for respondent.
Judgment affirmed, with costs.

Allen BLOOMFIELD *et al.*, Exrs. etc., *Respts.*,
v.
George CLARKE, *Appt.*

Mr. **James B. Jenkins,** for appellant.
Mr. **James A. Lynes,** for respondents.
Order affirmed, with costs.

Re Petition of Leonard SCOTT, to Vacate Assessment, etc.

Mr. **D. J. Dean,** for appellant.
Mr. **Herbert A. Shipman,** for respondent.
Order affirmed, with costs.

Sherwood STERLING, *Respt.*,
v.
METROPOLITAN L. INS. CO., *Appt.*
SAME
v.
SAME.

Mr. **William H. Arnoux,** for appellant.
Mr. **John A. Straley,** for respondent.
Appeals dismissed, with costs.

Edward BURKE *et al.*, *Respts.*,
v.
Philip HONE, *Appt.*

Mr. **Lowrey,** for appellant.
Mr. **William Hildreth Field,** for respondents.
Order affirmed, with costs.

Re Accounting of John C. CONNER, Assignee, etc.

Mr. **Matthew Hale,** for appellants.
Mr. **Hamilton Harris,** for respondents.
Order affirmed, with costs.

NEW JERSEY.

SUPREME COURT.

EXECUTORS OF Elizabeth RORER, *Plffs. in Err.*,
v.
William H. RORER.

*It is **not error to permit a jury to take** to their room, where they retire to consider of their verdict, an **itemized account,** used by counsel and referred to in the course of the trial, but not offered in evidence, proof as to the items of the account having been given, and the court having instructed the jury not to use it as evidence, except for the purpose of aiding the memory as to amount claimed by a party, should the jury find he was entitled to a verdict.

(Decided ——— — 1886.)

ERROR to the Court of Common Pleas of Monmouth County, to review a judgment on a verdict for defendant in an action of assumpsit to recover the amount claimed to be due on two promissory notes and also on an account. *Affirmed.*

Argued before Beasley, *Ch. J.*, Knapp, Magie and Parker, *JJ.*

The case is stated in the opinion.

Mr. **George C. Beekman,** for plaintiff in error.

Mr. **W. D. Holt,** *contra.*

Parker, *J.*, delivered the opinion of the court:

An action in assumpsit was brought in the Monmouth Pleas, by the executors of Elizabeth Rorer, deceased, against William H. Rorer to recover the amount claimed to be due on two promissory notes, and also on an account.

The defendant pleaded the general issue and gave notice of set-off, but did not attach a bill of particulars of his account; nor did the plaintiffs, before trial, demand of him a bill of particulars.

During the trial the counsel of the defendant, in examining his witness, made use of a paper containing a long itemized account of the demand on which his plea was founded; and the counsel for plaintiffs, in cross examination, used and referred to the same paper, but it was not offered in evidence.

At the conclusion of the testimony the defendant's counsel requested the court to permit the jury, when they should retire to consider of their verdict, to take said paper with them, for the purpose of aiding their memory as to the figures thereon, about which witnesses had testified.

The court allowed the jury to take the paper with them when they retired, to which decision of the court the plaintiffs' counsel objected, and prayed an exception, which was allowed.

In charging the jury the court instructed them that the said paper was not evidence of defendant's claim, and that they were permitted to take it out with them and use it only for the purpose of refreshing the memory as to the figures thereon, which had been sworn to. Was this error?

In some States this question is committed to the discretion of the courts by statute, and in those States the action of the trial court on this subject is final. There is no such statute here.

In their work on Juries, Thompson and Merriam state, as a general principle, that bills of particulars, statements of claims and computations, used on the trial for reference, although not received in evidence, may be taken to the jury room if so directed by the court; giving as a reason that such papers, like the pleadings in a cause, may be material aid to the jury in determining what the claim of a party really is; provided, however, that the jury are told by the court, and made to understand, that such papers must not be regarded by them as evidence.

In the State of Pennsylvania the courts permit parties to send out with the jury statements of their claims, accounts, computations, etc., simply to enable the jurors to remember what has been proved, which the memory is not expected to retain without such statements before them. This practice is sustained by numerous decisions in that State.

In the State of Michigan the same practice prevails. In *Miller* v. *Cuddy*, 43 Mich. 273, the court said: "There was no error in permitting the jury to take to their room the computation made by the plaintiff's attorney. It was but an aid to the jury in estimating the amount due the plaintiff, if they found his theory of the case correct. They were in no way bound by it, and were not misled thereby, as they could not consider it as evidence. It was in accordance with well settled practice and was unobjectionable."

The same rule prevails in the State of Vermont, where the courts say to the jurors that they may take such papers to the jury room, but must not regard them as evidence (where they have not been so admitted at the trial) but can use them merely to refresh memory.

In the case now under consideration, the paper which the court permitted the jury to take to their room was an itemized account of the defendant's claim, concerning which there was proof at the trial. The counsel on both sides had referred to the paper in the course of the examination of witnesses. The court was careful to instruct the jury that the paper was not evidence of defendant's demand.

We find no error in this, and the judgment is affirmed.

Cornelius A. BLAUVELT, *Plff. in Certiorari*,
v.
Henry R. FECHTMAN.

*1. **Chattels in** the **possession of a mortgagor** may be **attached** for his debts.

2. **Chattels** in the possession of a mortgagor who, according to the terms of the mortgage, is entitled to possession until default be made in payment of the mortgage debt **do not, before default, belong to the mortgagee,** within the

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* Head notes by PARKER, J.

*Head notes by DIXON, J.

meaning of section 60 of the Act for the Trial of Small Causes. Rev. p. 550.

(Decided ——— — 1886.)

CERTIORARI to review a judgment of a justice of the peace on a verdict for claimant in attachment proceedings. *Reversed.*

Argued before Depue, Dixon and Reed, *JJ.*

The case is stated in the opinion.

Mr. **E. T. Cowles,** for plaintiff in *certiorari.*

Dixon, *J.*, delivered the opinion of the court:

This *certiorari* brings up the proceedings had before a justice of the peace on trial of a claim to a wagon which had been attached as belonging to Peter C. Schmidt.

The claimant, Henry R. Fechtman, rested his claim upon a mortgage of the wagon given to him by Schmidt, dated May 11, 1885, securing payment of a note for $100 of the same date, due in sixty days thereafter. The mortgage contained a provision that in case default should be made in payment of the note, the mortgagee might take possession of the wagon, but until such default the mortgagor was to remain in quiet and peaceable possession and full and free enjoyment of the same.

The claim was presented June 12, 1885, and the trial took place June 16, 1885. The note did not mature until July 13, 1885.

When the attachment was levied, the wagon was in the possession of the defendant in attachment, who was the general owner. The claimant did not become entitled to possession until the maturity of his debt. While the mortgagor retained possession of the wagon it was subject to seizure by virtue of an execution or attachment against him; *Fox* v. *Cronan*, 18 Vroom, 493; and the possession under such legal process could not lawfully be disturbed by any one whose right of possession had not become perfect against the defendant.

The trial upon the claim was to determine whether the property belonged to the claimant; Rev. p. 550, § 60; and inasmuch as, by his own showing, it appeared that he was neither the owner of the wagon nor entitled to possession of it, it could not, in any just sense, be said that the wagon belonged to him; and consequently the justice should, as requested, have instructed the jury to that effect. He refused, however, to do so, and the jury found for the claimant.

The finding and judgment thereon should be reversed.

Walter N. SOUDER
v.
Samuel E. LIPPINCOTT, *Admr., etc.*

*Where a **rule, to show cause why a judgment of non pros. should not be set aside,** was obtained on the ground that the files of the court in the suit showed that the judgment had been irregularly entered, and the rule recited the matters appearing by the files, the **plaintiff,** on a motion to make the rule absolute, **may produce** the **files** without other formality.

(Decided ——— — 1886.)

RULE to show cause why a judgment of *non pros.* should not be set aside, in an action of debt. *Rule made absolute.*

The case is sufficiently stated in the opinion.

Mr. **E. A. Armstrong,** for the rule.

Mr. **A. Flanders,** *contra.*

Per Curiam:

A rule to show cause why a judgment of *non pros.* should not be set aside was obtained, on the ground that the files of the court in the suit showed the judgment to have been irregularly entered. The rule recited the matters appearing by the files, which indicated the irregularity. The rule was served on the defendant's attorney, but nothing further was done under it until the time mentioned for showing cause.

The plaintiff then moved that the rule be made absolute, and produced the files in support of his motion. The defendant objected that the files had not been offered in evidence previously, under the rule to show cause, so that he might have had an opportunity of impugning their accuracy.

The plaintiff, having apprised the defendant of the files upon which he would rely, may produce them without other formality.

The rule should be made absolute.

COURT OF ERRORS AND APPEALS.

Rachel STULTS, *Plff. in Err.*,
v.
EAST BRUNSWICK & NEW BRUNSWICK TURNPIKE CO.

1. In a **suit** brought **by a turnpike company to recover tolls** it is **no defense** that the company has not complied with its charter in making its road, nor **that** such **road** was **not in a proper state** when defendant used it.
2. The **company** is **answerable** for **such** delinquencies **to the public** at large in a public prosecution, **but not to** the defendant nor any other **individual.**

(Decided ——— — 1886.)

ERROR to the Middlesex Circuit Court, to review a judgment on a verdict for plaintiff in an action to recover upon a contract to pay tolls. *Affirmed.*

The case is stated in the opinion.

Mr. **Alan H. Strong,** for plaintiff in error.

Mr. **A. V. Schenck,** for defendant in error.

Runyon, *Chancellor*, delivered the opinion of the court:

This suit was brought to recover tolls alleged to be due from Mrs. Stults to the Company, for travel by her over its road.

The action is in assumpsit, and is based upon a contract to pay $65 a year, in monthly payments, in commutation of tolls. There are also common counts, including counts for tolls, in the declaration. Mrs. Stults pleaded the general issue, and pleaded also, specially, that the Company had not complied with the requirements of the charter, in that it had not constructed the road according to the provisions of that instrument, and had not kept it in good repair, etc.

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* Head note by the Court.

One of the assignments of error is in reference to the exclusion of evidence of a conversation which, it is alleged, took place between Mr. Stults and J. Biddle Herbert, a director of the Company, prior to the making of the contract. It does not appear by the record what the subject of the conversation was which it was thus proposed to put in evidence. The same may be said in respect to the objection to the refusal to admit testimony as to what certain persons—one, the engineer of the Company, another, the superintendent, and the third, a toll-gate keeper—said when the witness complained to them of the condition of the road. It may be added that it does not appear that the statements of those persons upon the subject, whatever they might have been, were made under such circumstances as to be binding upon the Company.

The charge of the judge upon the subject of the Company's compliance with the requirements of its charter as to the construction of the road is also made the subject of objection. It was correct.

The cause was tried upon the issues, but it should be said the defenses set up by the special pleas were not allowable. Those matters constituted no defense to the action. To an action by a turnpike company for the recovery of tolls, it is not permissible to set up as a defense that the company has not complied with the requirements of the charter in making the road, nor that the road was not in a proper state when the defendant passed over it. The company is answerable for such delinquencies to the public at large in a public prosecution, and not to the defendant, or any other individual. *Vinkestone* v. *Ebden*, 1 Salk. 249; *Adams* v. *Beach*, 6 Hill, 271; *Centre Turnpike Co.* v. *Smith*, 12 Vt. 212; *Strong* v. *Dunlap*, 10 Humph. 423; *Proprietors of Quincy Canal* v. *Newcomb*, 7 Met. 276.

In *Vinkestone* v. *Ebden, ubi supra*, where the question was as to the liability to pay port duties, it was held that to entitle the town to recover the duties it was not necessary that it should show that it actually did keep the port in repair, for the consideration of the liability to pay the duties was not the keeping of the port in repair, but the fact that the town was bound to do so.

In *Proprietors etc.* v. *Newcomb, ubi supra*, which was a suit for tolls for using a canal, the court said: "This canal is a public highway * * * and every individual has a right to use the canal, on paying the toll. Levying a toll on a public highway, whether by land or water, is a claim of franchise; and whoever makes such claim without authority is liable to an information in the nature of a *quo warranto*. So if the canal is not made according to the provisions of the Act of incorporation, it is the failure to perform a public duty, for which indictment or information will lie. If the canal was opened, and the toll claimed, and the public did not interfere, and the defendant used the canal, he thereby subjected himself to the payment of the toll. By demanding the toll the plaintiffs claim to have complied with the conditions and provisions of their Act of incorporation; and the defendant, by using their canal, is estopped to deny their right to the payment of the toll; although they might be proceeded against by *quo warranto* for the repeal and dissolution of their charter, or by indictment for a misdemeanor in not keeping it in repair." See also *Nicholson* v. *Williamstown etc. Turnpike Co.* 4 Dutch. 142.

The charter of the Company authorized it to erect toll gates and take tolls, so soon as one mile of the road had been completed, and it provides a prompt, ready and efficient remedy in case the road should not be kept in proper repair. That remedy is by complaint to a judge of the court of common pleas, who is to appoint three disinterested freeholders to view the road and report whether it is in such a condition as required by law, and if their report be that it is not in such condition, the judge is to order that the gates be kept open until further order.

The judgment of the Circuit Court should be affirmed.

For affirmance—**The Chancellor, Chief Justice, Depue, Dixon, Knapp, Magie, Parker, Reed, Van Syckel, Brown, Clement, Cole, McGregor, Whitaker—14.**

For reversal—None.

Edward B. HUMPHREYS, *Plff. in Err.*,

v.

Mayor and Council of the Borough of WOODSTOWN, *Deft. in Err.*

*1. The **charge of** the **court,** or refusal to charge, can be assigned for error, only when the party objecting or requesting is injured by the ruling.

2. **A recorded road return cannot be attacked collaterally,** and cannot be adjudged void, except in direct proceedings to set aside.

3. If a **request to charge** be not supported by any evidence in the case, it is not error for the court to refuse to charge as requested.

4. The seventy-eighth section of the **Road Act** refers to cases where no part of the road has been opened and used.

5. The **court** has the **right to put in** proper **legal form a verdict,** if it be not changed in substance.

(Decided ——— —1886.)

ERROR to review a judgment in favor of plaintiff in ejectment to obtain possession of a strip of land claimed as a part of a public road. *Affirmed.*

The case is stated in the opinion.

Messrs. **M. P. Grey** and **S. H. Grey,** for plaintiff in error:

Where there is both competent and incompetent evidence offered, to sustain the same claim, the verdict will be set aside.

Settle v. *Alison*, 8 Ga. 201-209; *Marquand* v. *Webb*, 16 Johns. 89-91; *Delaware etc. Canal Co.* v. *Barnes*, 31 Pa. 193, 196, 197.

The necessity for the withdrawing, by the court, of any incompetent evidence from the consideration of the jury is recognized and enforced in the following cases.

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*Head notes by PARKER, *J.*

Deerfield v. *Northwood*, 10 N. H. 269; *Hamblett* v. *Hamblett*, 6 N. H. 334; *Randall* v. *Doane*, 9 Gray, 408; *Tullidge* v. *Wade*, 3 Wils. 18.

So carefully have the courts guarded the rights of litigants, to a perfectly fair trial, by strictly legal methods and upon entirely competent proof only, that it has been held that even the direction of the court to the jury to disregard illegal evidence is not enough to cover the error of its admission.

Shaeffer v. *Kreitzer*, 6 Binn. 430; *Nash* v. *Gilkeson*, 5 Serg. & R. 352; *Ingham* v. *Crary*, 1 Penr. & W. 389; *Gillet* v. *Mead*, 7 Wend. 193.

The courts of review hold that incompetent evidence having been admitted in the trial court, the court of review must set the verdict aside and grant a new trial.

Gage v. *M'Ilwain*, 1 Strob. Law (S. C.) 135; *Den* v. *Johnson*, 3 Harrison (N. J.) 101.

The return of surveyors, of August 19, 1820, was not competent evidence by which to prove the existence of a public road, when objection was made to its admission in evidence. It is not the record of the proceedings of the court of common pleas, but of the proceedings of the surveyors who were exercising a special authority given by the statute, not conferred by the court.

In all cases when the exercise of a special authority is delegated to particular persons, or special and limited tribunals, the preliminaries which give them power to act must appear on the face of the proceedings themselves.

State v. *Lewis*, 2 Zab. 564.

The return itself shows no compliance with jurisdictional requirements and cannot be offered as a means of proof. There are several grounds of objection.

1. The return does not show due proof of advertisement of the meeting of the surveyors.

That the surveyors shall act on the proof of the advertisement of their meeting is a jurisdictional fact which is necessary to give validity to their action.

State v. *Scott*, 4 Halst. Law, 22; *Turner* v. *Bank of N. A.* 4 Dall. 8 (4 U. S. bk. 1, L. ed. 718); *State* v. *Van Geison*, 3 J. S. Green, 341, 342; *N. J. etc. R. R. etc. Co.* v. *Suydam*, 2 Harrison (N. J.) 31; *Stout* v. *Freeholders*, 1 Dutch. 205; *Den, Obert,* v. *Hammel*, 3 Harrison (N. J.) 78; *State* v. *Lewis*, 2 Zab. 564, 566; *State* v. *Lord*, 2 Dutch. 140; *Matter of Highway*, 1 Harrison (N. J.) 93.

2. The return shows that five of the surveyors acted, and made and signed the return; but it does not show whether the sixth was present and did not concur, or if absent whether he was served with such notice as the law requires. This omission is fatal.

State v. *Van Geison*, *State* v. *Scott*, *N. J. etc. R. R. etc. Co.* v. *Suydam*, and *State* v. *Lord*, *supra; Griscom* v. *Gilmore*, 1 Harrison (N. J.) 106.

3. In the return an adjournment to a different place than that fixed by the court is set out, but no showing of any notice, either verbal to parties or written to the sixth surveyor.

Act 1818, § 5; *State* v. *Lippincott*, 1 Dutch. 434.

4. The surveyors do not show by the return that they regarded either public or private convenience, the shortest distance or best ground.

State, Parmley, v. *White*, 6 Vroom, 204.

The highest courts of New Jersey have repeatedly held the proceedings of special and limited jurisdictions to be void, when jurisdictional facts do not affirmatively appear, and that they may be impeached collaterally.

Martin v. *Carron*, 2 Dutch. 230; *S. C.* Id. 594; *Nixon* v. *Ruple*, 1 Vroom, 58; *Munday* v. *Vail*, 5 Vroom, 420; *Cross* v. *Morristown*, 3 C. E. Green, 305.

In *Tainter* v. *Mayor of Morristown*, 4 C. E. Green, 46, a return made under Act of 1774 was challenged because it did not appear that proper notice of the meeting of surveyors had been given. No proof of any notice whatever was required by this Statute of 1774; and consequently the return, if attacked on that ground directly by *certiorari*, would not have been set aside, as the chancellor admits in his opinion. It was then a perfectly good return, and unimpeachable either by direct attack or collateral inquiry. All that the court says beyond this is therefore mere *dicta*.

Taintor v. *Morristown*, 4 Vroom, 65, 66.

Messrs. **C. H. Sinnickson** and **Wm. E. Potter**, for defendant in error:

Said street or road became a public highway.

1. By being laid out as a public road, by surveyors of the highways of Salem County in 1820.

2. By user, having been used by the public as a highway for more than twenty years.

3. By dedication by the owners of the soil.

This bill is not a mere statement of documentary evidence to be offered by plaintiffs, but is a specific statement of the nature of the plaintiffs' claim, and they are confined to it.

Graham v. *Whitely*, 2 Dutch. 255.

That the court of common pleas is a court of general jurisdiction is undeniable.

Den, Vanderveere, v. *Gaston*, 4 Zab. 818; *Dean* v. *Thatcher*, 3 Vroom, 470.

If proceedings to lay out roads, under the Act of 1818, with its supplements, constitute "proceedings in the course of judicial action" before that court, they must stand until reversed by direct attack, and cannot be collaterally questioned.

That they are such proceedings appears to be patent. 1, they are begun by petition to the court; 2, the court exercises a discretion in the selection of surveyors.

Oxford v. *Brands*, 16 Vroom, 332.

Such discretion is not reviewable.

Parsell v. *State*, 1 Vroom, 530.

The proceeding to lay out a road has been, directly and in terms, decided by the supreme court to be "a proceeding in the course of judicial action."

Frame v. *Boyd*, 6 Vroom, 457, 458.

See also on the general question:

Thompson v. *Tolmie*, 2 Pet. 157 (27 U. S. bk. 7, L. ed. 381); reversing *Tolmie* v. *Thompson*, 3 Cranch, C. C. 123; *Camden* v. *Mulford*, and *Carron* v. *Martin*, 2 Dutch. 49, 594, 598; *Vantilburgh* v. *Shann*, 4 Zab. 740, 748; *Taintor* v. *Morristown*, 4 Vroom, 57, 67; *State, Bodine,* v. *Trenton*, 7 Vroom, 198, 200; *Stokes* v. *Middleton*, 4 Dutch. 32; *Tainter* v. *Morristown*, 4 C. E. Green, 48–59.

The principle is affirmed by this court in respect of condemnation proceedings, in

State, Morris etc. R. R. Co. v. *Hudson Tunnel R. R. Co.* 9 Vroom, 548.

Municipal assessments for the purpose of payment of money under them, although defective, held conclusive until set aside by direct proceeding.

Davenport v. *Elizabeth*, 12 Vroom, 362; *Fuller* v. *Elizabeth*, 13 Vroom, 427.

The court, especially after great lapse of time, will make all presumptions necessary to the validity of public official acts, as a matter of public policy.

Williams v. *Eyton*, 2 Hurlst. & N. 771; *S. C.* affd. 4 Hurlst. & N. 357; *Rex* v. *Morris*, 4 Term Rep. 552; *Rex* v. *Stockton*, 5 Barn. & Adol. 546; *Waddington* v. *Roberts*, L. R. 3 Q. B. 579; *Bank of U. S.* v. *Dandridge*, 12 Wheat. 64, 69–71 (25 U. S. bk. 6, L. ed. 552); *Chosen Freeholders of Hudson Co.* v. *State*, 4 Zab. 718; *State, Paulison*, v. *Taylor*, 6 Vroom, 184, 188; *State* v. *Alstead*, 18 N. H. 59; *Tainter* v. *Morristown*, 4 C. E. Green, 59.

As the verdict was based solely upon user, the admission or rejection of the minutes and return could not possibly have affected the result, and did not prejudice the rights of the defendant below.

It is a well settled rule that unless the error complained of did occasion or might have occasioned some prejudice to the rights of this defendant, it constitutes no ground for reversal.

Graham v. *Whitely*, 2 Dutch. 260; *Freeman* v. *Bartlett*, 18 Vroom, 35; *Smith* v. *Ruecastle*, 2 Halst. Law, 427; *Hunter* v. *State*, 11 Vroom, 498.

Even if the court below clearly erred in the decision, the judgment will not be reversed on writ of error, unless the evidence rejected be such as might have produced a different result.

Rodenbury v. *Rosebury*, 4 Zab. 493; *Ayres* v. *Van Lieu*, 2 South. 768; *Marshall* v. *Hann*, 2 Harrison (N. J.) 429.

No exception to the action of the judge as to the modification of the verdict was taken in the court below.

On error a point not embraced in any exception taken below cannot be considered or decided.

Pa. R. R. Co. v. *Page*, 12 Vroom, 188; *Oliver* v. *Phelps*, Spencer, 180; *Coxe* v. *Field*, 1 J. S. Green, 218; *Conover* v. *Middleton*, 13 Vroom, 382; *Associates of Jersey City* v. *Davison*, 5 Dutch. 417; *Hoey* v. *Lewis*, 10 Vroom, 507; *Perth Amboy Mfg. Co.* v. *Condit*, 1 Zab. 659.

The statute gives the largest latitude to the court in the amendment of all defects and errors in any proceeding in civil causes, for the purpose of determining in suits the real question in controversy.

Rev. p. 1010, § 138.

No objection can be taken by the defendant below that no damages were found by the jury. This is not to the disadvantage of the defendant below. A man shall not reverse judgment for error, if he cannot show that the error is to his disadvantage.

Tey's Case, 3 Coke, Part 5, fol. 38 b, p. 78.

When damages only are to be recovered, if none are assessed the verdict is bad; but it is otherwise in ejectment, debt, etc., when anything is to be recovered besides damages.

Trial per pais, 293, 5 Bac. Abr. 324; 2 Lilly, Abr. 159; *Harvey* v. *Snow*, 1 Yeates, 159; Sedg. Dam. 7th ed. 244; *Budd* v. *Hiler*, 3 Dutch. 55.

When the jury omitted to assess damages as required by statute, the court held it to be a defect beneficial to plaintiff in error, and refused to reverse.

Harrell v. *Stringfield*, 1 Morris (Iowa) 18; *Hunt* v. *O'Neill*, 15 Vroom, 566.

Although the verdict is not in form and does not find the technical issue raised by the pleadings, if it is at the same time a verdict that the court can understand, and there is no difficulty in concluding a verdict out of the finding, it is the duty of the court to mold and work it into form, according to the justice of the case.

Foster v. *Jackson*, 1 Hob. 54; *Hawks* v. *Crofton*, 2 Burr. 698; *Porter* v. *Rummery*, 10 Mass. 64; *Cane* v. *Watson*, 1 Morris (Iowa) 52; *Smith* v. *Johnson*, 8 Tex. 418; *Jones* v. *Julian*, 12 Ind. 274; *Settle* v. *Larabee*, 2 Greenl. 37.

In our own State this has been repeatedly held. If the point in issue can be concluded from the finding of the jury, the court will mold it into form, and give it due and legal effect.

Stewart v. *Fitch*, 2 Vroom, 17; *Phillips* v. *Kent*, 3 Zab. 155; *State Street Meth. Church* v. *Gordon*, 2 Vroom, 264; *Ware* v. *Millville Fire Ins. Co.* 16 Vroom, 177; *Ordinary* v. *Thatcher*, 12 Vroom, 412; *Price* v. *N. J. R. R. & T. Co.* 2 Vroom, 232.

Whenever the verdict in ejectment is sufficiently certain to enable the court to give judgment, and the sheriff to deliver possession, when that is required by *habeas* it will not be disturbed.

Tyson v. *Passmore*, 7 Pa. 273; *Green* v. *Waterouse*, 17 Serg. & R. 400; Adams, Eject. 391, and notes; *Hagey* v. *Detweiler*, 35 Pa. 409.

The verdict, either as rendered or molded, is sufficient to sustain the judgment entered.

In a bastardy case the statute required the jury, by verdict, to declare and find whether the accused was the father of the child: The verdict was "guilty." Nothing else. Court permitted it to stand and gave judgment.

Gaskill v. *Downe*, 7 Vroom, 356.

Verdict in form "We the jury find for the plaintiff," held to be sufficient, the amount not being in issue.

Jones v. *King*, 30 Minn. 368.

In action on claim of property seized under execution, verdict: "We, the jury, find the property subject and twenty-six per cent damage;" held good.

Harvey v. *Head*, 68 Ga. 247; *Browning* v. *Skillman*, 4 Zab. 355.

In action on promissory note and no dispute as to the execution terms or amount of note, verdict was: "We, the jury, find for plaintiff." Upon recording the verdict the court rendered judgment for amount of note. Sustained on appeal.

Hutchinson v. *Inyo Co.* 61 Cal. 119.

Also see:

Ernest v. *Brown*, 4 Bing. N. C. 162; *Richardson* v. *Mellish*, 3 Bing. 334; *Lowrey* v. *Brown*, 8 Sneed, 17; *Steed* v. *Barnhill*, 71 Ala. 157; *Massey* v. *Duren*, 7 S. C. 310; *Woodruff* v. *Webb*, 32

Ark. 612; *Plummer* v. *Currier*, 52 N. H. 287; *Delaware etc. R. R. Co.* v. *Toffey*, 9 Vroom, 525; *Patterson* v. *Hubbard*, 30 Ill. 201; 2 Johns. 181; *Den, Obert*, v. *Hammel*, 3 Harrison (N. J.), 74; *Herbert* v. *Hardenbergh*, 5 Halst. Law, 264; *Stephens* v. *Westwood*, 25 Ala. 716; *Hawley* v. *Twyman*, 24 Gratt. 516; *Russell* v. *Pyland*, 2 Humph. 131; *M'Murray* v. *Oneal*, 1 Call, 216; *Elliott* v. *Sutor*, 3 W. Va. 37; *Brown* v. *Dean*, 123 Mass. 254; *Hamm* v. *Culvey*, 84 Ill. 56.

It has been held in this State that power of amendment conferred by section 138 of the Practice Act extends to changing actions from assumpsit to covenant.

Am. Life Ins. Co. v. *Day*, 10 Vroom, 89; *Redstrake* v. *Cumb. Ins. Co.* 15 Vroom, 295.

It also extends to striking out the name of the plaintiff and inserting another; *Farrier* v. *Schroeder*, 11 Vroom, 601; after argument in court of errors.

Apgar v. *Hiler*, 4 Zab. 808; *Brown* v. *Warden*, 15 Vroom, 179; *Lehigh Valley Co.* v. *McFarland*, 15 Vroom, 674.

Any amendment necessary to sustain judgment that might be made lawfully under a rule of the court will be considered as already done.

Coxe v. *Field*, 1 J. S. Green, 216; *Willis* v. *Fernald*, 4 Vroom, 206.

Parker, *J.*, delivered the opinion of the court:

A suit in ejectment was brought by the Mayor and Council of the Borough of Woodstown against Edward B. Humphreys, to recover possession of a parcel of land in said Borough, containing forty-seven square feet.

The nature of the controversy between the parties is briefly stated in the bill of particulars furnished by the plaintiffs before the trial, which, by consent of counsel, was made part of the record. In it the plaintiffs claim that the premises in question are included within the bounds of a public road or street in the Borough of Woodstown, and that said road or street, including the *locus in quo*, had been used by the public as a road for more than twenty years, and had become a public highway by user.

It was also claimed that a public road, including the land, the possession of which was in dispute, had been laid out by surveyors of the highway in the year 1820, and the return of same, in August, of that year, recorded in the clerk's office of the County of Salem.

At the trial a number of witnesses were called and examined upon the question of user. The plaintiffs also offered in evidence the book of minutes of the Court of Common Pleas of the County of Salem of June Term, 1820, containing the order of the court appointing surveyors of the highways to lay out a public road. The return of the road laid out by the surveyors, dated August 19, 1820, was also offered.

To these offers objection was made, not on account of the mode of proof, but because of alleged defects and irregularities in the proceedings of the surveyors, appearing on the face of the order and return. The objections were overruled, the evidence admitted, and exception taken.

Upon the question of user the judge charged the jury first to determine and return, as matter of fact, whether the *locus in quo* had been used for a public road, running over the place in dispute, for more than twenty years before the year 1865, the time of the erection by defendant of the railing and cellar way complained of.

The judge further charged that if the jury found that question in the affirmative, they need not proceed further in the investigation, but return a verdict for the plaintiffs; but if they were not satisfied, from the evidence, that there was a public road there by user for a period of over twenty years previous to 1865, including the *locus in quo*, then they should proceed to inquire and to determine whether the public road laid out and returned by surveyors of the highways August 19, 1820, included within its bounds the *locus in quo*.

When the jury rendered their verdict the judge was not present; and by consent of counsel the clerk received it. The verdict rendered by the jury was as follows, viz.: "We find for the plaintiffs; and we find that the place in dispute was within the limits of a public street for a period of at least twenty years anterior to the erection of the railing and cellar way by the defendant in 1865."

Application upon notice was made to the court to mold the verdict into proper form, which was heard; and the judge thereupon made the following order, viz.:

"It appearing to the court that the jury impaneled in above stated cause did find and return a verdict in said cause, which, as recorded by the clerk, is as follows, viz.: (as above stated) and application being made to the court to mold said verdict into proper form, and it appearing that due notice of the making of this application hath been given to the attorney of record of the said defendant, and the court having heard such application, and having duly considered the matter in question, it is, on this 26th day of October, A. D. 1885, ordered, on motion of the attorney of record of the plaintiffs, that the verdict of the jury aforesaid be and the same is hereby amended and molded into proper form, so that the same shall read as follows, viz.: 'We find that the said defendant, Edward B. Humphreys, is guilty in manner and form as the said plaintiffs, the Mayor and Council of the Borough of Woodstown, complained against him; and we do assess the damages of the said plaintiffs, over and above their costs and charges, to six cents; and we do also find that the place in dispute was within the limits of a public street, for a period of at least twenty years anterior to the erection of the railing and cellar way by the defendant in 1865.' And it is further ordered that the clerk of the court make entry of the verdict returned by the jury aforesaid in manner and form as the same is herein above molded and amended by the court."

Thus it appears that the jury found the *locus in quo* to be in a public highway, made so by user for more than twenty years before the occupation thereof by defendant in 1865; and upon such finding the plaintiffs were entitled to judgment of possession, whether the public road laid out in 1820 by surveyors of the highways included the premises in dispute or not. The jury did not pass upon any question, except whether the premises were within a public highway, made so by user; and finding that issue in the affirmative, it was not necessary for them to consider, and they did not consider and determine, whether the disputed premises were within the bounds of the public road laid out in 1820.

The exceptions taken at the trial related to the admission of evidence, and refusals to charge in reference to the public road laid out in 1820. As the verdict was based alone on the fact of a highway by user, which included the *locus in quo*, the admission in evidence of the minutes of the court of common pleas, and the return of the road laid out in 1820, could not affect the result. The plaintiffs were entitled to a verdict, whether that evidence was legal or not.

So, also, it matters not whether the trial judge was right or wrong in refusing to charge as requested, because the requests related to the road laid out in 1820, a subject which was eliminated from the cause, when the jury based their verdict solely upon the fact of a highway by user, including the *locus in quo*.

If the judge had erred in admitting in evidence the book of minutes and the return of the surveyors, and in refusing to charge as requested, no injury to the defendant resulted, because the verdict was grounded only on the question of user, in relation to which no exception to evidence or to the charge was taken. The charge of the court, or refusal to charge, can be assigned for error only when the party objecting or requesting is injured by the ruling.

The counsel for the plaintiff in error insist that the admission of the return of the public road of 1820 by the surveyors of the highways, and the book of minutes of the court of common pleas, injured the defendant, because it tended to incline the jury to the result they reached on the question of user.

The argument is that if the jury had evidence before them that a public road had been laid out by surveyors of the highways, over the locality in question, more than sixty years previous, they would be more likely to reach the conclusion that there was a highway there by user. It is difficult to perceive how this would be possible, in view of the charge of the court, which submitted to the jury the questions separately, in clear terms. The judge charged distinctly that the jury should first consider and determine whether the place in dispute was within the limits of a public highway created by user for more than twenty years, and if they so found they need not go further, but return a verdict for the plaintiffs; but if they did not so find, then they might proceed to the consideration of the question whether the premises in dispute were within the bounds of the public road laid out in 1820.

But suppose the admission in evidence of the book of minutes, and the return of the surveyors, did have some influence upon the jury, tending towards the result arrived at, and manifested by their verdict; if such evidence was not illegal, the judgment entered on the verdict will not be disturbed. It is clear that the judge did not err in admitting the evidence.

It will be observed that no objection was made to the mode of proof; but it is contended that upon inspecting the order for the appointment of surveyors of highways, and the return of the road, there appears on the face of the papers that there was a noncompliance with the law, in respect to jurisdictional requirements, which rendered the return of the road illegal and of no probative force, and therefore inadmissible as evidence.

One alleged defect is that it does not appear that proof was made before the surveyors that the advertisements of their meeting had been set up according to law; or that any notice whatever of their meeting had been given. Another alleged defect is that while it appears on the face of the return that only five of the surveyors signed it, it does not appear whether the sixth surveyor was present, or if he had notice of the meeting.

If these objections to the legality of the return of the road had been made before the Court of Common Pleas of the County of Salem, in 1820, at the term succeeding the coming in of the return, it is probable it would have been set aside by that court; and if not set aside there, the proceedings might have been removed, within the time limited by law, to the supreme court, where they would undoubtedly have been declared illegal. But the legality of the return cannot be questioned in this cause, by reason of alleged unlawful action or want of action by the surveyors of the highway. The court of common pleas had at that time jurisdiction over the subject matter, but a recorded road return cannot be attacked collaterally. At this distant period of time, upon the production and proof of a road return, the court will presume that whatever was necessary to make the return valid was done; and a party will not be permitted to go behind the return, to question the proceedings.

In *Frame* v. *Boyd*, 6 Vroom, 457, it was decided that the return of a public road was a proceeding in the course of judicial action. The court of common pleas, under a well settled course of adjudication, has power to set the return aside, if defective. If not set aside, it was the duty of the court to order the return recorded; and this involved judicial inquiry.

The opinion in the case just cited holds that the return of a public road is not merely a statutory proceeding outside the court, filed in the office, over which the court has no control, but, although statutory, it is part of a judicial proceeding. The recorded return of a road is equivalent to a judgment, and cannot be questioned collaterally.

In direct conflict with the uniform practice of the courts of common pleas of the various counties of this State, and in opposition to the decisions of the courts, the counsel for the plaintiffs in error cannot successfully contend that the court of common pleas has jurisdiction over the subject of roads only to the extent of deciding whether proper notice of the application had been given, and selecting the surveyors to serve, and that when that had been done, the jurisdiction of the court ceased. If the court of common pleas was invested with such power only, it might be considered a tribunal of special and limited jurisdiction; and the result of its action might be impeached collaterally, when jurisdictional facts did not appear. But the court of common pleas, in regard to the subject under consideration, is a court of general jurisdiction.

The Road Act of 1818, under which the road in question was laid, is similar to the present

Act, the eighth section of which provides that if no *caveat* be entered, the clerk shall, by order of the court, record the return; and every road so recorded shall be a lawful highway. Should there be a *caveat*, and the return not be set aside by the court of common pleas, and application be made for review by chosen freeholders, the court appoints them; and when they make their certificate the same has no binding effect until the court orders it to be recorded. Thus it is seen that the court of common pleas has jurisdiction over the subject matter.

In *Tainter* v. *Morristown*, 4 C. E. Green, 46, where the return of a road came up collaterally, it was decided that it could not be adjudged void for any irregularity or deficiency, and that where the road had been used under a return, the court would presume that the proceedings of the surveyors were lawful, although facts requisite to give the surveyors jurisdiction did not appear.

The evidence admitted was legal, and there was no error in the ruling of the court to receive it.

The seventy-eighth section of the Road Act provides that all public roads having been laid out by surveyors or otherwise, and not opened, worked or used, for more than twenty years next before the 24th day of March, 1859, shall be considered and are declared by said section to be vacated.

In view of this section the counsel of defendant requested the court to charge that if the jury believed that the road of 1820 was not opened and used over the *locus in quo* for twenty years or more next after the same was laid out, then it was, to the extent of the *locus in quo*, vacated.

The court properly refused so to charge. There was no evidence showing that the *locus in quo* was not used as part of a public highway for twenty years or more after it was laid out. A request to charge must be supported by evidence; and if a request be made which is not supported by any testimony, and the court refuses to charge as requested, it is not error. *Davison* v. *Schooley*, 5 Halst. Law, 171.

The question upon which a charge is requested must appear not to be merely hypothetcal, but must be warranted by the evidence, and necessarily involved in the verdict. *Allen* v. *Wanamaker*, 2 Vroom, 370.

The proposition contained in the request is not the law. The section in the Road Act just cited refers to cases where no part of the road laid out has been opened and used. A road may be opened, used and worked throughout its entire length, and yet not used and worked on every foot of its entire breadth; and if the *locus in quo*, being within the lines of the road, was not actually passed over by the wheels of vehicles, it would not therefore be vacated.

It has been settled in this State that encroachment on a highway cannot be legalized by lapse of time. If the public once acquires a right to any part of a road, it cannot be lost by negligence of public officers. 4 C. E. Green, 59.

In that case the chancellor said that "Time does not run against the State or the public. * * * To protect highways from encroachments, that it is the business of no one to resist, requires that the public be allowed to resume its rights at any distance of time, disregarding any loss to those who have appropriated it and erected improvements on the public domain."

The last assignment of error is directed against the power of the court to mold the verdict of the jury. The attorney of plaintiff in error, attending upon notice, made no objection to the court directing the verdict put in proper form, nor did he except to the order made by the judge on that subject. Under the circumstances, counsel of the plaintiff in error has no right now to be heard on that question. But supposing the question properly before this court, it is clear that there was no error in the ruling. The verdict was not changed in substance, but only put in proper form. This practice is of almost daily occurrence. It is seldom that a verdict is stated by a jury with technical correctness. The one hundred thirty-eighth section of the Practice Act (Rev. p. 869) gives ample power to the court, in order to prevent the failure of justice by formal objections, to amend as may be necessary to determine the question in controversy.

It has been decided repeatedly, in this and other States, that if the point at issue can be concluded from the finding of the jury the court will mold it into form and give it due and legal effect. *Stewart* v. *Fitch* and *Price* v. *N. J. R. R. & T. Co.* 2 Vroom, 17, 229; *Phillips* v. *Kent*, 3 Zab. 155.

The right of the Borough to bring the suit was not controverted; and the court has not, therefore, considered that question.

There being no error in the rulings of the court, *the judgment is affirmed.*

For affirmance—**The Chancellor, Chief Justice, Depue, Dixon, Knapp, Magie, Parker, Scudder, Van Syckel, Brown, Cole, McGregor, Paterson**—13.

For reversal—None.

Caroline R. HUNT, *Plff. in Err.*,

v.

STATE, Sigmund WARSHUNG, Prosecutor, *Deft. in Err.*

*1. The supplement to the **Act to regulate** the practice of courts of law, approved April 25, 1884, (P. L. p. 269) **limiting** the allowance of a writ of **certiorari to review an assessment for taxes,** to recover which any sale has been made by virtue of any special or local law, **to six years from** the date or time of such **sale, is** prospective and **not retroactive.**

2. Such **construction** is favored in law.

3. It is essential that all **statutes of limitation** which effect axisting rights and remedies shall allow a reasonable time after they take effect for the commencement of suits on such cause of action.

4. An **advertisement of sale** of lots **for taxes** must be sufficient in description to warn the owner and direct the attention of others to the particular property to be sold.

(June Term, 1886.)

*Head notes by SCUDDER, J.

ERROR to the Supreme Court, to review a judgment affirming on *certiorari* an assessment for a tax and invalidating a sale therefor. *Affirmed*.

Land in the City of Rahway was assessed to Julia Chapman for taxes of 1876, and in default of payment thereof sold to the mayor, etc., of the city, and the city subsequently assigned the certificate of the sale to Caroline R. Hunt.

The case was heard in the Supreme Court at the February Term, 1885, before Depue, Van Syckel and Scudder, *JJ.*, on *certiorari* to review the assessment and sale, and the following opinion was there delivered by SCUDDER, *J.*:

The first motion is made on behalf of the defendants, to dismiss the writ of *certiorari*, because not allowed within six years from the date or time of the sale, according to the "supplement to the Act to regulate the practice of courts of law," (P. L. 1884, p. 269) approved April 25, 1884.

The sale of these lands for taxes was made January 5, 1878; the certificate of sale is dated March 20, 1878, and the writ was allowed October 20, 1884, after more than six years had elapsed. The writ was purchased in aid of an action of ejectment and is within time, unless this recent statute is applicable. *State, Baxter*, v. *Jersey City*, 7 Vroom, 188.

The Act is brief, and enacts "That no writ of *certiorari* shall hereafter be granted or allowed to review any assessment for taxes, to recover which taxes any sale has been had or made by virtue of any special or local law, or to review the proceedings of any such sale, unless such writ be granted or allowed within six years from the date or time of such sale." It is to take effect immediately.

This sale was made under a special and local law, to wit: the charter of the City of Rahway, and is, in this respect, within the terms of the statute. But the important question is whether the whole Act is intended to be retrospective, or prospective only. Its terms are prospective, and apply to all cases where, in the future, any sale has been had or made for the recovery of taxes. The fact of such sale is made the point on which the limitation shall begin to act; and the writ can only be granted or allowed within six years thereafter.

It is true that the words "has been had," or "has been made," might apply to a sale that had been made before the law was enacted; but the construction already given, that it may indicate a sale in the future, is sufficient to decide which shall be adopted, for the rule of construction of statutes is that every reasonable endeavor shall be made so to interpret the statutory text as to give the law a prospective and not a retroactive effect. *Proprietors* v. *Jones*, 7 Vroom, 206; *State, Alden*, v. *Newark*, 11 Vroom, 92; *State, McGovern*, v. *Connell*, 14 Vroom, 106; *Citizens' Gas Light Co.* v. *Alden*, 15 Vroom, 648; *Boylan* v. *Kelly*, 9 Stew. Eq. 331.

If a retroactive effect were given, then the cases of municipal sales in the past, where the parties may, by statute (Rev. p. 1045, § 15), have the proceedings reviewed by *certiorari*, are suddenly deprived of this remedy without any time given before the Act takes effect. A law limiting the time in which an action shall be brought has been held not to apply to a suit which was begun after the Act was passed, but before it took effect. *State, Vreeland*, v. *Bergen*, 5 Vroom, 438.

It is conceded that while there is no power in the Legislature to take from this court the right to allow a writ of *certiorari*, or to deprive the writ of any of its essential attributes as a prerogative writ, yet a reasonable regulation or limitation as to the time within which it is to be sued for and allowed, is valid. *State, Green*, v. *Jersey City*, 18 Vroom, 118.

But it has been doubted whether any such limitation can be imposed, where an assessment on lands has been made under a statute which is challenged as unconstitutional. *State, Van Cleef*, v. *New Brunswick*, 9 Vroom, 320.

It is essential that all statutes of limitation which affect existing rights and remedies shall allow a reasonable time after they take effect, for the commencement of suits upon such causes of action.

This is a general rule which has been applied in many cases. Cooley, Const. Lim. § 366, and notes.

To give this statute immediate effect as a retroactive law would take away rights now secured by statute, without any time given for their assertion. This will not be presumed to be the legislative intention; nor will such construction be given, unless the words used are so positive as to permit no other interpretation.

The other reasons relating to the form of the assessment are either not sustained by the facts, as proved, or are amendable under the Statute of 1881, and may be corrected by evidence outside the return. *Woodbridge* v. *State, Allen*, 14 Vroom, 262; *Conover* v. *Honce*, 17 Vroom, 347. It is not necessary to refer to them in detail.

There is, however, a defect in the advertisement of sale which cannot be remedied. The only notice of what property is to be sold is in these words: "Third Ward, Chapman, Julia A., cost 1.50, Int. 24.22, Tax, 177.23—Total 202.95."

This is the only advertisement of eight parcels of land in the Third Ward belonging to Julia A. Chapman. To hold such notice of sales of land for taxes good would go far beyond any case yet decided.

State, Allen, v. *Woodbridge*, 13 Vroom, 401, where there was a fuller description given, says it should be such as to warn the owner for what property he is assessed, and such as to secure a fair sale, by showing to purchasers what property is to be sold. Here, there was no notice to purchasers to indicate whether one lot or eight lots were to be sold, and no description whatever, by which they could be identified.

This omission will invalidate the sale and all that follows it, including the certificate of sale to the city and the declaration of sale to Caroline R. Hunt.

The assessment is particular and sufficiently descriptive of the land, giving the name of the owner, the ward, the streets, number of lots, and amount assessed.

This will, therefore, be affirmed, but without costs to either party.

Messrs. **Vail & Ward,** for plaintiff in error.

Mr. **Robert E. Chetwood,** for defendant in error:

The defect in the advertisement of sale, cannot be remedied by invoking the aid of the Statute of March 23, 1881, P. L. page 194, because this Act gives jurisdiction to the court to amend in case of irregularities or defects in form only.

State v. *Montclair etc. R. R. Co.* 14 Vroom, 524; *State, Peckham,* v. *Newark,* 14 Vroom, 576; *Conover* v. *Honce,* 17 Vroom, 347.

The absence of the description of the property in the advertisement of the sale is not an irregularity or defect in form only. The description of the property is essential and necessary to a valid advertisement and sale of the property. It is a condition precedent to such advertisement and sale. Without a description of some kind the sale is absolutely void. The want of such description is not an irregularity or defect in form only, and therefore is not within the terms of the statute.

Per Curiam :

The judgment in this case is affirmed, for the reasons given by the Supreme Court in its opinion.

For affirmance—**The Chancellor, Chief Justice, Dixon, Knapp, Magie, Parker, Reed, Brown, Clement, Cole, McGregor, Paterson, Whitaker.**—13.

For reversal—None.

COURT OF CHANCERY.

John H. HAGERMAN *et al.*
v.
John C. FARR *et al.*

A **sale, by partners to a copartner,** of all the partnership property, which was **conceived in fraud,** and carried through by fraudulent representation on the part of the vendee, cannot be upheld; it will, at the suit of a creditor of the firm, be **declared void;** and where the property sold has been converted into money, the proceeds must be accounted for.

(Filed March 28, 1887.)

BILL to set aside, as fraudulent towards partnership creditors, a transfer by partners to a copartner. *Decree advised declaring transfer void.*

The facts in this case are the same as those in *Second National Bank of Red Bank* v. *Farr,* 6 Cent. Rep. 321.

Messrs. **Collins & Corbin** and **A. C. Hartshorne,** for complainants.

Mr. **W. S. Stuhr,** for defendants.

Bird, *V. C.*, filed the following conclusions:

This case was heard with that of *Second Nat. Bank of Red Bank* v. *Farr, ante,* 321.

I have taken still more time to consider this than that. And after all, my mind is that the whole transaction was conceived in fraud, and was, by fraudulent misrepresentations, carried through.

However much Mr. Farr may have been convinced of his ability to accomplish what he said he could, it was the merest delusion, as every step taken by him, after the purchase of the interests of his copartners proved. This is, in the law, a fraud which cannot be upheld by the courts.

I will advise that the sale be declared void. As the property has been converted into money, the proceeds must all be accounted for. When an application is made for distribution other questions which have been raised, will be determined. The complainants are entitled to costs.

Ella CHADWICK
v.
ISLAND BEACH CO. *et al.*

1. The practice of the court of chancery is to put the **purchaser at a foreclosure sale** in possession by a **writ of assistance,** when the person refusing to deliver possession was a party defendant in the foreclosure proceedings.
2. **Where** the **complainant and defendant in a foreclosure** proceeding **both derived a title** to the mortgaged premises **from** the **same source, but defendant also had title from another source,** which latter title defendant claims is the superior and better title, and complainant only alleged in the proceedings the title of defendant derived from the common source, defendant's default only admits such title, leaving the title derived from the other source undecided; and **against** such **latter title complainant is not entitled to a writ of assistance.**

(Filed April 1, 1887.)

MOTION for writ of assistance. *Denial of motion advised.*

The case is stated in the opinion.

Mr. **D. J. Pancoast,** for complainant, for the motion.

Mr. **P. L. Voorhees,** for defendant Island Beach Co., *contra.*

Bird, *V. C.*, delivered the following opinion:

The complainant filed her bill to foreclose a mortgage given by E. P. Carpenter to H. W. Torra, to secure the payment of a bond for $15,000 on certain premises conveyed by said Torra to said Carpenter, in which mortgage the premises are described as follows: "Being all that part of Tucker's Island and Flat Beach lying on the southwesterly side of the new inlet, to the northwesterly side of where Brigantine Inlet formerly ran, containing within the last mentioned boundaries one hundred acres of land, be the same more or less."

One of the defendants, the Island Beach Company, was in the possession of the premises covered by the mortgage. Such proceedings were had that the complainant obtained a final decree directing a sale. An execution was issued, a sale of the premises was made by the sheriff, and the complainant was the purchaser. She now comes into this court by her petition asking the aid of this court, in obtaining possession, the said Island Beach Company having refused to deliver possession to her on demand.

The Company resists this motion. It disputes the title of the complainant, who was the purchaser and is now the petitioner. It says it is true the complainant had a mortgage which purported to cover certain lands, but which mortgage was worthless, because the mortgagor really had no title to the lands included in the mortgage which he gave. In other words, the Island Beach Company says, You and your grantors for some time past describe certain lands and premises in your and their conveyances; but neither you nor they had, in reality any title whatever thereto. It says, If at any time any of your grantors had title to lands in the vicinity of the lands in question, they were situated a considerable distance from the lands described in the complainant's mortgage and were no part of them.

It further says that it has procured title from the board of proprietors for this very land, which the said board caused to be located for it, and that thereby it has a perfect title as against the complainant. It insists, also, that whatever may be the rights of the parties, the complainant cannot proceed, in this summary way, to recover possession; urging upon our attention the well settled practice that when there is a dispute as to title the purchaser must settle it by an action at law.

But the practice also is for the court of chancery to put the purchaser in possession by a writ of assistance, when the person refusing to deliver possession was a party defendant in the foreclosure proceedings.

In this case the defendant company was in possession of the premises as owner of the fee. It procured a title subsequently to the execution of the mortgage which was foreclosed, taking such title from E. B. Carpenter, the then owner of the fee, subject to the payments, conditions and agreements of the mortgage aforesaid. It surveyed said premises, made a map of them, plotting them and offering lots for sale, and has sold and conveyed several hundred lots, being parcels of the said mortgaged premises. The title which it took from the board of proprietors bears date January 24, 1882, subsequent to complainant's mortgage.

The title deeds offered in evidence, by the complainant, being sixteen or seventeen in number, carry us back to February 19, 1881; and these all describe the land included in the mortgage in the same terms as nearly as may be, and as above set forth.

Under such circumstances (the complainant and defendant both deriving their title on the one hand from the same source, but the defendant procuring title from another source, which it says is the superior and better title, and the defendant being in possession of the premises when the bill was filed and made a party thereto and allowing a decree to go against him by default) will it be proper for this court to aid the purchaser in obtaining possession?

The insistment that the court should implies that all the rights of the respective parties have been adjudicated which is in reality not true. No right or interest or title has been adjudicated or settled by the foreclosure proceedings and the final decree therein, except such as was alleged to be in the complainant for the purpose of perfecting his title, or such as was alleged to be in the defendant, or alleged to be claimed by the defendant for the purpose of removing it or having it declared subsequent or subject to the title of the complainant.

The complainant alleges that the defendant company took title by deed to these premises from Carpenter, and alleges that that conveyance was subsequent to her mortgage. This raised an issue which the defendant admitted, by not answering, to be in favor of the complainant, and consequently the decree *pro confesso*. But there was no issue raised with respect to any other title of the defendant company which now alleges, in answer to this petition, that it took title to these lands from the board of proprietors, who surveyed and located them to it, for the first time. So far as appears, the defendant had a right to take such title; and, if it be true that it has the first survey and location, it may ultimately be established, however many difficulties may present themselves, that such title is superior to all others.

I cannot now decide it. No issue has been made respecting it. Certainly there is difficulty enough before me not to attempt to override it or to disregard it, by putting the purchaser in possession.

The complainant had it in her power to raise this very issue by alleging, not only that the defendant held a deed of conveyance for the fee of the premises and claimed some interest therein, but also by alleging that the complainant claimed title from the board of proprietors, and then denying the legality or priority of that title. But this she did not do, and the issue thereby suggested remains undetermined.

The case of *Wade* v. *Miller*, 3 Vroom, 296, is quite in point. In that case a widow who had an interest in dower in lands took title to the same from her husband, through a third person, after the husband had executed a mortgage thereon in which she did not join. This mortgage was foreclosed after the death of the husband. The widow was made a party *as the owner of the equity of redemption. Nothing was said in the bill, respecting her right or claim of dower.* After decree, the property was sold and conveyed to the purchaser. The widow brought her action for dower, and it was declared that she was not deprived thereof by the decree because the question of her right of dower had not been raised. See also *Kirkpatrick* v. *Corning*, 11 Stew. Eq. 234.

This principle may be likened to the mortgage of a leasehold interest and the foreclosure thereof and sale of the term, without making the remainderman a party, who has obtained possession either through some default of the lessee or the expiration of term, before the sale under foreclosure. In such case, I think, the court would not award a writ of assistance.

I will advise an order denying the motion, with costs

Louis M. FINGER
v.
Jacob H. HAHN.

Where one sold out his butcher **business, and covenanted** with the purchaser that he would **"not carry on** the retail butcher **business** on his own account, or operate any butcher business, except a wholesale butcher business, within the limits of the city," *held*, that his engaging with another as an assistant in the retail butcher business in such city, at a salary, was a **violation of** his **covenant.**

(Filed April 4, 1887.)

BILL for an injunction to restrain the defendant from engaging in business. On final hearing or pleadings and proofs. *Decree advised making injunction perpetual.*

The case is stated in the opinion.

Mr. **F. E. Bradner,** for complainant.

Mr. **G. H. Lambert,** for defendant.

Bird, *V. C.*, delivered the following opinion:

The complainant, Finger, purchased the butcher business of the defendant, Hahn, in which he was engaged in the City of Newark. Hahn entered into a covenant, in these words: "Does hereby covenant to and with the party of the second part * * * that he will not carry on the retail butcher business on his own account, or operate any butcher business, except a wholesale butcher business, within the corporate limits of the City of Newark," during a period not yet expired.

Soon thereafter Hahn commenced the grocery business; this proving a failure, he desired to sell it; to do which he had an opportunity, provided the purchaser, one Horst, could establish, in connection therewith, the butcher business. Hahn sold to Horst and the butcher business was established in connection with the grocery business. Horst employed Hahn to assist in the butcher business, as well as the grocery.

Hahn says he was to receive $30 a week as compensation for his services, but didn't know whether that would be his compensation or not, if he could not cut meats. Hahn bought all the meats for the establishment, and, as I understand his testimony, continues to do so.

The prayer of the bill is that Hahn may be restrained from carrying on the retail butcher business on his own account or operating any butcher business except a wholesale butcher business, within the corporate limits of the City of Newark during the period fixed by the agreement.

It is strenuously insisted that there has been no violation of the agreement. Let us see if Hahn has engaged in any business which seems reasonably to be a violation of his covenant. He engaged with Horst to cut meats for him, as well as to assist in the grocery business. It may be said that this is not proof of his "carrying on the retail butcher business on his own account," but it cannot be claimed that it does not bring him within the other phrase "or operating any butcher business." I cannot perceive that the mere fact of his being employed at a salary protects him against this covenant.

In my judgment the letter and spirit of the covenant are just as certainly violated, as though he were in partnership with Horst or had the entire ownership and control of the business himself. In common sense or reason, the object of every such covenant is to get rid of the competition which endangers the business of the purchasing party; to remove beyond reach the influence of the vendor's popularity, business integrity, knowledge or skill; and to make it impossible for personal influences and friendly considerations, arising from long continued business acquaintance, exerting themselves to the prejudice of such purchaser. Without these considerations such contracts are quite meaningless. But not one of these influences is there which will not be felt or brought to bear, to a greater or less extent, if the vendor engaged in business even as a clerk.

This reasoning is established beyond controversy in this very case; for persons who had been purchasers of Hahn, before he sold to Finger, continued to buy meats of Finger, until a short time after Horst purchased the grocery business of Hahn and opened in connection therewith the butcher business, when they left Finger and made their purchases of Horst. So many did this that it certainly was very damaging to Finger.

Now there is nothing whatever to show that these customers left Finger and went to Horst on account of Horst, or because of his skill in the business. Indeed I think that Horst was a stranger to them, absolutely, and was a comparative stranger in the City of Newark, and to the butcher business, although he had formerly been engaged in business in Decatur, Illinois. How then can the mind escape the conclusion that Hahn, engaging with Horst as clerk, and assisting in the butcher shop as well as in the grocery, did violate his covenant not to operate any butcher business except to wholesale? Certainly he injured Finger.

The legal effect of this, the defendant's counsel endeavors to overcome by insisting that it does not appear that Hahn really did any act which was in violation of his contract. This argument I think is overcome by the facts disclosed in his testimony. Mr. Hahn says in answer to certain questions viz.:

Q. What do you do for Mr. Horst at the present time? How are you engaged?

A. I do all the buying for him for the place.

Q. Buying what?

A. Of everything that he sells there; meats, groceries, vegetables, fruits and everything.

Now I think everyone will say that no part of the butcher business is of greater importance than that of buying, and that the experience and skill of Hahn in that particular was of great value to Horst and, if brought in competition with Finger, must be very damaging to him. The only difference between this and running a business on his own account, absolutely, is that of degree or extent.

Again, Hahn says to the questions:

Q. Where do you take orders?

A. Inside of the grocery store.

Q. And how do you take them? What are the orders for that you take?

A. Well, regular routine of goods they want; groceries, meats or anything they want.

He also says he calls off orders from the books after they are taken down; this he says he is doing right along. To a lady customer

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NOTE—*As to contracts in restraint of trade*, see Smith v. Fell (Pa.), 5 Cent. Rep. 208; Mandeville v. Harman (N. J.), *Id.* 625, and note.

who was on her way to Finger's and who was speaking to him about meats, in front of Horst's store, and who said to him that she could buy much cheaper down there, meaning Finger's, Hahn said: "The boys ought to be able to sell to you as cheap as anywheres, because I buy it cheap enough for them." When he said this he stood under the sign first adopted by himself in large letters: "J. H. Hahn & Co.," just above which was the sign "Park Market Co." adopted by Horst.

I conclude that the facts bring this case within the spirit and reason of the cases heretofore decided by the most eminent judges.

Richardson v. *Peacock*, 11 C. E. Green, 40; *S. C.* 1 Stew. Eq. 151; 6 Stew. Eq. 597; *Levy* v. *Walker*, 10 Ch. Div. 436; 27 Eng. Rep. 6; *Labouchere* v. *Dawson*, L. R. 13 Eq. 392; 1 Eng. Rep. 711; *Cruttwell* v. *Lye*, 17 Ves. 335; and *will advise a decree making the injunction perpetual, with costs.*

ANGLECEY *v.* COLGAN.

On an application by complainant for an **injunction restraining** defendant from **executing a judgment** at law **in ejectment against** him, it appearing from the statements in the bill that the plaintiff has no equity, and no fraud or mistake or surprise requiring the interference of this court being shown, the injunction is **denied.**

(Filed April 11, 1887.)

BILL for an injunction to restrain the execution of a judgment at law in ejectment. *Denied.*

The case is stated in the conclusions of the Vice Chancellor.

Mr. **Peter Bentley,** for complainant.
Mr. **M. T. Newbold,** for defendant.

Bird, *V. C.*, filed the following conclusions:

The complainant, Anglecey, asks for an injunction restraining the defendant, Colgan, from executing a judgment at law in ejectment against him. An order to show cause was awarded.

Is Anglecey entitled to a preliminary injunction as the case now stands? Taking the statements of the bill, it appears that one Kelly was the owner of four lots of land which were plotted and mapped on the map of Jersey City and numbered 93, 97, 98 and 99. On June 1, 1875, Kelly conveyed said lots to one B., and B. secured a part of the consideration money by his bond and a mortgage on lot 97, together with other property, for $3,000; that Kelly foreclosed this mortgage and, at sale made by the sheriff, became the purchaser of said lot 97 and took a deed therefor, and that Kelly went into the possession of said lot and occupied the house thereon, and on April 25, 1879, sold and conveyed to Anglecey.

The bill states that K. represented that he was the owner of said house and land, and then states that all of the deeds refer to said lot by lot and "block" number "*referring to the map*, and that said lot 97, on said map, referred to in said deeds, is twenty-three feet, four inches (23 ft. 4 in.) in width, but that the house upon said lot ninety-seven (97) which was erected for many years before Kelly sold" it to B., is about twenty-five feet in width, "and was located about two feet, eight inches, on the northerly side of lot ninety-eight."

It appears that the other three lots (93, 98 and 99) were in 1876 conveyed by said Kelly to one Colgan and his wife, who is the defendant; that afterwards (1878) said Colgan conveyed his interest to his wife, and that she brought her action at law in ejectment against Anglecey to recover that portion of lot 99, being about two feet and eight inches, which is covered by the house standing principally on lot 97, and which was standing there before the land was mapped and plotted into lots, and that in that action Colgan recovered a judgment and now threatens to execute.

The bill then states that the complainant, Anglecey, has other evidence which he was unable to produce at the trial of the action at law, further stating that said Kelly knew all about the arrangements; but it does not appear that Kelly was subpenaed or that he could not be reached; and also that said B. was subpenaed but failed to appear, and that his testimony is important.

Now is there any equity in this? First, as to representations. What were they? When Kelly sold lot 97 to Anglecey he was in possession of the house which had for a long time stood partly on lot 99, which last lot was then owned by the defendant. Such possession of the house by Kelly may have been some advertisement to the world that he was the owner or had some rights or interests in all of the land which it covered. It was enough, perhaps, to put anyone bargaining for lot 99 upon inquiry; but was the fact of possession of the house enough to justify Anglecey in dispensing with all further inquiry as to the title and quantity of land? Was it enough when the *deed* which Anglecey accepted *referred* to the *number* of the lot and to the *map*, which was a matter of record and which correctly described the lot, giving its true width?

It would seem that if the possession by Kelly was an advertisement of ownership of any value in determining the equity of the parties, the unequivocal advertisement or notice in the deed that there was a map of the premises, a public record should be at least of equal account. Undoubtedly Anglecey was bound to heed that notice. Kelly sold to him lot numbered 97 on a certain map, which was as potent, to all intents, as though it had been copied in or attached to the deed.

In the second place it is said that Kelly *represented* that "he was the owner of the house and lot;" but the bill does not show that Kelly represented that he was the owner of the two feet and eight inches of lot 99 covered by the house. Indeed, the bill does not show that that particular question was in any sense alluded to by the parties. Nor does the bill state that the complainant, Anglecey, believing such representations to be true, relied upon them and made the purchase with the full conviction that he was entitled to all the land covered by the house.

In the third place it is too plain for discussion that no equities arise from anything that was done or omitted at the circuit. It does not appear that Kelly was subpenaed. B., who was subpenaed, did not attend; but it does not appear that the court refused to postpone the trial. I can see no fraud, nor any mistake or surprise requiring the interference of this court.

I will advise an order setting aside the order to show cause and dissolving the ad interim *restraining order. The costs will abide the final determination of the suit.*

READING
v.
READING.*

1. On the facts in this case *held*, that defendant was guilty of **adultery** as charged in the petition.
2. The law will not charge a husband with **condonation** because he takes time to consider whether the allegations against his wife are likely to be sustained.

(Filed April 11, 1887.)

PETITION for divorce, on the ground of adultery. *Decree for complainant advised.* The case is stated in the conclusions of the Vice Chancellor.

Messrs. **J. W. Shultz** and **H. S. Harris**, for complainant.

Mr. **J. F. Dumont**, for defendant.

Bird, *V. C.*, filed the following conclusions: The conduct of the defendant with one Rinker is such as to awaken the gravest suspicions respecting her chastity. I cannot avoid the conclusion that her mind, her heart, her desires, must have been depraved and sensual. It seems impossible to believe that any female could go so far as she admits she did without more. That she took every step in the downward path but the last fatal one is overwhelmingly proved. And when these things have all been established by the most indubitable proof, the court seems obliged to conclude that the crime charged has also been committed.

After a very short acquaintance Rinker would meet Mrs. Reading at the theater, and accompany her home, late at night. Mrs. Reading would make arrangements for him and a lady friend, a Mrs. H. to call and spend the evening in her bedroom. This they would do, and while there they would drink beer and sometimes more intoxicating beverages. This happened several times. Rinker would sometimes call before the rest and sometimes remain after they left.

On one of these occasions Mrs. H. and the defendant Mrs. Reading, were on the bed, with Rinker lying between them, when Mrs. H. made the most indecent remarks about the person of Rinker, and swears that Mrs. Reading did also. This Mrs. Reading denies; but she admits being on the bed with them, and admits that she allowed Mrs. H. to take her hand and to place it upon the private parts of Rinker. Mrs. H. swears that Mrs. Reading voluntarily laid down on the bed beside Rinker after she and Rinker had lain down; this Mrs. Reading denies and says that Rinker caught hold of her and threw her on the bed. How can such things be without more? There was no outcry, nor expression of indignation, as of outraged innocence and virtue.

Mrs. Reading soon learned that Mrs. H. was a woman of the very strongest desires of a lustful character; she had seen her on the sofa, in the embrace of this same Rinker; and she had had many other proofs that she was not only most low and groveling in her appetite, but that no woman could possibly associate with her without suffering the foulest contamination. And such was the inevitable result in this case. It soon came to pass that the parties were vying with each other for the chief place in Rinker's affections. And all these meetings, entertainments, and carousals, took place in the *absence* of Mr. Reading. He never so much as was informed, when he came home every other night, that Mrs. Reading had made the acquaintance of a man by the name of Rinker. For full three months, this was concealed. And on one occasion, when Rinker was in the house of Mrs. H. with Mrs. Reading and Mr. Reading was about to enter, Mrs. Reading either advised Rinker to leave so as to avoid meeting Mr. Reading there, or consented thereto at the suggestion of Mrs. H. No; Mrs. Reading concealed all until a scandalous story had spread over the community. Then it was that she first spoke to her husband about Rinker, and endeavored to prepare his mind for the sad news which must very soon reach him.

About this time Rinker, himself a married man, left the neighborhood; but Mrs. Reading wrote him one or more letters. She also called upon his father, whom she had not known before, and make important inquiries and statements concerning Rinker; and, likewise, wrote entreating letters to a colored woman who had been employed in the hotel where it is said the principal transactions between Mrs. Reading and Rinker took place, and who waited on them and carried their liquors for them. This colored woman was produced as witness against Mrs. Reading; and her statements seemed so extravagant as to baffle all belief; but when the letters of Mrs. Reading to her are considered, and when the admissions of Mrs. Reading as to what took place on the bed are considered, and when the testimony of Mrs. H. and another woman, as to what they saw and as to what Mrs. Reading admitted to them, is considered, there seems to be some grounds for believing that the statements of the colored woman may, in many particulars at least, be true.

I conclude that Mrs. Reading was guilty of adultery with Rinker, as charged in the petition.

But it is said that if this be so there was a condonation. I am not prepared so to advise. I think that as soon as Mr. Reading became convinced of his wife's crime he abandoned her. He did not cast her off when he first heard of the accusation. But why not? She opened the subject herself and protested her innocence. He had a right to trust and to believe her above all others; and if he did so for a reasonable

*See Same Case 4 Cent. Rep. 134.

time, if he did so until the proofs became reasonably certain of her misconduct, the law will not, because of such trust and confidence, condemn him to a life of the most loathsome bondage. The load of shame, of sorrow, and of regret which he will have to bear, surely, is sufficient without being chained to the author of these afflictions.

The law will reward a man for caution in such case, rather than condemn him. The law does not mean to charge a husband with condonation because he takes time to consider whether the allegations against his wife are likely to be sustained. Besides, it is not at all clear that in any event there was any conduct that can be construed to amount to condonation.

I will advise a decree according to the prayer of the petition.

Theodore R. ROBINS *et al.*, *v.* Rialto O. ARNOLD, Admr.

1. The **filing** of a **bill** not verified by oath, **against** an **executrix**, for a discovery of trust funds and to follow them into certain land, **is not a presentation of** the **claim** for such funds in the form **contemplated by** the **statute**, which provides that claims shall be presented in writing, specifying the amount claimed and the particulars of the claim, and be verified under oath.
2. A **creditor whose claim** was **not** duly **presented cannot receive a dividend** thereon with the other creditors who duly presented their claims in the usual and prescribed way within the time limited by the order to limit creditors made by the orphans' court.

(Decided April 12, 1887.)

BILL for relief. On final hearing upon bill and answer. *Bill dismissed.*

The case is stated in the opinion.

Mr. **C. T. Cowenhoven,** for complainants.

Messrs. **Collins & Corbin,** for defendant.

Runyon, *Chancellor*, delivered the following opinion:

The object of this suit is to establish a claim (for trust funds) of the complainants against the insolvent estate of Wright Robins, deceased, the trustee, in order that the complainants may receive a dividend thereon with the other creditors who duly presented their claims in this usual and prescribed way within the time limited by an order to limit creditors made by the Orphans' Court of Middlesex County.

The complainants claim that they duly presented their claim by the filing by them of a bill in this court against the executrix, within such limited period. The bill was filed for a discovery of the trust funds and to follow them into certain land mentioned in the bill. The bill stated that there was due to the complainants in this suit (Theodore R. Robins and Margaret R. Robins), out of what was called "the Maria Robins fund," about the sum of $17,720, and that there was due to them also their shares of what was called "the Caroline McClure fund." It was not verified by any oath.

The executrix did not answer. On August 6, 1884, the bill was dismissed as to the Maria Robins fund, and as to the other it was dismissed at the final hearing. *Cuming* v. *Robins*, 12 Stew. Eq. 46.

On the 4th of September, 1884, the administrator *de bonis non cum testamento annexo* answered. The executrix was discharged and he was appointed in May, 1883. He admitted the liability of the estate for the Maria Robins trust money to the amount of $17,750, besides interest. The order to limit was made April 8, 1882, and the nine months limited therein expired in January, 1883. An order barring creditors who had not proved their claims was made on the fifteenth of that month. The bill was filed in December, 1882.

After the dismissal of that bill the complainants brought suit in this court in 1884 to establish their claim, by virtue of their interest in the Maria Robins fund, to certain land which they alleged that the testator had purchased with money of that fund belonging to them. An answer was filed by the administrator. The suit resulted in a decree that some of the lands mentioned in the bill, of which the testator died seised, had been purchased with the money of that fund, and that it therefore belonged to the complainants, and that a certain sum of money of that fund should be charged on other land of the testator. *Arnold* v. *Robins*, 13 Stew. Eq. 723.

The complainants did not present their claim as they might have done, in the form contemplated by the statute. The statute provides that claims "shall be presented in writing, specifying the amount claimed and the particulars of the claim, and shall be verified under oath, or the bringing in of the same shall be of on effect."

On the 12th of April, 1882, the executrix represented to the orphans' court that the estate was insolvent; and on the third day of April, 1883, after having given due notice, she filed a report of the claims presented and an account of the personal estate and an inventory of the real estate. The complainants' claim was not included in the report. No exceptions were filed to the account; and on the 22d of May following the orphans' court decreed that the estate was insolvent. On the 28th of the same month the executrix was discharged (as before stated) upon her own application; and the defendant was appointed administrator with the will annexed. She accounted and her account was allowed, and she paid over the balance to the administrator. On the 28th of July, 1885, the latter applied to the orphans' court for an order for the sale of lands to pay debts.

In his application for the order he stated the claims against the estate just as they were stated by the executrix in her report, before referred to, and stated that the appeal was pending from the decree of this court in the before mentioned suit begun in 1884, and asked for an order for the sale of all of the real estate except the land in question in that suit. In no report to the orphans' court was any mention made of the complainants' claim. The creditors and all other persons interested would have had the right to file exceptions to the claim if it had appeared in the report by the executrix, and the complainants, if they had the right to have it there, might have excepted because it was not there.

The executrix did not answer the bill in *Cuming* v. *Robins*, and the answer of the administrator was filed long after the expiration of the period fixed in the order to limit. There was therefore neither verification nor admission of the claim in question within that period.

In *Mutual Benefit Life Ins. Co.* v. *Howell*, 5 Stew. Eq. 146, it was held that the filing of a bill for foreclosure in this court, claiming decree for deficiency, was not a presentation of a claim for the deficiency within the meaning of the statute. See also *Lewis* v. *Champion*, 13 Stew. Eq. 59.

The bill will be dismissed, but without costs.

Alexander GRANT, Jr., *Assignee, etc.*, *v.* David S. CROWELL.

1. It is not necessary in order **to enable one to sue as assignee of an insolvent debtor** that he should aver in his bill that he has given bond and filed an inventory as required by the Assignment Act.
2. Such **assignee may bring suit to recover property conveyed** owing by the assignor **in fraud of** his **creditors,** if such property is required to satisfy the debts of the creditors who, if they were themselves to sue for that object, would be entitled to such relief.
3. Such **assignee cannot recover money lawfully paid by** the **assignor** to the defendant and which the latter lawfully received and which as between them he is entitled to retain.
4. **If** the **creditors have an equity** against the defendant in respect to the matters set up in the bill, **they are the proper ones to enforce it.**

(Decided April 14, 1887.)

BILL for relief. On general demurrer. *Demurrer allowed.*

The case is stated in the opinion.

Messrs. **F. M. Olds & H. K. Coddington,** for demurrant.

Mr. **W. G. Cumming,** for complainant.

Runyon, *Chancellor*, delivered the following opinion:

The bill states that the complainant is assignee of David Thompson under an assignment made by him for the equal benefit of his creditors under the Act "To secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors;" that as such assignee he has given the bond required by the statute: that Thompson carried on business under the name of Bolles Brothers from about May 2, 1881, to the 10th of July, 1886; that in some way the business of the Bolles Export Company was, on or about March 7, 1885, added to that which up to that time had been carried on under the name of Bolles Brothers; that by entries on the books of Thompson it appears that the defendant contributed all of the capital invested in the business of the Bolles Export Company except $3, and that he virtually owned that branch of the business: that on or about September 14, 1883, another business, that of manufacturing and selling perfumery extracts, was added to the branches which were then carried on, the capital for which last mentioned branch appears by Thompson's books to have been furnished by the defendant; that on or about the first day of November, 1884, still another branch—the manufacture of sarsaparilla powder—was added: the right to manufacture which was, as appears by those books, bought with the defendant's note; that on or about the 8th of October, 1883, the manufacture of a certain oil was added, one half of the cost of the right to manufacture which was, according to the books, paid for by the defendant and the other half by Thompson; that it appears by the books that the defendant from time to time between September 14, 1883, and June 30, 1885, contributed to the business carried on under the name of Bolles Brothers divers other sums of money and at different times during that period drew out of the business considerable sums; that on or about June 30, 1885, a very considerable quantity of the stock of that concern was burned, and that of the insurance money there was paid to the defendant the sum of $7,714.07, as appears by the before mentioned books; that the defendant appears by the books to have drawn from the business divers large sums of money (about $1,700 in the aggregate) for interest upon alleged advances and loans claimed to have been made to the concern by him before February, 1886; that he continued to pay into and draw out money from the concern up to some time in June, 1886, and that when the before mentioned money was drawn out by him for interest the concern was insolvent; that it appears from the inventory annexed to the deed of assignment that the assets of the concern amounted nominally to the sum of $10,946.93, and that the amount due creditors was $11,853.90, exclusive of $5,500 therein stated to be due to the defendant; that among the assets is a house and lot valued in the inventory at $5,000, which was incumbered to almost, if not quite, the full value thereof: that the inventory includes personal property of the assignor, not employed in the business, of the estimated value of about $500, and that for the property in or connected with the business not over 50 per cent of the valuation can be realized; that the business and credit of the concern were increased by the money contributed thereto by the defendant, and that he, by his personal visits to the place of business and otherwise, manifested great interest in the business; that when the $7,714.07 were paid to the defendant out of the insurance money he promised to return that money in a few days; that the money was paid to him upon that promise, but he never returned it but appropriated it to his own use; that the withdrawal of that money so crippled the concern that from that time it ceased to be prosperous, and thenceforward until it ceased its business was conducted at a loss, and the concern has never been able since then to meet its liabilities; that the present creditors of the concern are to a great extent those who had dealt with it before the withdrawal of the $7,714.17, and that they continued to deal with the concern afterwards in the belief that it was conducted in the same manner and with the same command of resources as before that time.

The bill prays a discovery and an account, and that the defendant may be decreed to pay to the complainant, as assignee, the $7,714.07 and the moneys withdrawn by him from the capital of the business since June 30, 1885, or so much thereof as may be necessary for the purpose, to enable him to pay in full such of the creditors of the concern as have proved their claims before him or as may apply to this court.

The object of this suit is to ascertain whether the defendant was not a partner with Thompson in his business, and, if he shall be shown to have been such, to hold him liable accordingly. There is enough stated in the bill to warrant the court in retaining it, provided the complainant is entitled to the relief which he seeks. The objection that it does not appear by the bill that the complainant has given bond and filed an inventory as required by the Assignment Act is of no weight. It is not necessary in order to enable him to sue as assignee that he should aver that he has complied with all the requirements of the statute.

But the bill has no merits. The complainant shows no ground of claim. As the assignee of Thompson he might bring suit to recover property conveyed away by the latter in fraud of his creditors, if such property were required in order to satisfy the debts of the creditors, who (if they were themselves to sue for that object) would be entitled to such relief. *Pillsbury* v. *Kingon*, 6 Stew. Eq. 287.

But no such relief is sought in this case. It is not denied that the money paid by Thompson to the defendant was due to the latter as between them, and therefore as between them it was properly paid and properly received. If such payment was an injustice to the creditors of Thompson, it must be because there was a copartnership between Thompson and the defendant. But if there was such copartnership, the complainant is not assignee thereof; he is assignee of Thompson alone. As such assignee he voluntarily champions the cause of Thompson's creditors, and endeavors by this suit to ascertain whether they have not an equity against the defendant; and if they have such equity he seeks to make it available to them for the payment of their debts.

This is no part of his duty as assignee of Thompson. If the defendant was a partner of Thompson, and therefore ought to contribute to pay partnership debts, the complainant would have the right to maintain a suit under the proper conditions, to compel him to make such contribution; but the bill makes no claim that there was such partnership *inter sese*; it suggests that there may have been a partnership as to the creditors, or some of them, of the Bolles Brothers' concern; so that the complainant does not seek to recover from the defendant money due to Thompson, but money which was lawfully paid by Thompson to the defendant and which the latter lawfully received from him and which as between them he is entitled to retain.

While the complainant as assignee represents, to a certain degree, the creditors of the assignor, he does not represent them to such an extent as to clothe him with their rights or charge him with the duty of seeking out and protecting those rights, under such circumstances as are presented by the bill in this case. If the creditors have an equity against the defendant in respect to the matters set up in the bill, they are the proper ones to enforce it.

The demurrer will be allowed.

OSBORNE
v.
OSBORNE.

In a suit for **divorce** for adultery where complainant is entitled to a decree for that cause, the court cannot grant the divorce on the ground of cruelty and desertion set up in the answer of defendant.

(Filed April 15, 1887.)

BILL for divorce on the ground of adultery. *Decree for complainant advised.*

The case is stated in the conclusions of the Vice Chancellor.

Mr. **H. H. Wainright**, for complainant.
Mr. **W. F. Abbott**, for defendant.

Bird, *V. C.*, filed the following conclusions:

The complainant is entitled to a decree. The proof satisfies my mind that Mrs. Osborne has been guilty of adultery with one Stratton. Stratton was a married man; he had a wife and two children; and not very long after his intimacy with Mrs. Osborne began, he abandoned them. Very soon after his acquaintance with Mrs. Osborne there was very great familiarity between them. They would take Mr. Osborne's horse and carriage and ride out together.

Stratton taught school near by where Osborne lived and for several weeks boarded at Osborne's. He afterwards taught school two miles distant from Osborne's, but continued boarding there, although there can be no doubt that he could have procured board in the immediate vicinity of the school. While teaching at the last place referred to, Mrs. Osborne would take him to the school or drive there for him. This she did several times. Mr. Osborne was then living at Manasquan, N. J. Soon after he moved to New York City. Before going there Mrs. Osborne promised Mr. Osborne that she would not see Stratton any more; but Stratton met them at Jersey City when on their way to New York; and it was not long before Mrs. Osborne took him to board with her in 49th Street. He continued to board with her, most of the time for several years and until the commencement of these proceedings; and although the intimacy between Mrs. Osborne and Stratton was enough to prompt Mr. Osborne to commence these proceedings, yet the institution of this suit was not enough to drive Stratton away from her daily presence nor to compel her to turn her back upon him. They visited Philadelphia together. Mrs. Osborne and her son and daughter went to Niagara, and Stratton went along. She spent some time at the Catskills and Stratton was there with her. But, it is true he paid his own bills.

Mrs. Osborne was upon the witness stand, but she did not deny having committed adultery with Stratton. Stratton was called by her, nor did he deny having committed adultery with Mrs. Osborne. She says Stratton *always* conducted himself *as a gentleman*.

The defendant in her answer, by way of cross bill, sets up recriminatory charges of cruelty and desertion; and upon the argument counsel said if there must be a divorce, let it be on the ground of desertion, for the sake of the children. The court cannot do any such thing. I suppose every court would most gladly throw the mantle of oblivion over the faults of citizens if, by so doing, justice could at the same time be done to the complaining party. I would not have made reference to this appeal did I not think that it involved a strong conviction on the part of counsel of the guilt of Mrs. Osborne.

Clarence WHITE
v.
Clemence BORDEN *et al.*

In a **suit to set aside** an **assignment** to defendant of a bond and mortgage, **made by complainant when** he was **weak in body and mind,** in consideration of an agreement by defendant to maintain him and provide a home for him during his life, which agreement defendant refused to perform, *held*, on the facts, that the **assignment** was **fraudulently obtained** and that the same be set aside and that complainant credit defendant for board, etc., furnished by the latter to the former.

(Decided April 16, 1887.)

BILL for relief. On final hearing on pleadings and proofs. *Decree for complainant.*

The case is stated in the opinion.

Mr. **H. M. Nevius,** for complainant.

Mr. **J. Steen,** for defendants:

Cited Wait, Fraud. Conv. § 395.

Runyon, *Chancellor*, delivered the following opinion:

This suit is brought to set aside an assignment made by the complainant April 26, 1879, to the defendant, Clemence Borden, of a bond and mortgage. The bond and mortgage were given to the complainant on the 12th of January, 1874, the bond by Borden and the mortgage by him and his wife upon real estate of his in Shrewsbury Township, in Monmouth County. The instruments were given to secure the payment of $2,700, then lent by the complainant to Borden, in one year, with interest at the rate of 7 per cent per annum.

The bill states that about the first of April, 1874, an agreement was made by and between the complainant (who was an elderly single man) and the Bordens, that the latter would board the complainant in their house, which was upon the mortgaged premises, and do his washing and take care of him in sickness in consideration of the interest upon the bond and mortgage; he to furnish his room; that he boarded with the defendants under that agreement from the first of April, 1874, until April 25, 1879, when (induced, as he alleges, by the persuasion of Mrs. Borden, he having then just recovered from a very severe illness, and being weak in body and mind), he assigned the bond and mortgage to her in consideration of an agreement then made by her with him to provide him a home and maintain him in the family during all the rest of his life; that he continued to live with them under that agreement until the 12th of June, 1886, when Borden and his wife refused him admittance to their house and told him that he must seek a home elsewhere; that he was then compelled to find another place of abode; that he is fifty-four years old and is weak and sickly and unable to work or to support himself, and that he is without means or property except the bond and mortgage and is homeless and dependent upon his friends for support.

The bill prays that the assignment may be set aside, as having been obtained by fraud, and that the amount due Borden for the complainant's board, etc., from April 25, 1879, the date of the assignment, to June 12, 1886, when the Bordens refused to support him longer, may be credited upon the bond and mortgage.

The defendants by their answer, which is under oath in pursuance of the requirement of the bill, deny that they or either of them agreed to board the complainant and do his washing and take care of him in sickness in consideration of the interest upon the bond and mortgage; and they deny that they or either of them ever agreed to support him for life in consideration of the assignment of the bond and mortgage, but they allege that the consideration of the assignment was money which he then owed to them, and money which he expected to and did in fact afterwards owe them for board, and for money paid by Borden to or for him and for his benefit, and that the money so due for board and the money so paid together amounted to the sum due upon the bond and mortgage, and that although the defendants boarded him after the making of the assignment, they did so, not from obligation on their part, but merely from benevolence and friendship.

The evidence establishes the truth of the complainant's allegation that he went to board and boarded with the defendants as and under the agreement stated in the bill. Opposed to the defendants' denial is the complainant's testimony on the subject, which is corroborated by the circumstance that Borden never made any charge against the complainant for board or washing or care in sickness, but took a receipt from him upon the bond under date of the 12th of January in each year from the date of the mortgage up to 1879 (in which year the last one was taken) for the interest for the preceding year. For such receipts he paid nothing, and he had no accounting with the complainant and never called upon him to pay anything more.

Had there been no agreement between the complainant and Borden that the interest should pay for the board it is reasonable to presume that Borden would have insisted upon a credit upon the principal of the bond and mortgage of whatever was due to him above the amount of interest. The conduct of Borden in the transaction has been consistent only with the existence of the agreement. The Bordens have no claim against the complainant for board or washing or care in sickness, up to the date of the assignment; and on the other hand it will be held that the interest on the bond and mortgage is paid up to that date.

The bill alleges that the complainant was induced by Mrs. Borden's persuasion to assign the bond and mortgage to her, and that the consideration of the assignment was an agreement that she would provide him a home and maintain him in the family for life. The answer denies, as before stated, that such agreement was made; and it denies that the complainant was induced to make the assignment by the persuasion of Mrs. Borden; but it alleges that money due to Borden from the complainant for board and money advanced by the former to the latter of which Borden had kept no account and which exceeded $1,200, constituted the true consideration of the assignment.

In his testimony Borden says that the complainant then owed him for board to June 12, 1886, $3,170, and for money advanced more than $1,200; so that, according to the answer, the complainant owed Borden at the date of the assignment over $4,370. In fact, as already appears, he owed him nothing for board up to that time; and there is no satisfactory evidence that he owed him anything at that time for money advanced. In his testimony Borden says that he can safely say that the money which he has paid out for the complainant will amount to $500; but in the answer he said it was, at the time when the assignment was made, over $1,200. Moreover, the $500 includes $152.22 paid by him to William W. Clayton at the request of the complainant in January, 1880, after the assignment was made, and which he says he did not (when the assignment was made) promise to pay. While he says that an agreement for the future support of the complainant was no part of the consideration of the assignment, he nevertheless boarded the complainant afterwards without charge. He says he did not do so pursuant to any understanding, but did it gratuitously; and he adds that he expected so to keep him so long as the complainant should conduct himself properly. The defendants admit that they refused to keep him, as stated in the bill; and they give no proof of any reason for doing so.

The complainant says that Mrs. Borden urged him to make the assignment because she was apprehensive that "some one would sell the mortgage from them." She probably expressed an apprehension that the mortgage would get into the hands of some one who would foreclose it. She does not deny this allegation, but corroborates the complainant in the statement, by saying that he said to her that he "would fix her so that she need never worry about it."

It is quite clear that the assignment was obtained from the complainant when he was feeble in mind and body, and under circumstances which should induce the court to annul it. It will be set aside as having been fraudulently obtained; and it will be decreed that the defendants deliver the bond and mortgage to the complainant, but he will be required to credit thereon whatever shall appear to be justly due to the Bordens for board and washing and care in sickness since the assignment and for money advanced.

There will be an account as prayed in the bill. The complainant is entitled to costs.

John KERR
v.
Henry S. LITTLE, Receiver.

In an **action to recover damages for** the **breach of a contract, made by** the **former receiver** of a railroad company, that the complainant should keep clean for a year the ash pit where the engines of the company emptied their ashes, and for his compensation should have the cinders and coal from such pit, the contract having been broken by the receiver, *held*, that the **complainant** is **entitled to damages**, and that the court will not refuse to sanction the contract on the ground that it was an improvident one.

(Decided April 16, 1887.)

BILL for relief. On final hearing on pleadings and proofs. *Decree for complainant.* The facts and case appear in the opinion.

Mr. **A. A. Clark,** for complainant.

Mr. **B. Williamson,** for defendant.

Runyon, *Chancellor*, delivered the following opinion:

This suit is brought to recover damages for the breach of a contract which the complainant alleges was made with him by Francis S. Lathrop, the former Receiver of the Central Railroad Company of New Jersey, by which it was agreed between the parties that the complainant should clean and keep clean for a year from March 7, 1878, the ash pit at a place called Junction Station in Hunterdon County, where the locomotive engines of the company emptied their ashes, and that for his compensation the complainant should have for his own use cinders and coals to be taken by him from the pit with the ashes.

The grounds of jurisdiction in this case, which is merely a suit for damages, were stated in the decision overruling the demurrer. *Kerr* v. *Little*, 12 Stew. Eq. 83.

The complainant (who was a lime burner), had the benefit of the contract for six months when he was discharged, not because of any fault on his part, but because Mr. Stearns, the assistant general superintendent of the company, thought it proper to do so in order to put a stop to jealousies which the fact that the complainant had the benefit of the contract had engendered in the minds of other lime burners in the neighborhood.

In his letter of August 31, 1878, to George W. Howland, then an employee under him but now deceased, and George W. Abbott, then also an employee and by whom the contract in question was made, Mr. Stearns said: "From September 1, *prox.* we will discontinue the contract arrangement of having Hampton ash pit cleaned by outsiders for the contents of same, and hereafter do the work ourselves, same as at other points, and dispose of the cinders the same as we did formerly. This will put a stop to any jealousy or ill feeling on the part of the lime men who are not individually benefited by the present arrangement."

The defendant denies that the arrangement was for any specified period, but insists that it was a mere privilege, determinable at the will of the company. The proof is that the agreement was made as the complainant alleges. Mr. Abbott, by whom it was made on behalf of the company, says not only that the arrangement was to continue for a year, but that he had authority from Mr. Stearns to make it for such period, and neither more nor less. The contract having been broken by the Receiver, without fault on the part of the complainant, and not only without his consent but against his protest, the complainant is entitled to damages.

It appears that the coals and cinders were worth to him, not only for use in lime burning, in view of which use of them he made the contract, but also for sale, $3 a ton; and the average amount which he got daily was 4½ tons and the cost was $2 a day.

There will be a decree in his favor, for damages to the amount of $1,794, with lawful interest from the first of May, 1879.

It is urged on behalf of the defendant that the contract was an improvident one and that therefore this court should not sanction it by giving damages for the breach of it on the part of the Receiver. But it was not broken on that account; and it seems to have been regarded as desirable, except for the reason that being held by a lime burner it created jealousy and ill feeling on the part of other neighboring lime burners. The complainant was bound by the contract, and might have been compelled to pay damages for breach of it on his part.

On the other hand he should be protected in his interest in it. It was not, to say the least of it, so uneconomical an arrangement for the railroad company that he could be held to have had notice that it was one which the court probably would not sanction.

Kunigunda GEBEL
v.
Caroline WEISS *et al.*

1. Where a **woman paid** her **money for land** and for the repairs and improvements put on it after the purchase, **and accepted a conveyance** thereof **to herself and another, as her husband,** in the belief that she was the lawful wife of such other, and that in case she should survive him the property would be wholly hers, **those who claim under him** have **no better claim** to the property **than he had.**
2. **Where she learns after his death** that **when** he **married her he had a wife living,** she **can maintain a suit** against the latter and her children **to obtain a decree assuring** to complainant the **title** to the whole of the property, on the ground that his name was inserted in the deed through his fraud in marrying her and inducing her to believe that he was her lawful husband.
3. The **law of evidence prevents** the **complainant** in such suit from **testifying** therein **to** his **statements** or to his transactions with her in reference to the matter; **but she is competent to prove** the **facts** that she bought the property and paid for it and for the improvements and repairs with her own money and that he neither paid for them nor paid anything on account of them.
4. The **deed itself** is **evidence of an agreement** between the parties that the conveyance was to be so drawn that **she should be sole owner** of the property **in case she should survive him.**
5. Such **agreement** may be **effectuated in equity.** He would not have been permitted to retain the interest in the property which he obtained by his gross fraud upon her; neither can his real wife and her children, defendants in this action, be permitted to hold it.

(Decided April 13, 1887.)

BILL for relief. On final hearing on pleadings and proofs. *Decree for complainant.* The case is stated in the opinion.

Mr. **Carl Lentz,** for complainant.

Mr. **F. E. Blackwell** of New York, for defendants.

Runyon, *Chancellor*, delivered the following opinion:

The complainant was married to Peter Weiss on the 11th of February, 1872. They lived together until October 9, 1881, when he died. John Zipfel, by deed dated February 27, 1875, conveyed to them in fee a lot of land in Newark. The conveyance was made to "Peter Weiss and Kunigunda, his wife" and the consideration was $2,040—of which sum $440 was paid in cash on the delivery of the deed; and for the rest, $1,600, a mortgage was given by them to Zipfel, payable in five years from date (the date of the deed) with interest. The mortgage was canceled January 2, 1878, although it was not due until February 27, 1880.

The complainant had three children by Weiss, two of whom are still living. After Weiss' death she learned that when he married her he had a wife, the defendant (Caroline Weiss), living. She brings this suit against the latter and her two children, to get a decree assuring to her the title to the whole of the property, on the ground that the property was paid for entirely with her own money, and that the fact that Weiss' name was inserted in the deed as one of the grantees was due solely to his fraud in marrying her and inducing her to believe that he was her lawful husband. She swears that the whole of the purchase money of the property was paid with her money. When asked why the title was taken in the names of both herself and Weiss, as her husband, she answers that the scrivener told her that after Weiss' death the property would be hers. The scrivener supposed that the deed was to husband and wife, as grantees, when in fact no lawful marital relation existed between her and Weiss. But she and the scrivener both thought that it did.

The complainant swears that she paid the greater part of the consideration with money which she received from her father: and she is corroborated in that statement by the testimony of her sister and brother-in-law. She swears that of the cash ($440) paid on the delivery of the deed, she drew $410 from the savings bank in which it was deposited in her own name, and in this she is corroborated by the books of the bank. When he married her (in 1872) Weiss had no money. He appears to have been working at his trade for small weekly wages (he was a workman in a tailor's shop) up to February, 1873; and although he carried on the business of manufacturing clothing in the house upon the property in question, yet he was too ill to conduct business for four years before his death, that is, from 1877; so that he carried on that business there for only about two years. It does not appear that he paid any part of the purchase money of the property with the proceeds of that business, and it does not seem probable that he did so. After he became ill she herself conducted the business. She not only paid her money for the property, but also for the repairs and improvements which were put upon it after the purchase; and she did it all in the belief that she was the lawful wife of Weiss; and she accepted the conveyance made to him and her as husband and wife, because she believed that that relation in fact existed between them, and that in case she should survive him the property would be wholly hers.

Those who claim under him have no better claim to the property than he would have. The law of evidence prevents her from testifying to his statements or to his transactions with her in reference to the matter, and so far she is under disadvantage. She is competent to prove the fact that she bought the property, and that she paid for it, and for the improvements and repairs, with her own money, and that Weiss neither paid for them nor paid anything on account of them.

The transaction in question in this suit is the purchase of property by her; and the necessity of seeking relief arises from his fraud in marrying her. Through his deceit and only through his deceit his name was inserted in the deed as one of the grantees; and indeed it may be added that but for his fraud she would not have invested her money in the property at all. It was to get a home for him and her and their children that, in the belief that she was his lawful wife, she bought the property. It may be added that the deed itself is evidence of an agreement between the parties that the conveyance was to be so drawn that she should be sole owner of the property in case she should survive him. And she now asks that under the circumstances, that agreement may be effectuated in equity. Obviously, Weiss would not have been permitted to retain the interest in the property which he obtained by his gross fraud upon her. Neither can the defendants be permitted to hold it.

There will be a decree in favor of the complainant. The defendants were admitted to defend in forma pauperis. *No costs will be awarded.*

Georgiana B. TERRY
v.
William H. SMITH, Admr., *et al.*

1. Where the **will** gave to the complainant and W., another daughter of the testatrix, each the interest of one sixth of the entire estate for life, with remainder to the complainant's daughter, and after giving certain legacies, gave the residue of the estate, real and personal, to the executor "in trust for the execution of my will," to pay debts, etc., and then to pay over to another daughter, S., the rents, issues and profits of the balance of the residue and at her death to hand over such balance to S's two daughters, *held*, that the **shares** of complainant and W. are **not subject to** the **trust** created for the residue.
2. *Held, further*, that the **words "for the execution of my will" employed to qualify** the **trust are superfluous,** and do not extend it over the shares of complainant and her sister W., but that they are each entitled to their share, without deduction for the payment of debts or pecuniary legacies.
3. The **trust** of the residue did **not devolve upon** the **administrator with** the **will annexed.**
4. If good reason be shown for so doing, a **mixed trust** is **partible in equity.**
5. *Held further*, that the will created a **trust** as to the shares of complainant and W.; in such case, no trustee having been appointed as to those shares, the trust would **devolve upon** the **executor; where he has renounced,** the administrator having no authority to execute the trust, the **court may appoint a trustee.**
6. *Held, further,* that if the real estate can be partitioned without prejudice to the interests of the owners, the **share** of the complainant may be **set off** and she may enjoy it as tenant for life.
7. The fact that the testatrix's plan of division of her property fails to effectuate her purpose in this respect will not justify the court in disregarding the **plain provisions** of the **will.**

(Decided April 11, 1887.)

BILL for partition. On final hearing on pleadings. *Decree for complainant.*

The case is stated in the opinion.

Messrs. **Hawkins & Durand,** for complainant.

Messrs. **S. Patterson** and **G. C. Beekman,** for defendants.

Runyon, *Chancellor*, delivered the following opinion:

The complainant seeks partition of the land of her late mother, Harriet E. Manning, deceased, and an account of the rents and profits thereof coming to her, and an account of the personal estate of her mother and a decree that her share thereof be invested for her benefit. She claims, under the will of her mother, a life interest in one sixth of the whole estate.

By the will the testratrix, after directing payment of her debts and funeral expenses by her executor and trustee named, gave and bequeathed to her daughter, Frances M. G. Wilson, "the interest of the one equal undivided one sixth part or portion" of her whole estate during Mrs. Wilson's natural life, and directed that upon the death of Mrs. Wilson "the said interest and principal thereof" be paid absolutely to Georgiana Sweet, a granddaughter of the testatrix.

She then gave and bequeathed to her daughter, the complainant, "the interest of the one equal undivided one sixth interest, part or portion" of the whole estate during the complainant's natural life, and directed that on the death of the complainant "the said interest as well as principal thereof" be paid absolutely to the before mentioned Georgiana Sweet.

She next gave a legacy of $1,000 to her sister, Mrs. Hendrickson (which, however, she subsequently revoked by a codicil), and $5,000 absolutely to her granddaughter, Bessie Belle Bateman, daughter of her daughter Nellie J. Smith, on her attaining the age of twenty-one years, and $2,000 absolutely to Harriet L. Smith, another daughter of Mrs. Smith, upon her attaining her majority; and she then gave and devised all the balance and residue of all her property, both real and personal, of whatever nature or kind, and wheresoever situated, to James A. Bradley, her executor, "in trust for the execution of her will," and gave to her daughter Mrs. Smith, all the rents, issues and profits of all her estate, both real and personal, so to be held in trust, and directed the executor to pay over to her those rents, issues and profits, quarterly, for and during her natural life; and upon her death gave, bequeathed and devised all the remainder and residue of her estate, both real and personal, to Mrs. Smith's two daughters, before mentioned, absolutely. The value of the personal property was, it is said, about $700, that of the real estate about $42,000, and the debts amounted to about $14,200.

The gift to the complainant is of the clear one sixth of the estate, real and personal. The scheme of the will is to give to her and Mrs. Wilson, each, one sixth of the entire estate for life, with remainder to the complainant's daughter; to give to Mrs. Smith's two daughters $7,000 and then to give the residue of the estate to the executor to pay debts and funeral and testamentary expenses, and then to pay over to Mrs. Smith, quarterly, the rents, issues and profits of the balance of the residue, and at her death to hand over such balance to Mrs. Smith's two daughters.

The shares of the complainant' and Mrs. Wilson are not subject to the trust created for the residue. The words "for the execution of my will" are employed in the will to qualify the trust; but they are superfluous and do not extend it over the shares of the complainant and her sister Mrs. Wilson. The debts and the pecuniary legacies of $5,000 and $2,000 to Mrs. Smith's daughters are to be paid out of the residue in exoneration of those shares. The complainant and Mrs. Wilson are each entitled to an undivided one sixth of all the testator's estate real and personal, without any deduction for the payment of debts or for the payment of the pecuniary legacies.

The trust of the residue did not devolve upon the administrator with the will annexed. *Brush* v. *Young*, 4 Dutch. 237; *Lanning* v. *Sisters of St. Francis*, 8 Stew. Eq. 392.

The complainant is entitled to have her share set off to her for her use. If good reason be shown for so doing, a mixed trust estate is partible in equity. *Wetmore* v. *Zabriskie*, 2 Stew. Eq. 62.

It is manifest from the language of the bequest that the testatrix contemplated a conversion of the share into money and the investment thereof for the benefit of the complainant for life. The gift to her is of the "interest of the equal undivided one sixth part or portion" of the estate and the will directs that after her death the "said interest and principal thereof" be "paid" to Georgiana Sweet.

And so, too, the gift to Mrs. Wilson is of the "interest of the one equal undivided sixth interest, part or portion" of the estate for life, with a direction that upon her death the "interest as well as the principal thereof" be "paid" to Georgiana Sweet. The testatrix indeed gives no express power of sale of the real estate, and in the gift of the residue to Mrs. Smith appears not to have contemplated the sale of the real estate therein, for she gives to her the rents, issues and profits for life, and gives, bequeaths and devises the property, after Mrs. Smith's death, to Mrs. Smith's daughters.

The difference between the provision for the complainant and Mrs. Wilson and the provision for Mrs. Smith is very marked. The testatrix appoints no trustee of the shares of the complainant and Mrs. Wilson, but she evidently meant to create a trust as to those shares. In such case, where such a trust is created and no trustee is appointed, the trust would devolve upon the executor. But the executor has renounced and refuses to act and the administrator has no authority to execute the trust. Under such circumstances this court would appoint a trustee. If the real estate can be partitioned, without prejudice to the interests of the owners, the share of the complainant may be set off and she may enjoy it as tenant for life.

By the will the testatrix declares that her reason for bequeathing a larger share of her estate to Mrs. Smith than to the complainant and Mrs. Wilson, was not want of affection for the latter, but because they were "amply provided for in this world's goods;" whereas, Mrs. Smith was poor and had no property of her own whatever; and that her reason for giving more of her estate to Mrs. Smith's two daughters than to her other granddaughter, Georgiana Sweet, was that they were poor and had no property whatever, while Georgiana Sweet had ample means, and property in her own right.

It is urged on behalf of Mrs. Smith and her daughters that, under the construction which is above put upon the will, the testatrix's intention to give to Mrs. Smith more than she gave to the complainant and Mrs. Wilson, will be frustrated. But this consideration cannot control in the construction of the will, inasmuch as the language and terms of the instrument are not doubtful. The fact that the testatrix's plan of division of her property fails to effectuate her purpose in this respect, will not justify the court in disregarding the plain provisions of the will. If her design is defeated, it is because she overvalued her property, or because it has fallen in value or because she contracted debts or met with losses after the making of the will. Where the testator's language and the provisions of the will are plain the court must be guided by them.

RUSLING
v.
RUSLING'S Exrs.

1. When the **trustee** is the **husband of** the **cestui que trust,** nothing short of clear and satisfactory proof will establish that the obligation of the former to the latter has been discharged or forgiven.
2. The **Statute of Limitations** is **not a bar** to trusts of such a character; nor is it a bar to the obligation of a bailee of money to hold or invest, where there is no stipulation as to the length of time he should hold it, and there has been no demand.
3. **Where a husband in his will recognized a claim of** his **wife** against him, **for money loaned,** and there is no certain proof that it was ever satisfied or extinguished, **it will be presumed** to be **still outstanding.**
4. A **legacy** will generally be **presumed to be in satisfaction of a demand against** the testator. Circumstances may arise or facts may appear on the face of the will showing a different intention. The **intention of the testator is to govern.** A devise of land is not to be taken in satisfaction of a debt.
5. If a testator declares that all his debts and legacies shall be paid, it will overcome the presumption that he intended the legacy to be in satisfaction of a debt due from him. The **presumption** is **also overcome** if the amount of the legacy be less than the debt, or if the debt be unliquidated, or if the legacy be not given to the creditor but to a third person.
6. When the testator does not provide that his just debts and legacies shall be paid, but that his just debts shall be paid if any he has, and the legacy given is in excess of the amount of the debt and interest due his wife, and he directs that the bequests in favor of his wife shall be in lieu of dower or any other claim against his estate, *held,* that he thereby **intended to discharge** and **satisfy his indebtedness** to his wife.

(Filed March 31, 1887.)

BILL to recover of executors a sum of money alleged to have been loaned to testator. *Dismissal of bill advised.*

The case is stated in the opinion.

Messrs. **Isaac R. Wilson,** and **C. A. Skillman,** for complainant.

Messrs. **J. F. Rusling,** and **B. Gummere,** for defendants.

Bird, *V. C.*, delivered the following opinion:

Mrs. Rusling, the complainant, is the widow of Gershom Rusling, who died in 1881, leaving a last will, in which the defendants were named as executors. Mrs. Rusling brings this suit to recover $1,000, and the interest thereon, which $1,000 she alleges she gave to her husband in May, 1863, to invest for her. I will set forth the principal facts:

The testator married Mrs. Rusling in 1861. About the first of May, 1863, Mrs. Rusling received $1,000 as her own separate estate; this she gave to her husband to invest for her and to pay to her the interest. I think he paid her the interest for the first year after he accepted the trust, which was thereby created. December 5, 1863, before the expiration of the first year after he received the $1,000, Mr. Rusling made his will. In this will he directed that all his debts should be paid; gave to his wife $120 yearly, so long as she remained his widow; gave her also the sum of $1,000 in cash, using this language:

"The same being the amount of certain moneys which I received from her of her separate estate after my marriage with her, and which said sum I direct to be paid to her by my executors within one year from the time of my death, with interest thereon from the time of my death. And I further direct that all the household goods and furniture, silverware, and personal property of every description, which she had of her own separate property at and after her marriage with me, be given to and taken by her as her own property."

September 23, 1865, Mr. Rusling made and published another will, differing in the particulars above named in no material respect, except that he made the $120, $180.

It is a fact that some of the children of Mr. Rusling by a former wife were greatly displeased with Mrs. Rusling's presence in the household, without sharing any of the burdens thereof out of her separate estate. From time to time they expressed their displeasure to her, but when does not appear to any degree of certainty. It is insisted that in view of this dissatisfaction Mrs. Rusling gave this $1,000 to her husband and thereby, to that extent, contributed to the daily recurring wants. It will not be amiss to note that if she made any such donation, and Mr. Rusling so regarded it, it must have been after September 23, 1865, the date of the last will named; for it will be seen that in that will he directed the $1,000 to be paid to her, with interest.

January 8, 1873, Mr. Rusling executed another will, directing all his just debts to be paid; giving to his wife $2,000 with interest from the time of his death, to be paid to her in one year thereafter; directing his executors to pay to her annually from the time of his death a sum equal to the interest of $3,000 and to invest a sum sufficient for that purpose; making the same direction as in the former wills, with respect to her personal property; and declaring the said gifts to be in lieu of her right of dower; after which he made disposition of all the balance of his estate.

October 4, 1873, Mr. Rusling executed another will in all material respects, so far as it affected Mrs. Rusling, like the one last referred to, except instead of giving her the interest of $3,000 he gave her the interest of $4,000; and directed that such gifts be in lieu of "her right of dower or any other claim that she might have against my (his) estate."

During the year in which these last two wills were made Mrs. Rusling built herself a cottage at Ocean Grove, and for that purpose borrowed about $900 of her husband, which shortly thereafter she paid back to him. This was done without any claim on her part of the $1,000 which she gave to him to invest in 1863 and without any accounting between them therefor.

December 10, 1874, Mr. Rusling made another will directing his just debts to be paid, saying: "If any I have;" giving to Mrs. Rusling the $2,000 as in the two former wills last mentioned, and the interest of $4,000 during her natural life, if she should so long remain his widow; making the same directions as to her personal property, and declaring that such gifts should be in lieu of dower or any other claim against his estate and disposing of all the balance of his estate.

The last will in the series, and which was admitted to probate, is dated January 4, 1875, after which time Mr. Rusling lived about six years. In this will he directed "that all of my just debts, if any I have," should be paid. He gave to his wife $2,000 and directed that it should be paid to her with interest from his death in one year thereafter; gave to her the interest of $4,000 to be paid to her annually during her life, if she so long remained his widow; directing that all her goods, silverware, and personal property of every description, should be taken by her as her own separate property; and adding: "And it is my will and I do hereby direct that the said bequests in favor of my said wife shall be in lieu and in bar of her right of dower, or any other claim that she might have against my estate."

About the time of making these last wills, and before, Mr. Rusling said that his wife had brought him $1,000 and that he had invested it for her, that he had paid her one year's interest and that he wanted her to have it after his death.

After the making of these wills, and after Mr. Rusling had said that he had this $1,000 from his wife, she said that she had given Mr. Rusling $1,000; and when the witness to whom she made the statement was asked if she gave any reason for so doing, she said Mrs. Rusling replied that it was "to have peace in the family;" that "she had unpleasant times with them" "because she didn't bring anything in the family, and she gave him $1,000 to make peace, and afterwards she said there was peace; they were satisfied."

One witness says that Mrs. Rusling told this to her frequently. Another witness says that about the same time Mrs. Rusling told her that she had given Mr. Rusling $1,000 and that he had never given her a cent of interest. In 1876 or 1877 Mrs. Rusling told another witness that she had given her husband $1,000 in 1863 "to pacify him and his children;" saying "there existed a little unpleasantness in the family;" "they had an idea that she ought to have brought something into the family as his other wives had done, and that in order to pacify them she gave him this $1,000."

While it is true that Mrs. Rusling either denies making these statements or says she does not remember them, all rules applicable in such cases require me to regard these alleged statements as established facts, the decided preponderance of testimony being against her.

From these facts the first question is, What relation was Mr. Rusling in, to Mrs. Rusling, with respect to her separate estate, at any time during their married lives? One of his wills shows that he accepted from her the $1,000 and, by the same will, gave it back to her with interest from the time of his death. This will bears date December 5, 1863, about six months after he received the money. This clause was retained in the next will dated September 23, 1865. These unmistakable declarations, with the other undisputed facts, establish the relation of principal and agent or, what I think more nearly expresses the truth, of *cestui que trust* and trustee.

But it may be said that the gift of $1,000 in 1865, with interest from the death of the testator, will not satisfy the demands of a trust of $1,000 created two years or more before. Truly not; but it does not fail, any the less, to establish the relation of the parties. And speaking with reference to this natural and logical criticism, I remark that the will is to be read as a whole; and so reading it, it is seen that while the $1,000 stands as before, the annuity, which in the first will was $120, is in the second increased to $180.

I conclude, therefore, that the relation of *cestui que trust* and trustee was established. The next question is, Was the obligation created by that relation discharged by the trustee in his lifetime, except as provided in his last will? Or if not discharged by him, was it released by Mrs. Rusling?

It is important to observe that the trustee was the husband of the *cestui que trust*. This being the case nothing short of clear and satisfactory proof will convince the court that the obligation has either been discharged or forgiven. I feel it my duty to say that ordinary expressions, importing a gift, or satisfaction, or discharge, provoked or called forth by dissatisfied members of the household, are wholly insufficient to justify the court in pronouncing judgment in favor of the trustee.

The fact that about ten years after the advance of $1,000 to Mr. Rusling, Mrs. Rusling borrowed of him about $900 to use in building herself a cottage, and soon thereafter paid it back to him, is in the law of much more significance. Ordinarily, under such circumstances, the creditor would require the debtor to account for the money already due, with interest, rather than become himself the debtor by borrowing. But, as stated above, it cannot be forgotten that Mrs. Rusling was the wife; and however greatly the law has extended to her the privilege of asserting and maintaining her own rights, in her separate estate, nothing is more certain or better known than that in multitudes of instances, the married woman confides and trusts the management of her affairs, absolutely, to the husband. With this view of the case before me I cannot conclude that the obligation resting upon Mr. Rusling, as trustee, was, by that transaction of borrowing and repaying, discharged.

During the progress of the cause it was insisted that the Statute of Limitations was a bar. If I am right in my conclusions, this view cannot prevail, since it has been declared many times that the statute is not a bar to trusts of this character. Besides this view, it may safely be said that Mr. Rusling not only stood in the relation of trustee, but also that of *bailee;* for he took this money to hold or to invest for Mrs. Rusling and to pay her the interest, it not appearing that any stipulation was made as to the length of time he should hold it; nor does it appear that she ever made demand for the money. I cannot conclude, therefore, that the statute has any application to this case. See *Boughton* v. *Flint*, 74 N. Y. 481, 482.

I am brought now to the declarations of Mrs. Rusling, made long after she placed the money in the hands of Mr. Rusling, made five or six years after she borrowed the $900 of him, which she repaid without requiring him to account for the $1,000, and nine or ten years' interest then due thereon, and made three or four years after the execution of the last will of Mr. Rusling.

Mrs. Rusling is a most highly respectable lady, and in every way worthy of credit; but it is difficult, according to the ordinary rules applicable to such cases, to disbelieve the other witnesses, and for the court to say that two who appear to be truthful and to be disinterested are less worthy of credit than one who is much more advanced in years and whose recollection would be much more likely to be influenced or be clouded by her interest. I must, therefore, conclude that Mrs. Rusling said that she had given the $1,000 to her husband for the sake of peace.

In so deciding I do not forget that one of the witnesses produced by the defendants said that Mrs. Rusling told her that she had given Mr. Rusling $1,000 to put out at interest for her. But it cannot be overlooked, as stated above, that two other witnesses very distinctly stated that Mrs. Rusling told them repeatedly that she had given Mr. Rusling the $1,000 for the sake of peace.

But whether, as between husband and wife, this ought to be regarded as sufficient to discharge the husband from his trust, under the circumstances, is not clear to my mind, nor will I now pause to determine,—because of another view of the case, which must necessarily be considered. Mr. Rusling not only recognized this claim, in his first will, but (as I understand the testimony) distinctly did so to two of the witnesses between the years 1870 and 1876. And, in my judgment, although he did not name this particular sum, he recognized some claim of Mrs. Rusling against him, in his last three wills: one made in October, 1873, one in December, 1874, and the one which was proved in January, 1875, in each of which he directed that the bequests in favor of his wife should be in lieu of and in bar of her right of dower or any other claim that she might have against his estate.

The bequests referred to were the $2,000, payable one year after his death with interest, and the interest on $4,000 payable during her lifetime. The testator declares this to be in lieu of dower, which all understand to have a certain definite meaning and application, and also in lieu of any other claim, which certainly must be understood as referring to something in the mind of the testator besides dower. It was aimed at an object. It was not an idle, careless, meaningless expression, interjected at random. The court cannot disregard it. If it be possible, every word and phrase must be assigned to some purpose. And the fact appearing that Mrs. Rusling once had this just claim and there being no certain proof that it was ever satisfied or extinguished, the expression in the will or "any other claim" will be applied to it; the court will say that the testator thereby intended to recognize this claim.

I cannot escape the conclusion that some indebtedness must have existed and been recognized by the testator, which awakened in his mind and called forth this expression, just as certainly so as her right of dower prompted him to expressly provide and guard against her making claim therefor and also taking the legacies.

But the question remains: Did Mr. Rusling intend by the gifts made to discharge this claim? Both as to the general rule of law in such cases and the exceptions thereto there is no controversy. The general rule is stated, in *Van Riper* v. *Van Riper*, to be that a legacy will be presumed to be in satisfaction of a demand against the testator. Circumstances may arise, or facts may appear on the face of the will, showing a different intention. The intention of the testator is to govern. 1 Green, Ch. 1, 3, and cases there cited.

A devise of land cannot be taken in satisfaction of a debt. If the testator declares that all his debts and *legacies* shall be paid, it is regarded as sufficient to overcome the presumption that he intended a legacy to be in satisfaction of a debt due from him. The presumption is likewise overcome, if the amount of the legacy be less than the debt, or, if the debt be unliquidated, or the legacy be not given to the creditor, but to a third person. See *Van Riper* v. *Van Riper*, 1 Green, Ch. 1; *Reynolds* v. *Robinson*, 82 N. Y. 103; *Boughton* v. *Flint*, 74 N. Y. 476; *Chancy* v. *Wootton*, Select Cas. in Ch. 44 and note at the end of the case found in 13 Eng. Ch. 118.

In *Phillips* v *McCombs*, 53 N. Y. 494, it was said: "The debt being due and the legacy being payable two years after the testator's death, no legal presumption arises upon the face of the will that the legacy was intended as a payment of the debt." Now, what appears upon the face of this will to guide me in this matter? The testator does not say that "All of my just debts and *legacies* shall be paid," but says "All my just debts if any I have." The $2,000 given was payable in one year after the testator's death.

These expressions, and the one above quoted declaring the bequest and that the annuity should be in lieu and in bar of dower or *any other claim*, are the only expressions which can aid me in ascertaining the intention of the testator, under the rules above presented. The $2,000 given was at the date of the will considerably in excess of the amount of principal and interest due at the date of the will, and also at the death of the testator, from which time the legacy drew interest because of which it became impossible for the debt and interest to be equal to the legacy. This I think takes the case out of the rule laid down in *Phillips* v. *McCoombs, supra.*

And it seems to me that the direction that the bequests in favor of his wife shall be in lieu of dower or any other claim takes it out of the rule established in many of the cases, that where the testator directs that all of his debts shall be paid the presumption is that it was not his intention that a legacy should be in satisfaction of a debt; and it gives to the defendants in this case the benefit of the general rule. It seems to me it would not have been stronger if the testator had said that the bequests made to her were intended to be "in payment and discharge of any and every debt, claim or demand that she now has against me." It will strike the mind of everyone that this case is not within the exception to the general rule which provides that when the testator says that his debts and *legacies* shall be paid; for in this case he only directs that his debts be paid, if any he have. *Edmunds* v. *Low,* 3 Kay & J. 318, 321; Lead. Cas. Eq. 777.

In this work I have found a more complete and useful analysis of the whole subject than elsewhere. See pp. 774, etc. 820, etc.

I conclude that the testator was indebted to Mrs. Rusling at the time of making his last will; and that by his bequest therein of $2,000 he intended to satisfy and discharge such indebtedness. And the creditor, Mrs. Rusling, having accepted such bequest, she was not justified in filing her bill to enforce her claim.

The bill must therefore be dismissed, with costs. I will so advise.

Charles BARCLAY, Admr.,
v.
Samuel C. COOPER.

1. Where a **bill is filed by the administrator** of a decedent **for an account** of her interest in an estate, **and** for a **discovery** of her personal property, held by defendant, and to restrain him from expending that property in improvements upon the joint real estate, and it appears that defendant had made several settlements and paid the balance found due from him thereon and offered to make a further settlement which was refused, and that complainant could have got all the information he desired as to the property by inquiring of defendant who had not refused to give it, and that defendant did not contemplate any expenditures upon the joint real estate except those which he was constrained to make by the municipal authorities,—*held*, that **defendant** should **not** be **required to pay** the **costs** of the suit.
2. **Where** it was **agreed** that **defendant should manage** an **estate** in his hands for the interest of those concerned **and** should **not charge for** his **services,** should make annual settlements and should pay no interest for balances in his hands, and a settlement was made on that basis and defendant tendered a further settlement; *held*, that **he should pay no interest** up to the time of the settlement nor since, as he was always ready to pay the money to the complainant.
3. **Land bought in under foreclosure** proceedings by the defendant in trust for himself and the others interested in joint mortgages which were foreclosed, before the death of complainant's intestate, and which purchases were necessary to protect the interest of the holders of those mortgages and which land remains unsold, is to be **regarded as real estate** and not personal **in** the **accounting** of defendant with complainant **of** the **personal estate of** his **intestate,** who was interested in the mortgages.
4. **Land conveyed** to defendant **after** the **death of** complainant's **intestate in satisfaction of a mortgage** thereon given **to** defendant and complainant's **intestate** and others, in order to save the expense of foreclosure proceedings, which conveyance was taken by defendant **in trust** for those interested in the mortgage, must be **regarded as personal property;** and complainant is entitled to an account in respect thereto, and defendant to an allowance of **taxes** paid by him thereon.

(Decided April 13, 1887.)

BILL for an account, etc. On final hearing upon pleadings and proofs. *Decree for an account.*

The case is stated in the opinion.

Mr. **H. A. Drake,** for complainant.

Mr. **H. M. Cooper,** for defendant.

Runyon, *Chancellor*, delivered the following opinion:

The complainant was the husband of Ellen C. Barclay, deceased (who was one of the daughters of Joseph W. Cooper, deceased), and he sues as her administrator. Her father died in 1871. By his will and the codicil thereto, after making provision for his widow (who is dead), he gave all the residue of his estate to his four children, Samuel C., Mary E., Ellen C., and Walter M. The executors were the widow and the two sons Samuel and Walter. They all proved the will and codicil.

Walter died in 1882, intestate and without issue. Letters of administration upon his estate were issued to his brother Samuel, the defendant. Ellen was married to the complainant in October, 1882. She died intestate about one year afterwards, leaving one child who is still living. The estate of Joseph W. Cooper appears to have been managed by the defendant. Upon Walter's death each of the three surviving children was the owner of one third of the property. Up to the death of Ellen, Samuel managed the estate in the interest of and for all three and without charge to his sisters for his services, under an arrangement that he should not charge for his services, should make annual settlements and should pay no interest for balances in his hands. After Ellen's death he continued still to manage it in like manner, with (as he says) the consent of the complainant.

The bill is filed for an account of Ellen's interest in the estate for a discovery of her personal property held by the defendant and to restrain him from expending that property in improvements upon the joint real estate. The parties made a settlement in January, 1884; and in pursuance of it the defendant paid the complainant about $33,000, for his deceased wife's interest in the assets of the estate of her father, except the property held jointly and her interest in Walter's share. There was a settlement of her interest in Walter's estate in July, 1884. In the fall of that year the complainant told the defendant that he would like to have the whole matter settled up, and the latter replied that it was his custom to settle the matters of the estate with the members of the family at the first of the year, that he had always done so. The complainant did not object to waiting until that time.

On the first of January following the defendant was ready to settle, but on account of the complainant's illness the settlement was deferred and it took place on the 5th of March following. The defendant paid the complainant upon that settlement $11,179.09, the amount found due. At that time the defendant stated that he would be ready to settle again upon the first of the next year, and he says the complainant made no objection. On the first of January, 1886, the defendant was ready to settle with the complainant for all moneys received and paid out during the preceding year, and tendered himself ready to do so to the complainant's attorney, who refused to make the settlement. The attorney, indeed, says that the defendant, after the bill had been filed (it was filed December 4, 1885), told him that the settlement which he desired to make upon the first of January would be made only in case this suit should be withdrawn or the matters in controversy in it settled: but he also says that on or about the first of January the defendant called at his office with his book (his account book) in his hand, and then stated to him that he was ready to settle according to his custom at the beginning of the year for the moneys which he had collected and paid out during the year. In October preceding, and before the bill was filed, the defendant stated to the attorney that he would settle on the first of January as he had been accustomed to do ever since he had acted as trustee in the management of the estate.

The case shows no unwillingness on the part of the defendant to account to the complainant. If, as the former testifies, the latter made no objection to his proposition made on March 5, 1885, to settle again upon the first of January succeeding, the filing of the bill was not necessary to get an account.

On the first of January, 1886, the defendant offered to account. The complainant could have got all the information he desired in reference to the matters involved in the transactions of the defendant in the management of the estate by inquiring of the defendant. There is no evidence of any refusal whatever to give him any information for which he asked.

The defendant swears that after the death of his sister, the complainant's wife, he explained to the complainant everything in regard to her personal estate and the securities belonging to it, and that when he handed to the complainant the bonds (held by her in severalty) in his possession belonging to her estate he and the complainant went over the defendant's book, page by page, to see whether the indorsements upon the bonds corresponded with the defendant's book, in which he kept a memorandum of all mortgages and of the time up to which interest was paid, and that the complainant saw all the mortgages which the defendant had belonging to the joint estate or to the complainant's wife. He also says that at one time he showed the complainant his plans of the real property, and his way of keeping books in reference to that property, and gave him such information upon the subject as would enable him in case of the defendant's death or disability to understand the whole matter.

It may here be remarked that the complainant says that in the settlement made in March, 1885, the defendant declined to pay over his, the complainant's, share of the principal of the joint mortgages that he had in his possession, on the ground that there were expenses of the joint real estate to be met, and he had assumed to meet them. The defendant could not reasonably have been expected to pay over any of the principal of those mortgages to the complainant at that time. The mortgages belonged to the defendant, his sister, Mrs. Kaighn, and the estate of the complainant's deceased wife, and the principal had not been collected.

The complainant's attorney says that the defendant said to him that he declined to make a settlement with the complainant as administrator, relative to the personal property (referring to the joint mortgages) of the complainant (as administrator) in his possession; and that he intended to retain it in his possession for the purpose of meeting out of the income thereof the expenses for improvements and repairs upon the real estate, in which the complainant and his child were interested. He says also that the defendant said that he ought to retain that personal property for the purpose stated for his protection, or in justice to himself, or that he ought to be allowed to do so for his protection; but the defendant never in fact refused to account for the money and property in his hand.

The complainant admits that when he solicited the defendant to become his surety upon his bond for $5,000, as administrator, he said to the latter that he considered the taking out of the letters a mere form, as there were no creditors and there was practically nothing for an administrator to do as such, that what there was to do, could be done as well without letters of administration as with them, and that he expected that the affairs of his wife's estate would go on just as they had gone on theretofore; that is, that the defendant would continue to manage both real and personal property as he had done. The defendant testifies that the complainant told him so, on more than one occasion, and that he told him so as lately as the settlement in March, 1885.

Three questions are presented in reference to the account: one is whether the defendant should be required to pay interest upon the balance in his hands due the complainant; another is whether the land bought in under foreclosure proceedings by the defendant, in trust for himself and the others interested in joint mortgages which were foreclosed, and which purchases were necessary to protect the interest of the holders of those mortgages, and which land remains unsold, is to be regarded as personal or real estate in the accounting with the complainant which is of course to be of the personal estate only of his deceased wife; the other question is as to the liability of the deponent to account to the complainant in respect to a mortgage given by one Munn, to the defendant and his brother and sisters, of a vacant city lot sold by them to him, in satisfaction of which mortgage a conveyance of the lot was taken by the defendant in trust for those interested in the mortgage.

As to the first question: the defendant undoubtedly understood from the complainant that the latter was desirous that the family arrangement before referred to should continue until a final settlement should be made; and he appears to have had good reason for such understanding. By that arrangement the defendant was not chargeable with interest upon the balance in his hands at the end of the year. The settlement of March, 1885, was made upon that basis.

On the other hand the defendant was entitled to no commissions or other compensations for his services. He tendered himself ready to settle on the first of January, 1886, in accordance with the arrangement. He therefore should pay no interest up to that date; nor should he pay any interest for the period since then, for he swears that he has always been ready to pay the money to the complainant.

The discovery which was sought by the bill has been made; and the case shows no concealment nor any bad faith upon the part of the defendant. Nor is it shown nor does it appear that the defendant, when the bill was filed, contemplated expenditures out of the joint personal property in his hands for improvements upon the joint real estate, except it may have been such as he would have made unwillingly and because constrained to make them by the municipal authorities.

The Munn property was conveyed to the defendant in March, 1884, after the death of the complainant's wife; and it appears to have been taken in order to save the expense of foreclosure proceedings. The action of the defendant in the matter seems to have been judicious, and it is not impeached. That land must be regarded as personal property; and, therefore, the complainant is entitled to an account in respect thereto, and the defendant to allowance of any taxes, etc., paid by him thereon.

As to any land obtained through foreclosure proceedings or otherwise, in satisfaction of mortgages thereon, before the death of the complainant's wife, it is to be regarded as real estate, for such it was at her death.

There must be an account, but the defendant should not be required to pay the costs of this suit.

MORTON'S Administrator
v.
MORTON *et al.*

1. An unconditional **assignment** and transfer by delivery, **of all her estate,** made **by an aged person of weak mind** and rapidly failing memory, to those who live with her, reserving only the interest on a few small sums of money and taking no voucher for such reservation, *held* **void in law, unless** it be **shown** that such person was entirely **free from undue influence.**
2. When, at the time of such assignment and transfer, the persons to whom it was made held a power of attorney from such aged person, enabling them to take charge of her affairs, and had obtained from her absolute possession of all her estate, they were **trustees** for her, and the law will hold them to the strictest account for the property, and the assignment be held void.

(Filed April 9, 1887.)

BILL to set aside assignments by plaintiff's intestate of certain mortgages, notes, and other evidences of debt, on the ground of fraud and undue influence and for an accounting, etc. *Decree for complainant.*

The case is stated in the conclusions of the Vice Chancellor.

Messrs. **Robbins & Hartshorne,** for complainant.

Messrs. **R. T. Stout & H. H. Wainright,** for defendants.

Bird, *V. C.*, filed the following conclusions: The contention in this case is respecting the estate of Ann Morton, deceased. Ann Morton was the widow of —— Morton; she was his second wife, and sister of his first wife; by his first wife he had three children; by Ann Morton he had none.

The children, who are nephews and nieces of Ann and of whom Ann is the step-mother, claim her property. They say that she made an absolute gift of it to them. Ann died at about the age of seventy-nine years, her husband having died about twelve years before. She had a brother, Joseph J. Allen. In January, 1879, she committed her bonds, notes, and gold and silver, all of the value of about $3,600, to his custody; he kept it but a short time before she executed a power of attorney, dated the 4th day of February, 1879, to Peter C. Morton and John L. Morton, to collect all of her estate. Peter C. then lived in the same house with her and had done so for many years. John L. had lived within about 300 yards of her for a long time; they were two of her nephews and step-children. When this power of attorney was delivered to them they immediately demanded possession, and possession was given to them by Joseph J. Allen, of all the property which she had placed in the custody of Joseph.

A receipt which they signed shows that one of these securities was a bond and mortgage of the said Peter C. for $150, a bond of one Pierce for $275, a note for $20, a note for $344, upon which had been paid $284.30, a note of the said Peter C. Morton for $78.26, another of his notes for $50 and another for $47.68, and a note of John L. Morton, $506.64, together with other evidences of indebtedness. Peter C. and John L. held these papers by virtue of their power of attorney until the 12th day of May of the same year (1879), when one Clark Newman, who had been invited to the house of Ann Morton either by Peter C. or John L., to transact some business for her, came there and indorsed on Peter C. Morton's bond, as follows: "May 12, 1879, record of Peter C. Morton, satisfaction in full for principal and interst on the within bond, in consideration that the usual interest on the amount of the said bond be paid to me when demanded," to which she made her mark.

On the bond given by Pierce to her to secure the payment of $275, she indorsed as follows: "May 12, 1879, for a valuable consideration I do hereby transfer to Peter C. Morton and John L. Morton all my right and interest of, in and to the within bond, and for the equal benefit of the children of their brother, Joseph A. Morton, deceased; they to receive the one third part thereof, reserving the interest that may accrue thereon during my lifetime if I choose to demand it;" and signed it by her mark.

On the note of Joseph J. Allen, which was for $352.86, she made a similar indorsement transferring and assigning it to the said Peter C. Morton but without any reservations of interest to herself whatever.

She made a like indorsement on the note of John L. Morton, expressing satisfaction for the principal thereof, which was $506.64, reserving the interest thereof yearly to Peter C. She assigned another of his notes, reserving the interest which should fall due. She also assigned a note of $200 to Peter C. and John L. for the use of themselves and the children of their brother Joseph. Several other notes were indorsed by her, in a similar manner. Enough has been given to show the true nature of the transaction. The instruments so indorsed were all delivered to Peter C. and John L. Peter C. at once caused his mortgage to be canceled of record.

As I understand the testimony, Ann Morton thus surrendered to Peter C. and John L., her nephews and stepchildren, for their use and the use of the children of one of their brothers, all of her estate, reserving nothing to herself except the interest on the principal due upon the bond and upon three of the notes. She took nothing from them to show any liability upon their part to pay her such interest, should she demand it. The complainant, the administrator of Ann Morton, files his bill, alleging that this transaction of May 12, 1879, by which said instruments were transferred to Peter C. and John L., is fraudulent and void; both upon the ground of undue influence and incapacity.

There is evidence showing that the mind of Ann Morton had failed very greatly, that her memory was very perceptibly impaired, and that recent sickness had greatly prostrated her. These things are so manifest in the case that if it should be concluded that she was not incapable of contracting, the conclusion cannot be avoided that she was most easily subjected to undue influence. In such case, if such influence was exerted, it was clearly fraudulent in the law.

In considering this question of undue influence, we must take into account the relation of the parties and the manner in which they had been living. Ann Morton, being old and at best feeble in mind and body, living in the same house with her nephew and stepson, Peter C., naturally felt a sense of dependence upon him, if not subjection to his will. The testimony shows that he had many business transactions with her; and I think it is a striking fact, a fact which shows either great mental imbecility on her part or great control on the part of Peter C. and John L., that, after having placed all her securities in the hands of her brother, who seemed to be competent and worthy, in less than a month she executes a power of attorney to Peter C. and John L. to collect them and to take charge of them, without ever having herself demanded them of him personally. But what is more significant still is the fact that in about one month after they get possession of all of these papers, as her attorneys, they procure Clark Newman to come and have her transfer them all to them for their own and their nephews' absolute use and control, excepting the interest of a portion only, delivering up to them every voucher and taking no evidence of her reserved rights. She thus makes herself penniless. Who in a reasonable state does thus?

But the defendants say that, although this be all true, although she reserved nothing, although she surrendered all evidences of indebtedness and took no proof of any claim against them, she had a right so to do, and insist that the law will uphold the transaction, until the complainants either establish mental incapacity or undue influence. In other words: upon both branches of the case, it is urged that the burden is upon the complainant. As to mental unsoundness, considered independently, this is so; but whether so or not in this particular case, as to undue inflence, I think the complainant has sustained the charges made.

There is proof that Mrs. Morton had said that she intended to give her estate to the children of her husband by his former wife; but there is no proof that she ever undertook in any manner, except by will, to dispose of her estate, until she made this assignment to Peter C. and John L.: and this disposition was not made until they obtained the absolute possession of all her securities, under the pretense of acting as her attorney.

I conclude that when an aged person of weak mind and of rapidly failing memory makes an unconditional assignment of and transfers, by delivery, all of his or her estate, to those who live with him or her, reserving only the interest on a few small sums of money, and taking no voucher for such reservation, the transaction is void in law, unless it is shown that such person was entirely free from undue influence.

I come to this conclusion because it seems so plainly most irrational to suppose that any person would, without such influence, in some way exerted, strip himself or herself of all means of support or comfort. When in health and strength, Mrs. Morton was not guilty of any such folly. When she had the mind to see what her necessities were or might be she took care of her resources and so provided for her wants; but when age and weakness overcame her, and the time of her greatest need had also come, she lost sight of her former care and judgment, and allowed all to go, by one stroke of the pen. I say in some way her weakness must have been taken advantage of.

But Peter C. not only lived in the house with her, but he and his brother, John L., had been made her attorneys. She had all her estate delivered to them. Thus, besides their being the children of her dead sister, there was this confidential relation established. Their relation to her first gave them great control over her, in her decrepitude. Achieving this success, they procure a power of attorney from her, enabling them to take charge of her affairs. When this has been accomplished, it seemed easy enough to persuade her that she had no further use, in her old age, for what her prudence and frugality had treasured. But when they accepted that power of attorney, they accepted a *trust*, and the law will hold them to the strictest account. See Bigelow, Fraud, 223, and cases cited.

As to the responsibility of the trustee, and as to where the burden lies, see *Jones* v. *Lloyd*, 6 West. Rep. 35.

But upon both branches of the question, aside from that of trust, the complainant seems to be fully sustained by the careful exposition of the law as laid down in *Haydock* v. *Haydock*, 6 Stew. Eq. 494; *S. C.* 7 Stew. Eq. 570, court of errors on appeal.

I will advise a decree, setting aside all of said assignments as void, and that the said Peter C. Morton and John L. Morton account to the administrator de bonis non *of Ann Morton, deceased, for all the estate or assets of the said Ann Morton which were assigned and transferred to them May 12, 1879; they will be entitled to credit for all just disbursements on her account; they will be charged with interest upon the various sums transferred. The complainant is entitled to costs.*

PREROGATIVE COURT.

Garret CONOVER, *Appt.*,
v.
John L. CONOVER *et al.*, Exrs., *Respts.*

A **father made a will,** whereby he **devised** his **property to his** several **children,** giving a certain farm to his son Garret. After the making of the will, Garret misbehaved himself, and soon thereafter the testator **made a codicil** to the will, **whereby** "for certain reasons" **he revoked** the **gift** of the farm to Garret **and** instead thereof **gave** him **an annuity** of one hundred dollars. Both the will and codicil were duly executed. Thereafter testator altered the word "one" in the amount of the annuity in the codicil to "two," and made a memorandum that he wished Garret to have "two hundred instead of one, as per codicil." Soon after this testator died, and Garret filed a *caveat* against the probate of the codicil, on the ground that his father was induced to make it through undue influence. The will and codicil were both admitted to probate, the latter in the condition in which it was before the alteration. *Held*, on the evidence, that the **codicil,** as well as the will, was **properly admitted to probate.**

(Decided March 5, 1887.)

APPEAL from a decree of the Monmouth Orphans' Court, admitting a will and codicil to probate. *Affirmed.*

The facts are stated in the opinion.

Messrs. **R. L. Lawrence** and **M. W. Meagher,** for appellant.

Messrs. **E. W. Arrowsmith** and **A. C. Hartshorne,** for respondents:

See, as recent authorities on the question of undue influence:

Pemberton Will Case, 13 Stew. Eq. 520; *Rusling* v. *Rusling*, 9 Stew. Eq. 603; *Lynch* v. *Clements*, 9 C. E. Green, 434; *Kise* v. *Heath*, 6 Stew. Eq. 239; *Andrews Will Case*, 6 Stew. Eq. 514.

The influence acquired over a testator by kind offices unconnected with any fraud or contrivance, can never, alone, be a good ground of setting aside a will; such influence is lawful and proper.

Lowe v. *Williamson*, 1 Green, Ch. 82; *Den, d. Turnbull*, v. *Gibbons*, 2 Zab. 117; *Re Gleespin's Will*, 11 C. E. Green, 523.

A will contained alterations and erasures affecting the amount and objects of the testator's bounty, the existence of which at the time of the execution the attesting witnesses could not depose to; held, there being an absence of all direct evidence as to the alterations and erasures, that the presumption of law was that such alterations and erasures were made after the execution of the will, and the probate of the will was granted in its original form.

Cooper v. *Bockett*, 4 Moore, P. C. C. 419; 10 Jur. 931.

Where a testatrix told the witnesses to her will, at the time of attestation, that she had made alterations in her will but did not allow them to see what the alterations were, held, that in the absence of any means to determine what alterations were made before execution, the court could not give effect to any of them.

1 Johns. & Hem. Eng. Ch. Rep. 115.

A testatrix duly executed a draft of a will, in which at the time were several marginal notes and alterations in the handwriting of the solicitor. About four years after a codicil was executed in which no reference was made to the contents of the will. These papers remained in the custody of the testatrix until her death. It was then found that a marginal note disposing of the residue of the personalty and several bequests had been struck through with a pen, and other alterations had been made in the handwriting of the testatrix; held, that as no affirmative evidence was produced to satisfy the court that these last mentioned obliterations and alterations were made before execution, whether the date of the execution was taken to be that of the will or the codicil, the presumption in law was that they were made subsequently and that they could not therefore be included in the probate.

Rowley v. *Merlin*, 6 Jur. N. S. 1165.

Upon the death of A, a will was found in which a legacy to B was erased, but so as to be legible. One of the attesting witnesses stated that the erasure was made before the execution of the will; the other witness had no recollection on the subject, and evidence was given tending to show that the erasure was made after the execution. The court, upon the balance of the evidence, being of the opinion that the erasure was made after the execution, granted probate without the erasure.

Re Hardy, 30 L. J. N. S. Probate, 142.

In granting probate of a will an alteration will not be admitted to probate either in the ordinary way or the *fac simile* unless attested in the manner required by the Wills Act; and the court will decline to entertain any argument drawn from the intention of the testator as revealed by the context.

Re Gaussen, 16 Week. Rep. 212.

A testatrix after the execution of her will erased certain parts, substituting in their places other words. Probate was granted of the will with these parts erased in blank, the original words not being discernible on the face of the paper and there being no evidence to show what they were.

Re James, 1 Swab. & Trist. Prob. 238.

A testator some time after the execution of his will ordered the names of two executors to be erased and other names to be substituted in their places. This alteration was completely effected but not in the presence of two witnesses; held, that in the probate the names erased must be restored.

Re Parr, 6 Jur. N. S. 56; *S. C.* 29 L. J. N. S. Prob. 70.

A testator after executing his will erased the name and description of the executor and substituted those of another person. The alterations not having been duly attested the court ordered the words erased to be restored in the engrossment of the will.

Re Harris, 29 Law Jour. N. S. Prob. 79; *S. C.* 1 Swab. & Trist. Prob. 536.

W made a will, which was written on the first and third pages of several sheets of note paper. At the bottom of one of these pages were the words and mark: "I leave the whole of my property to the following religious societies, viz.: X to be divided in equal shares among them." On the top of the opposite page was a similar mark to that following the "viz.:" and the names of four religious societies. There being no evidence that the names of the societies were written before the execution of the will, the court, considering them to be interlineations, excluded them from probate.

Re White, 30 Law Jour. N. S. Prob. 55; 6 Jur. N. S. 808.

A testator executed a will and codicil. At some time after the execution of the will, but before that of the codicil, he with a pencil struck through several paragraphs of his will and made his initials on the margin; he also placed a query opposite other paragraphs. The codicil confirmed in so far as it did not alter the will; held, that the alterations so made were only deliberative and not final and not included in the confirmation of the codicil, and therefore to be omitted from the probate.

Re Hall, L. R. 2 Prob. & Div. 256; 40 Law Jour. N. S. 37; 25 Law Times, N. S. 284; 19 W. R. 897.

And the same principle applies to partial alterations, so that where a testator strikes out the name of a devisee and at the same time interlines that of another, or substitutes a larger or smaller interest or share for that which he had previously given, if the interlineation is inoperative for want of an attestation, the obliteration will also fail of effect.

1 Jarm. Wills, 295.

Glasses have been used for discovering what the words obliterated originally were; but parol evidence is inadmissible except in those cases where the obliteration was made for the purpose merely of altering the amount of the gift and not of revoking it, in which case, there being no intention to revoke except for the purpose of substituting a gift of a different amount, if the latter cannot take place by reason of the substituted words not being properly attested, the former gift will now (as under the Statute of Frauds) remain good, and evidence must be admitted to show what the original words were. The same rule, it is presumed, applies to an erasure of the name of the legatee as it appears to do to an erasure of the name of an executor.

1 Jarm. Wills, 302.

An intention to revoke, however strongly declared, will not prevail unless actually carried out. A testator having an only son devised certain real estate to his "son J. W. S.;" subsequently he erased the son's name from the will, leaving the word "son" uncanceled; held, that the devise was not revoked.

Clark v. *Smith*, 34 Barb. 140.

Alterations and interlineations in a will made by the testator with the intention of making it operative as to after acquired lands, but which alteration did not take effect for want of a proper attestation, do not destroy the original devise, not being made *animo revocandi*.

Jackson v. *Holloway*, 7 Johns. 394.

There may be a partial revocation by obliteration; but if it be accompanied by an inoperative attempt to give the property over to another (not duly executed) the revocation is ineffective.

McPherson v. *Clark*, 3 Bradf. Sur. 92.

A testator cannot by obliterations partially revoke a will, duly executed.

Quinn v. *Quinn*, 1 Thomp. & C. 437; Schouler, Exrs. & Admrs. § 84.

Alterations, erasures and obliterations found in a will should be treated according to circumstances. If they precede the formal execution, they stand as the final expression of the testator's wishes; but if made afterwards, the instrument in its altered shape must have been duly attested or else the alteration will fail and probate be granted as of a valid testament, according to the original attested expression.

Jackson v. *Holloway*, 7 Johns. 394; *Wheeler* v. *Bent*, 7 Pick. 61; *Bigelow* v. *Gillott*, 123 Mass. 102.

Runyon, *Ordinary*, delivered the following opinion:

Peter G. Conover, late of the County of Monmouth, deceased, died May 4, 1886, aged eighty-nine years. On the 22d of June, 1881, about four years before his death, he made his will, by which after directing payment of his debts and funeral expenses, he gave to his son John L. Conover his homestead farm of about 87 acres, subject to the payment of $4,000 (which he charged upon the farm) for the benefit of his estate and to be distributed as directed in the will. To each of his sons, Lafayette and Stacy, he gave $3,000; to each of his grandchildren, John L., Peter G., Jane and William Conover, he gave $700. To his daughter, Emma Hyers, he gave two sums of $8,000 and $1,000, the latter to compensate her for her care of him. And he directed that those sums should be invested for her for life, with remainder to her children or their descendants, with remainder over in case of her death without issue. To his granddaughter Caroline Dennis he gave $1,000 for life, with remainder to her children, and with remainder over in case she should die without issue. To his greatgrandson Holmes Dennis he gave $1,000 to be invested and to be paid to him with its accumulations of interest, upon his arriving at majority; and he provided that in case of the legatee's death before that time, the legacy and the interest thereon should go into his, the testator's, estate. To his son Garret, the appellant, the testator gave a farm of about forty-three acres. He provided that his desk and clock which his father left him, and some cupboards fitted to his house and belonging therein, should remain with the house. He gave the residue of his estate to his executors for their compensation; with provision that if any of them should die after the date of the will, his or their share or shares of the residue should go to the estate of the decedent or decedents, whether he or they should have done anything towards the execution of the will or the administration of his estate or not. He then gave to the children of his daughter Eleanor, and Alfred L. Conover, a certain promissory note of $2,600, with all interest thereon which he had paid for their father, and he appointed his sons John, Lafayette and Stacy, executors. The will was executed in the presence of Chilion Robbins and Acton C. Hartshorne.

On the 24th of June, 1885, about four years afterwards, and about ten months before his death, the testator made a codicil to the will by which "for certain reasons" as he declared, he revoked the gift of the farm to his son Garret, and instead of it gave him for life an annuity of $100, clear of taxes, which annuity was to begin three months after his, the testator's, death, and was to be payable quarterly; and he gave $100 to each of Garret's children. He directed that the farm given by the will to Garret should become part of the residue of the estate. The codicil was executed in the presence of Mr. Hartshorne and Charles Robbins. Afterwards, but at what particular time does not appear, the testator (he kept the will and codicil in his own possession) undertook to increase the annuity for Garret in the codicil to $200. He attempted to do this by changing the word "one" to "two," and by leaving with the codicil a paper (in his own handwriting and signed by him) as follows:

"$200. It is my wish that Garret should have two hundred dollars instead of one, as per codicil."

Both the will and codicil were executed with due formalities, and there is no reason to question the testamentary capacity of the testator at the time of making either instrument. Indeed no objection is made to the will upon any ground. Nor is any made to the execution of the codicil; and it is conceded that at the time of making thereof the testator was possessed of the requisite capacity. But the caveator objects to the latter instrument upon the ground of fraud, alleging that it was the result of undue influence on the part of the testator's sons Lafayette and Stacy, exerted by them to the prejudice of their brother Garret, the caveator.

The charge is based upon the fact that Garret was arrested on the 18th of April, 1885, and committed to the county jail of Monmouth County, upon a charge made by Lafayette that he had (according to Mrs. Hyers' testimony) made threats of personal injury to her. He remained in jail for three days and then was sent to the State Lunatic Asylum at Trenton, by virtue of regular proceedings to that end, as an insane pauper patient. He remained there one month, until the 21st of May, when he was released at the instance of Lafayette. From that time he received an allowance from the testator of $100 a year, paid in equal quarter yearly payments.

The codicil was, as before stated, made June 24, 1885, about a month after Garret left the asylum. By it, as already appears, the testator gives to him an annuity of $100 for life, and gives $100 to each of his children in lieu of the farm given to him by the will. Garret's wife and children lived at the time of his arrest in the City of New York, and he was in this State at his father's homestead where his father (whose wife was dead) lived with his daughter Mrs. Hyers and her husband, who had resided there for many years. Garret says he had been there all the spring (of 1885) when he was arrested (which was as before stated, April 18), and had been doing work upon the farm. Before his arrest he had become intoxicated, and while in that condition had in anger pushed a servant girl who was employed at the homestead against the wall, and she threatened to take proceedings to arrest him for that assault, but was dissuaded therefrom by the testator. It was said that her father had made threats that he would whip Garret for his violence to her.

On account of Garret's conduct while he was so intoxicated, Lafayette and Stacy, who happened to come to the homestead (neither of them lived there) to see their father, consulted with the latter as to what it was best to do with Garret. He told them to do whatever they thought best. They then caused his arrest as before stated, and took proceedings for his confinement in the asylum for the insane. The certificate which was made in these latter proceedings was made by Drs. Forman and Cook, two physicians of Monmouth County. It appears to have been drawn by the former. It states that they had examined into and were acquainted with the state of health and mental condition of Garret, and that he was in their opinion insane and a fit subject to be sent to the State Lunatic Asylum. There can be no doubt that the proceedings for his arrest and those taken for his confinement in the lunatic asylum were taken in good faith, and were deemed necessary by Lafayette and Stacy, in view of his condition resulting from excessive indulgence in intoxicating drink. And when he had been restored to his reason they released him from confinement.

Mr. Hyers testifies that the day before Lafayette went to the asylum to release Garret, Lafayette and Stacy were in conversation with the testator upon the subject of the proposed release of Garret, and they asked the testator what they should do with Garret when he should have come out, and the testator said he did not want him there (at the homestead); that he would rather pay $100 than to have him there—that he would rather give him $100 than to have him come back again. Lafayette says that on that occasion the testator told him to tell Garret that he would give him $100 a year, and he says he told Garret so.

In this connection it may be stated that the codicil itself is evidence that the testator had not been misled by being fraudulently induced to believe that Garret was insane while the contrary was the fact. The cause of the change in the provision for Garret is not stated to be his insanity, but the testator says that "for certain reasons" he makes the change. It appears, too, that the testator said on more than one occasion that Garret had not been placed in the asylum with his consent; so that there is no ground for the claim that the testator was under a false impression caused by the artful misconduct of Lafayette and Stacy towards Garret, as to the mental condition of the latter. He seems to have known all about it. The alteration in the codicil and the making of the paper before referred to, accompanying the will and codicil, are evidence that after he made the codicil his mind returned to the provision for Garret made thereby, and that while he intended to increase the amount of the annuity, he was not disposed to change the character of the provision.

The caveator's counsel insist that the threat said to have been made by Lafayette, that he would "fix" Garret, is evidence of animosity on the part of the former towards the latter; and they also insist that an expression to which Mrs. Hyers testifies, as having been made by Lafayette, that Garret was "fishing for the place but he, Lafayette, would be damned if he would get it," is evidence of an intention on the part of Lafayette to take advantage of Garret in the disposition of the testator's estate. Lafayette swears that he made neither of the expressions. But if he made them, it appears that the first had reference to Garret's conduct when he was intoxicated, and which resulted in his arrest, and the other was made in regard to the homestead property and not the farm given to the caveator by the will.

Mrs. Hyers testifies to another expression to which the caveator's counsel attach some importance. It is a proposition said to have been made by Lafayette to Mrs. Hyers, that she and her husband should tell the testator that they were going to leave the homestead in order thus to constrain him to do something. What it was that he was to be constrained to do does not appear, but she says that nothing was said about keeping Garret away from the homestead, and she also says she does not know what Lafayette meant by the proposition. It is manifest that the evidence on the subject of that proposition is of no value or significance whatever.

The whole case shows that the testator had full testamentary capacity; that after the making of the will in 1881 the conduct of Garret was such as to induce the testator in the exercise of his own judgment to change the provision which he made for him in the will (the gift of a farm, of which his improvidence might soon deprive him) to a life annuity which would be secure to him, and a legacy to his children of $100 apiece.

The orphans' court admitted the will and codicil to probate, the latter in the condition in which it was before the alteration.

The decree should be affirmed.

No costs of the appeal will be awarded to either side against the other.

COURT OF CHANCERY.

Jeanette S. HELLER, Admrx.,
v.
William S. GROVES *et al.*

In an action to foreclose a mortgage executed by a married woman, her husband not joining therein, *held*, on the facts, that the **mortgage is without vitality,** being without consideration, and **executed** and delivered only **to protect** the **property** therein described **from** a reckless and dissipated **husband.**

(Filed April 2, 1887.)

BILL to foreclose a mortgage made by a married woman. *Bill dismissed.*

The case is stated in the conclusions of the Vice Chancellor.

Mr. **John H. Backes,** for complainant.

Messrs. **W. D. Holt** and **James Buchanan,** for defendants.

Bird, *V. C.*, filed the following conclusions:

This bill is filed by the administratrix of Mrs. Smith, to foreclose a mortgage which, it is said, was executed and delivered to Mrs. Smith by Mary E. Groves, her daughter, to secure $1,350, so much money advanced by Mr. Smith, the husband of the one, and the father of the other. The mortgagor was a married woman at the time of the execution of the mortgage, and her husband not joining therein, an imperfection is manifest, which it is thought this court is capable of overcoming by declaring the alleged loan to be a lien on her separate estate, acting upon the supposition that the wife had the power of appointment, and did intend by her act so to appoint. The following authorities are relied upon as sustaining this view: *Harrison* v. *Stewart*, 3 C. E. Green, 451; *Wilson* v. *Brown*, 2 Beas. 277; *Leaycraft* v. *Hedden*, 3 Green, Ch. 512; *Homœopathic Mut. Life Ins. Co.* v. *Marshall*, 5 Stew. Eq. 103; *Cutler* v. *Tuttle*, 4 C. E. Green, 549; *Hulme* v. *Tenant*, 1 Bro. C. C. 16; *Armstrong* v. *Ross*, 5 C. E. Green, 116; *Pentz* v. *Simonson*, 2 Beas. 234; *Pierson* v. *Lum*, 10 C. E. Green, 390; *Murray* v. *Barlee*, 3 Myl. & K. 209; *Methodist Church* v. *Jaques*, 3 Johns. Ch. 77; *N. A. Coal Co.* v. *Dyett*, 7 Paige, 14.

Taking it for granted that the complainant has the correct view of these cases (which I do not pause to discuss), I will inquire what facts or statements have been introduced, by way of evidence, to establish whether or not any foundation is laid for this equitable doctrine to rest upon.

In 1879, Mrs. Groves being desirous of buying a lot of land, her father, Mr. Smith, advanced to her $300 for that purpose. There is no satisfactory evidence of what passed between the parties (the father and his daughter), except the payment of the money. There is no evidence that, at that time, it was regarded as a loan, or as a gift, by either. It does not appear that any note or memorandum was given or required. Mrs. Groves purchased a lot, and in order to build a house thereon, in 1870, borrowed $1,000 of Mrs. F. and gave to her a mortgage on the lot.

While this mortgage was in full force, and no part of the principal paid, Mrs. Groves, in December, 1871, executed a bond and the mortgage now in suit to her mother, Mrs. Smith, and delivered them to her. It was a year and perhaps longer after this that Mrs. Groves applied to her father to pay off the mortgage given to Mrs. F., which he did, the $1,000 and some interest then being due. He paid the money directly to Mrs. F. and had the mortgage canceled of record, taking nothing but the canceled mortgage as proof of what he did.

The allegation now is in the bill, that Mrs. Smith paid and advanced not only the $300, but also the principal and interest of the mortgage, being $1,050; and that, to secure the same, Mrs. Groves gave her a bond and the mortgage now in suit. This allegation, so contradictory to all the testimony, the complainant desires to remove, by amending his bill, so that the allegation shall be that the moneys were advanced by Mr. Smith, and that he ordered and directed the securities to be taken in the name of Mrs. Smith and caused them to be delivered to her, making her a gift of them.

Proceeding, then, with this more favorable and consistent allegation, many difficulties seem to be in the way of placing the case upon the foundation prepared by the counsel for complainant. When the mortgage was executed and delivered to Mrs. Smith (if it was so delivered in December, 1871, as is alleged) not one dollar was given therefor. There is no evidence that Mr. Smith was present or had anyone present to represent him, or had the slightest knowledge of the transaction. There is no evidence that he had at any time requested the execution of such bond and mortgage, nor that he knew anything about them until a long time afterwards. It is by no means satisfactorily established that his attention was called to them when he paid off and canceled the bond and mortgage held by Mrs. F. It cannot be safely said that he had any knowledge of them until 1878, when, it is said, they were in his possession, kept by him in a tin box under lock and key, and such box deposited in his trunk.

The attention is also arrested by the fact that it does not appear that Mrs. Smith was any party to the transaction, except to be the recipient of the bond and mortgage; or that she was in anywise consulted respecting it, or had any knowledge of it until the bond and mortgage were delivered to her.

But if this mortgage was executed without any knowledge upon the part of Mr. or Mrs. Smith, and without any pecuniary consideration, how did it come to be executed? The reason therefor is plain. Both of the witnesses called by the complainant concur in saying that their brother-in-law, Mr. Groves, became dissipated, neglected work, and abused their sister, and that she executed this mortgage to protect the property from him. They say that she was fearful that he would prevail upon her to execute a mortgage upon the premises for his convenience or accommodation.

How then, these things being so, can this mortgage have life? Or how can the amount of money therein named be declared a lien upon the land by way of appointment? Mrs. Smith gave nothing for it herself. There is nothing to show that Mr. Smith accepted it as security and made a gift thereof to Mrs. Smith. As has been already intimated, there is no thread of evidence suggesting that there might have been an understanding between Mr. Smith and his daughter, that he having already advanced the $300, she should execute this mortgage to secure that amount and also the $1,000, and that he would some time thereafter advance the $1,000. I am led to conclude that this mortgage is without vitality in the hands of the complainant; believing as I do, from the fullest declaration of the witnesses, that it was executed and delivered originally to protect the property therein described from a reckless and dissipated husband, and being unable to discover any proof that it was ever delivered or assigned for any other purpose, either to Mr. or Mrs. Smith.

I ought to observe that, if Mrs. Smith ever held this mortgage as a valid lien on the lot in question or as evidence of a just claim against her daughter, by the consent of Mr. Smith, then, it appearing that Mr. Smith had the undisputed possession of it before the death of Mrs. Smith, he may have come by it in a perfectly legitimate way, and for a good consideration; and all will agree that, he having the possession, the presumption (if there is any presumption in favor of any party) is that he was the lawful owner and holder. And again; Mr. Smith surviving his wife, and still having the possession thereof for several years, it would not be straining the rule (that the husband takes as next of kin) to hold that he supposed he was so entitled, having the possession without the formalities of administration.

I think the bill ought to be dismissed, with costs, and will so advise.

PENNSYLVANIA.

SUPREME COURT.

APPEAL OF Caroline SMITH.

1. In the absence of proof of fraud or concealment a **widow cannot avoid** an **antenuptial settlement.**
2. Although **fraud or concealment** may sometimes be **inferred from** the **disproportion of** the **wife's provision to** the **husband's means,** yet such a presumption does not arise under circumstances in which the disproportion might well have been intended by the parties.
3. A subsequent **increase in** the **value of** the **husband's property** does not affect the validity of a settlement.
4. It is **not essential** to the validity of a **settlement** that it should be **recorded** and delivered to the trustee named therein.
5. A widower fifty-two years of age, with six children and worth about $175,000, married a woman forty-three years old, who had no property. In an **antenuptial settlement,** she released, in consideration of real estate producing $1,200 a year, all her interest in his estate. The deed of settlement remained in the husband's possession and was never recorded. He died worth about $400,000. In addition to the real estate settled he bequeathed to her the interest of $15,000 for life. The residue of his estate he gave to his children. *Held*, that the **settlement** was **valid** and binding upon the wife.

(Argued Jan. 28, Decided Feb. 28, 1887.)

JANUARY Term, 1886, No. 431, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey and Sterrett, *JJ.*

Appeal from a decree of the Orphans' Court of Philadelphia County, confirming an adjudication. *Affirmed.*

The facts, as they appeared at the audit of the account of Alfred Smith and Horace F. Smith, executors of Stephen Smith, deceased, before ASHMAN, *J.*, were stated in the adjudication, which was as follows:

Stephen Smith died October 9, 1884, leaving a will dated November 9, 1878, and a codicil dated May 11, 1881, which were afterwards duly proved, and by which he gave to his executors $15,000, in trust to pay the income to his wife Caroline Smith during her life or widowhood; the principal thereafter to fall into the residuary estate. He gave the residue of his estate as follows (to his children) * * * .

He left surviving, his widow (by a second marriage), Caroline Smith, and six children, all by his first marriage, viz.: Alfred, Alonzo, Angelia, Stephen, Ellwood, and Horace F. Smith; all being of full age.

The widow elected to take against the will. Her right to do so was contested, upon the ground that in consideration of a certain interest conveyed to her by an antenuptial settlement, she had released all further claim to the estate of her husband. The contract was dated September 26, 1867, about one month before her marriage to the testator. The testator, by this agreement, granted to a trustee a warehouse property on Front Street, near Market Street, in trust to permit the said Caroline, after testator's death, to receive the rents during her life; and the said Caroline after releasing her thirds, covenanted that the testator should have the right to convey all the rest of his estate without her becoming a party to the deed or deeds of conveyance. The deed was not recorded until after the testator's death, and it was found among his papers by his legal representatives.

The question does not seem to be attended with difficulty. In the interest of the widow it must be admitted that the parties to an antenuptial settlement stand in a relation which compels the exercise of the largest good faith, and excludes from their dealings the thought of any material concealment by either. *Kline* v. *Kline*, 57 Pa. 120.

This doctrine has been so sedulously adhered to that a provision made by the prospective husband, which was manifestly disproportioned to the value of his estate, has been held to raise a presumption that he has practiced such concealment. *Bierer's App.* 92 Pa. 265; *Kline's Est.* 64 Pa. 122.

The principle was invoked by the widow of Stephen Smith. She showed that the testator's real estate was valued at $56,500 or thereabouts, and that the inventory of his personal estate footed up $358,493.10, with a net fund for distribution of $334,543.83. The property set apart for her use was assessed for taxation in the sum of $12,500, and has now a rental value of $1,200 per annum, out of which $231.25 must be deducted for taxes. She also showed that this property is in bad order, and that when the testator last repaired it he declared that he did so only to keep it in tenantable condition during his own life. He did not record the deed of settlement, nor deliver it to the trustee, but kept it among his own papers. These circumstances, it was claimed, were sufficiently indicative of bad faith to cast upon his legal representatives the burden of showing the contrary.

In answer to this [the solemn admission of the widow, that the testator had apprised her of the value of his estate, which appeared in the deed, may be used in two ways; it either throws upon her the burden of showing that she had been deceived; or if the *onus* is with the accountants, it is affirmative proof in their hands that she was not deceived.] The language of her covenant is:

"The said Caroline Reimer, after full consideration, and with full knowledge of all the other estate of the said Stephen Smith, in consideration of said intended marriage, and of the provisions of this deed, and for other good and valuable consideration her thereunto moving, doth," etc.

[The law presumes that she understood the force of these expressions when she used them over her signature.] But the case does not rest upon her admissions. When the contract was executed, the present widow was forty-three years of age, without property, and earning her livelihood, as an assistant in her brother's photograph establishment. The testator was fifty-two years old, with a family of six children. His estate was then worth, as shown by his books, $129,396.16, personalty and $50,000 in realty, and the property which he assigned to his wife yields now, at a time of low rentals, nearly $1,000 a year net.

[It is wholly outside the question, that the estate has enormously enhanced in value since the marriage contract], because the possibility both of its increase and diminution was a problem which was mutually waived by the parties. The only flaw in the testator's case is his failure to record the deed. [He certainly did not intend to destroy it, because it was found as carefully preserved as his own deeds.] [He did not convey the property, although the deed of settlement empowered him to convey it, without his wife's joinder, but subject to the trust. Hence, the widow has suffered no injury from his omission.] But the testator did not stand upon the legal provision which he had made for his wife; he supplemented it by a testamentary gift of the income of $15,000 for her life.

Grouping these circumstances together, the auditing judge feels bound to decree that [the widow's right of election is gone.] If authority were needed to show that the consideration was adequate, and that it was not affected by the after acquisition of property by the husband, he would cite *Ludwig's App.* 101 Pa. 535, and *Rahe* v. *Bank*, 96 Pa. 128. * * *

And now, December 28, 1885, the account, subject to the payment of clerk's costs, is confirmed *nisi*.

To this adjudication the widow filed exceptions, *inter alia*, to the findings inclosed in brackets above; but the court dismissed them and confirmed the adjudication absolutely.

The assignment of error specified, *inter alia*, these findings.

Messrs. **George Robinson** and **L. R. Fletcher,** for appellant:

The antenuptial contract was signed by the husband and wife and the trustee on the 26th day of September, 1867, and the marriage did not take place until nearly a month afterwards. There was no express evidence of a delivery of the contract, and it is submitted that from the circumstances of the case delivery should not be presumed. The trustee was a party to the contract, and his acceptance of the trust was nothing more than an execution of the contract, for until the marriage took place the contract was executory.

But if it is to be considered that the contract was delivered, it is submitted that the fact that the husband recognized the wife's rights, by her joining in a deed of conveyance, raises the presumption that at the time of the conveyance there had been a revocation of the contract, or that he did not consider it in force, and that the burden is on his legal representatives to overcome the presumption.

The fact that the husband, by his will, made a bequest to his wife should have but little weight; for although it may appear that he considered the contract in force, at the time he made the will, if by any act it had been revoked, he could not by this means revive it.

Marriage articles which may affect the title to land should be recorded.

Foster v. *Whitehill*, 2 Yeates, 259.

The contract not being recorded, it was possible for the husband to defeat the wife in the provision made for her. He could have mortgaged the property or even sold it; and in the case of sale she would have been entitled only to her thirds after his death.

Wilson v. *McCullough*, 23 Pa. 440.

If the provision for the wife be disproportionate to the means of the husband, it raises the presumption of designed concealment, and throws on him and his representatives the burden of proof.

Kline's Est. 64 Pa. 122.

Messrs. **H. Clay Haines, Bowers, Gormley & Snare** and **Crawford & Dallas,** for appellees:

It is the marriage, and not the fortune which supports and upholds an antenuptial settlement; marriage being the highest consideration.

Nairn v. *Prowse*, 6 Ves. 752; *Ford* v. *Stuart*, 15 Beav. 499; Peachy, Marriage Settlements, 56; *Magniac* v. *Thompson*, 7 Pet. 393, 394 (32 U. S. bk. 8 L. ed. 725).

Delivery may be either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing, or by both.

1 Shep. Touch. 578.

Dayton v. *Newman*, 19 Pa. 199.

If one execute a deed with a view to its being delivered, that is, if he does all that is necessary to perfect it, with the intention of having it delivered to the grantee and it afterwards comes into his hands, a jury may infer the assent of the grantor and the fact of delivery.

Arrison v. *Harmstead*, 2 Pa. 193.

Where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping of the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, that is a valid and effectual deed, and delivery to the party who is to take by it, or any other person for his use, is not essential.

Pa. Co. v. *Dovey*, 64 Pa. 267.

That the settlement was not recorded does not invalidate it. In some States, statutory provisions for recording marriage settlements exist, some expressly to protect creditors, some general; but even there the contract, although unrecorded, is good between the parties.

Stewart, Mar. & Div. § 36 and notes; Tyler, Coverture, § 828.

In this State there is no statutory requirement for recording articles of marriage settlement, except that so far as they relate to interest in land, they fall under the general Recording Acts, and if not recorded are good, except as against *bona fide* purchasers for value without notice, and this is the whole effect of the cases of *Foster* v. *Whitehall*, 2 Yeates, 259, and *Wilson* v. *McCullough*, 23 Pa. 440.

Any provision which an adult before marriage agrees to accept is sufficient. If of competent age she may bargain away her rights under a marriage contract, as her husband could have done.

Bishop, Mar. Wom. § 422; Schouler, Husb. & W. § 360; on Domestic Relations, § 183.

The whole effect of the appellant's contention would be to pass a large part of the decedent's estate from his children through the childless wife to strangers to his blood.

Mr. Justice **Paxson** delivered the opinion of the court:

We see no reason why the appellant should not be held to her antenuptial contract. It is true she has repented of her bargain. This, however, is not sufficient in the absence of proof of fraud or concealment practiced upon her in the procurement of said contract. While her husband was a much richer man at the time of his death than when the contract was made, yet this fact does not enter into the question of its validity. Aside from this, he left her by his will the income of $15,000 for her life, which was over and above what he was bound to do by the contract.

We cannot say that the provision made for her was so disproportioned to his means as to create a presumption of fraud and concealment. She was a second wife, past middle age, and her husband had a large family of children living. She was not the mother of his children, nor had she aided him in the accumulation of his fortune.

Situated as the appellant was at that time, she probably thought that a provision of about $1,200 a year after her husband's death was reasonable. At any rate she agreed to it; and having enjoyed the benefits of the contract she cannot now repudiate it for no better reason than that she would like to have more. She nowhere alleges that she was deceived; on the contrary, she declared over her hand and seal in the contract itself that she entered into it "after full consideration, and with full knowledge of all the other estate of the said Stephen Smith."

The deed was not recorded and was found in Stephen Smith's possession after his death. From this it was argued that there was no delivery. We are unable to see the force of this. He was the proper custodian of the paper, as he was the party alone interested in its preservation. It would have been an act of folly to give it to his wife; it was not recorded and her interests would have been promoted by its destruction. It was not essential to deliver it to the trustee; the latter had no duties to perform during Stephen Smith's life. Nor was recording essential to its validity. The appellant has no case.

The decree is affirmed and the appeal dismissed, at the costs of the appellant.

H. M. GROVE, *Plff. in Err.*,
v.
George McALEVY *et al.*

1. In an action of **trespass** for entering premises of plaintiff and destroying herbage, etc., therein growing, *held*, that a **division fence** established by owners of adjoining lands, and acquiesced in by them and their successors for twenty-one **years**, is **conclusive** upon them and those holding under them.
2. *Held*, *further*, that plaintiff could not recover unless he was in **actual possession** of the premises at the time of the alleged trespass.

(Argued Feb. 3, Decided Feb. 14, 1887.)

JANUARY Term, 1887, No. 225, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Crawford County, to review a judgment on a verdict for defendants in an action of trespass on lands. *Affirmed.*

The facts sufficiently appear from the charge of the court to the jury given below.

The plaintiff presented the following points:

1. If the jury find from the evidence that the boundary line between the lands of the plaintiff and defendants was fixed and established in the year 1851 by William Williams and John B. Hawthorn, and the division fence between said parties' lands was built upon the line so fixed and established, and was acquiesced in by the said Williams and Hawthorn, and their respective successors in title, for upwards of twenty-one years, the said line cannot now be altered, and their verdict should be for the plaintiff.

2. If the jury believe that at the time of the purchase by Hawthorn from Williams the vendor and vendee went to the ground and marked upon it the north line of the land bought by Hawthorn from Williams, the line so marked fixes the northern limit of the purchase by Hawthorn and all claiming under him.

3. If the jury should find that at the time Hawthorn purchased by articles of agreement from William Williams, or shortly thereafter, and more than twenty-one years before the committing of the trespass or entry by the defendants, they, Williams and Hawthorn, consented to a boundary line between them, and the same had been acquiesced in for upwards of twenty-one years, their verdict should be for the plaintiff.

4. If when Hawthorn bought from Williams, Williams was the owner of other land south of the piece he was conveying to Hawthorn, and he conveyed by courses and distances, and in pursuance thereof the parties ran the lines, and agreed upon the line between them and erected a fence thereon, agreeing that it should be the division fence or line between them, such acts on the part of Williams and Hawthorn were conclusive upon them, and those holding under them, and the verdict should be for the plaintiff.

The defendants presented no points.

The court, CHURCH, *P. J.*, charged the jury as follows:

This is an action of trespass brought by H. M. Grove, against George and Thomas McAlevy, to recover damages for an alleged entering upon the freehold of the plaintiff, and the destruction of certain herbage, timber, fruit trees and shrubs growing thereon.

[It seems that the defendants were in possession of these premises; that is to say, they had the actual foot possession of the premises at the time of the trespass alleged to have been committed.]

An action of trespass sounds, it being a possessory action, rather of an action to recover the foot possession. A party plaintiff could not recover anything, unless he was in actual possession of the premises at the time of the trespass alleged to be committed.

In this case the plaintiff was in possession of his strawberry patch and some other of his property. The defendants have pleaded that it is their own tenement, their own free tenement, that they entered upon. That plea, having been pleaded, raises the issue of title upon the strip of property upon which a trespass has been committed. It raises the question of whether the strip of land five or six rods wide and some rods long resides in and belongs to the plaintiff or the defendants; and that is the first question you have to determine, because if you determine it against the plaintiff, you have nothing further to say, and no damage is committed. If you find that the property is the legal, lawful property of the plaintiff, he has the title thereto, then you determine the question of damages; how much the plaintiff has been damnified. But you will first direct your attention to the question as to whether the property belongs to the plantiff or defendants.

[The defendants allege that this property once belonged to Mr. Shubal Williams, who deeded it prior to 1860.] He owned both pieces of property, on the north and on the south, the plaintiff, Grove, on the north, and the defendants on the south; and he sold the piece on the south to John B. Hawthorn, and thence by sundry conveyances the title became vested in A. D. Smith, about 1873, and from Smith to McAlevy. He owned the property on the north that Grove bought.

And they allege that, no matter where the real line may be, Shubal Williams, owning the whole property, and he selling a number of acres to Hawthorn, and he to Smith, under whom McAlevy claims, that he surveyed off a certain piece to Hawthorn, and that being the case that is the line that must govern these pieces.

[I cannot do better, although somewhat out of order, to state succinctly the claim of the *defendants*, than by reading the *defendants'* points of law.]

Defendants' first point read and affirmed.
Second point read and affirmed.
Third point read and affirmed.
Fourth point read and affirmed.

[So you will perceive that from the *defendants'* standpoint their statement of law is correct] provided you believe the evidence as to establishing and marking out the lines upon the ground and building fences.

[But all these points are hypothetically stated, that is, if you believe so and so, and that it is the line claimed to by the defendants. This is all true.]

[To arrive at the facts in this case you have to determine from the evidence whether the line claimed to by Grove is the line run by Williams and Hawthorn. If it is they are entitled to recover.]

That was argued very fully on Saturday, and I have nothing to say upon the probabilities or improbabilities of witnesses being correct.

[It is alleged on the part of the plaintiff that the sons of Shubal Williams are talking about a different fence, and that the fence that Hawthorn and Williams run is not the one the plaintiff claims to now. It is an old fence on which the defendants, Smith or McAlevy, put their fence afterwards. There is some evidence, it may be slight, to be sure, that the fence put on the ground four or five rods north is upon the remains or ruins of the old fence. I say slight, but it is sufficient for you to consider, and as such you will consider it.]

Some other testimony, which is altogether for you, is the testimony of Mr. Lippincott, who appeared on the ground two or three weeks ago, and surveyed this ground. [He took the deed from Williams to Hawthorn; according to the description in that deed he began and made a survey. You heard him describe what he did, and what he found in pursuance of that survey. When he found the courses and distances in this deed, he found marked corners and lines just exactly where these deeds put them.] The deeds were made in 1860, and the agreement in 1851. The witness says the place where the defendants claim to now, namely: on the north, comes, so far as courses and distances are concerned, up to these deeds; and that on the line claimed to by the plaintiff, he found no mark or any line there at all. He found a fence partly rail and partly brush.

It is for you to determine under the conflicting evidence, and under all the evidence, whether the line Hawthorn bought to, and subsequently Smith, and subsequently McAlevy, these defendants, bought, was the line that Mr. Lippincott surveyed, was the line they bought to, and are entitled to maintain and hold in this suit. And as a part of that consideration, you will consider whether the fence put there by McAlevy some time ago, last August or October, is, as the defendants claim, upon the line marked by Williams and Hawthorn. I say nothing about the weight of the evidence; you will consider all the evidence in the case bearing upon that.

It is alleged that these witnesses upon the part of the plaintiff, however truthful they may be about Williams and Hawthorn putting and designating a line, are mistaken about the fence of the plaintiff's being upon that line. But they say that the fence put there by the defendants, was put there on the ruins of the very fence Williams and Hawthorn laid out. The discoveries of Mr. Lippincott, when he surveyed the grounds by courses and distances of that deed, the marks on the ground, the corners and lines, are evidence—you have a right to consider as to whether the fence upon the north is the true line fence, or whether that upon the south is the true line fence.

If you find that the title is in the defendants, then they have committed no trespass, they have done that which they had a right to do, put their fence there, cut down timber and plow up the strawberry patch.

If you find the property is the property of the plaintiff, then you determine the question of damages; and there is a variety of opinions as to the value of his strawberry patch. It consisted of an old bed of plants, which of themselves were not worth very much, and the value consisted mostly in the runners, susceptible of being transplanted. One witness puts the damages at $100 for that and at $200 for the next year's crop. We say to you that the plaintiff cannot recover for the next year's crop.

If you find for the plaintiff, you find what that piece of strawberry patch was worth, not what it was worth to the plaintiff, but what it was worth, lying there, in the market. Then there was some wood and some rails taken away, variously estimated at from $15 to $18.

The question of damages is altogether for you. We simply state to you that when one of these witnesses calls damages for next year's crop, it is not an element to be considered by you. It is just what those strawberry plants were worth, the same as if they were so many oak, pine, or hemlock trees on the ground, provided you find for the plaintiff at all.

If you find for the defendants you have nothing to say as to the amount of damages. If you find for the plaintiff under the evidence, and under the rules we have given you, you find what the plaintiff has reasonably suffered.

The jury returned a verdict for defendants.

The assignments of error specified the portions of the charge inclosed in brackets; the action of the court in not answering all the plaintiff's points affirmatively without qualification, and in not affirming without qualification plaintiff's points *as plaintiff's points;* and the whole charge of the court, as being erroneous and misleading, and tending to prejudice the cause of plaintiff in the minds of the jury.

Messrs. **Haskins & McClintock** and **Thomas Roddy,** for plaintiff in error:

The charge of the court was prejudicial.

In the second paragraph of the charge the court says: "It seems the defendants were in possession," etc.; when in fact the plaintiff was in possession as is admitted by all parties.

The court also says in the charge: "It is alleged *on the part of the plaintiff* that the sons of Shubal Williams are talking about a different fence," etc. There was no such allegation or contention by plaintiff, but by the defendants.

Again, the court says: "I cannot do better * * * to state succinctly the claim of the *defendants,* than by reading the *defendants'* points of law." The court then immediately follows this by reading and affirming plaintiff's points and then says:

"So you will perceive that from defendants' standpoint their statement of law is correct."

The defendants presented no points.

Messrs. **W. R. Bole** and **J. W. Smith,** for defendants in error:

It is true the stenographer's report of the charge makes His Honor call the plaintiff's points, defendants' points. That is as likely to be the stenographer's mistake as the court's. It is probable if such a *lapsus linguæ* had occurred, the counsel would have corrected it at the time. But, if we concede that the court by inadvertence spoke as the stenographer's notes show, the mistake was too palpable and patent to mislead the jury or injure the plaintiff. The plaintiff's points had been presented and read to the court by counsel; and, the defendants having no points, the jury could not be misled by the court's calling them defendants' points.

Per Curiam:

We have carefully considered all the specifications of error, and find nothing in any of them which will justify a reversal of this judgment. The points submitted were correctly affirmed, and the case was submitted in a correct charge under the evidence.

Judgment affirmed.

Mary J. SOWERS, *Plff. in Err.,*
v.
Ellen LOWE *et al.*

1. The **natural flow of water** from a higher to a lower lot can **not,** as a general rule, **give a cause of action** to one injured thereby.

2. **Plaintiff and defendant owned adjacent lots.** Plaintiff's house was close to the line; defendant's thirty-two feet from it. The intervening space was sandy, and sloped from defendant's house to plaintiff's. Plaintiff's cellar was always dry until **defendant changed** the **spouting** which had formerly discharged into the street the water from defendant's house, and turned the spouts upon the space between the houses. The **water** then **percolated** through the sand and **plaintiff's cellar became damp** and the house was damaged. *Held,* that **plaintiff had no right of action** against defendant for the damage thus caused.

(Argued Feb.——, Decided February 28, 1887.)

JANUARY Term, 1886, No. 298, E. D. Error to the Common Pleas of Lycoming County, to review a judgment of compulsory nonsuit in an action of trespass on the case. *Affirmed.*

The facts as they appeared at the trial before CUMMIN, *P. J.,* were stated in his opinion, overruling a motion to take off the nonsuit, which was as follows:

This was an action to recover damages from the defendants for injuries done to plaintiff's real estate, by reason of the defendants having caused the surplus water from their land to flow on the land of the plaintiff.

When plaintiff closed her case the court directed a nonsuit to be entered, with leave to file a motion to take it off.

The parties to this suit own adjoining lots of land on the west side of Market Street, between the P. & E. R. R. and Fourth Street, in the City of Williamsport. The plaintiff showed this state of facts:

That the land naturally descended from the railroad to Fourth Street; that her lot had a frontage of twenty-six feet, which was nearly all taken up with her dwelling house; that defendants owned the next lot above her, which was fifty-two feet in width; that defendants' house was on the upper part of their lot, leaving an open space on defendants' lot of about thirty-two feet between the houses of the plaintiff and defendants; that the ground about there is of a sandy character and naturally descends towards plaintiff's property; that previous to 1882 plaintiff's cellar had always been dry; that during that year the defendants changed the spouting on their house, which theretofore cast the rain water on the street, so that this water was thereafter cast upon this open space between the houses; that sometime afterwards water was found in plaintiff's cellar after heavy rains, or in the spring when the snow and ice which had accumulated on this open space would melt; that in 1884, at the request of the plaintiff, the defendants changed their spouting so that the water from their roofs was discharged into the back part of their lot; that afterwards the water continued to come into plaintiff's cellar; that the water came into plaintiff's cellar along the bottom of the foundation walls of her house, or about one foot above the bottom of the walls; that plaintiff had, at considerable expense, endeavored in many ways to prevent the water from coming into her cellar, but found it impossible to do so; that plaintiff's dwelling house was damaged, etc.

The theory of plaintiff's counsel was that shortly after the water was permitted to flow from the spouts on this open space it soaked into the ground and worked underground channels into the plaintiff's cellar, and that when the spouts were turned in another direction the rain fall and the melted snow and ice on the open space found its way into these underground channels and thence into the plaintiff's cellar.

On the trial I was of opinion that the evidence did not disclose any unlawful act done by the defendants to the injury of the plaintiff; and after a more careful examination of the evidence in this case and the law on this subject, I find no reason to change my mind.

The assignment of error specified the action of the court in overruling the motion to take off the nonsuit.

Messrs. **H. T. Ames** and **T. H. Hammond,** for plaintiff in error:

A motion for nonsuit is equivalent to a demurrer to evidence.

Act of 1874, § 1, P. L. p. 6; Purd. Dig. p. 2054, pl. 12.

A demurrer admits not only the facts stated in evidence, but also every conclusion which the jury might reasonably and fairly infer therefrom.

McKowen v. *McDonald*, 43 Pa. 441.

The doctrine of dominant and servient tenements, as applied to agricultural lands, extends to city lots. Where several owners of house lots on which houses have been erected, divide them into separate estates, each parcel must take care of the surface water which gathers upon it, without its flowing from the one to the other.

Bentz v. *Armstrong*, 8 Watts & S. 40.

An adjoining lot owner has no right to turn upon the adjoining lot the water which falls upon his lot in rain, or which arises from a spring. Each lot owner must so regulate and grade his own lot that the water that falls or accumulates upon it shall not run upon the lot of his neighbor.

Bentz v. *Armstrong*, 8 Watts & S. 40; *Kauffman* v. *Griesemer*, 26 Pa. 407.

The defendants had no right to add to the amount which naturally fell on their lot by turning their roof spouts from the street on to their lot and thus increasing the quantity of water.

Kauffman v. *Griesemer*, *supra; Martin* v. *Riddle*, 26 Pa. 415.

A defendant who collects the water from his own land and turns it upon the lands of the plaintiff through an artificial channel made by the defendant is liable to the plaintiff for damages thereby caused.

Miller v. *Laubach*, 47 Pa. 154; *Hays* v. *Hinkleman*, 68 Pa. 324.

It makes no difference in the application of this principle, whether a man digs a ditch and thus throws on to his neighbor's lot water which he has not previously received; or whether one turns cave troughs so as to discharge on his neighbor's lot water which otherwise would not flow there.

The plaintiff is not precluded from recovering because the water accumulated and stood next to plaintiff's house in the depression and soaked or percolated through the soil into the cellar. The gist of the plaintiff's right is the nonfeasance of the defendants. The defendants have no right to permit the accumulation of the water; and if they do, they become responsible for all the consequences of their unlawful act.

In *Cooper* v. *Barber*, 3 Taunt. 99, it was held that where A had immemorially had, for watering his land, a channel through his own field, in a porous field, through the banks of which channel, when filled, the water percolated, and thence passed through the contiguous soil of B, below the surface without producing visible injury, and B built a new house on his land below the level of his soil in the current of the percolating water, A could not justify filling his channel with water if the percolating water thereby injured the house of B.

In *Curtis* v. *Eastern R. R. Co.* 98 Mass. 428, the railroad company in constructing its road bed had uncovered certain springs of water. To drain the water from these springs, it carried the water under its track, and dug a ditch into the banks, from which the water percolated on to the land of the plaintiff, for which injury he brought suit; and it was held that he could recover, because the defendant had no right to accumulate the water at a point where it would not naturally have gone.

The principle is settled by common-law authorities that if one places water spouts near the plaintiff's land, so that afterwards the water runs thereon, the defendant is liable for the damages caused thereby.

3 Bl. Com. 216; 1 Chitty, Pl. p. 139; 2 Chitty, Pl. 778; *Kauffman* v. *Griesemer*, 26 Pa. 407; *Adams* v. *Walker*, 34 Conn. 466; *White* v. *Chapin*, 12 Allen, 516.

Messrs. **H. C. McCormick** and **S. T. McCormick,** for defendants in error:

Where there is no water course by grant or prescription, and no stipulation between conterminous proprietors of land concerning the mode in which respective parcels shall be kept and improved, no right to regulate or control the surface drainage water can be asserted by the owner of one lot over that of his neighbor. The owner of land may occupy it in such manner or for such purpose as he sees fit, either by changing the surface, or by the erection of buildings or other structures thereon; and this right is not restricted or modified by the fact that his own land is so situated in reference to that of adjoining owners that the alterations in the mode of its improvement or occupation, in any portion of it, will cause water which may accumulate thereon by rains or snows falling on its surface or flowing on it from the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they are accustomed to flow.

Washb. Easm. ed. 1885, p. 311, 489, 503.

In *Vanderwiele* v. *Taylor*, 65 N. Y. 341, the parties owned adjoining lots. Defendant's land descended towards plaintiff's so that the surface water flowed from the former to the latter. Plaintiff built upon his land, the wall of the building being upon the line between the lots; this dammed up the surface water, which soaked through the wall into the cellar of the building. Defendant had done nothing on his lot to interfere with the natural flow of the water. There was a sewer in the street adjoining the lots. In the action to recover for the damages caused by the water it was held that the defendant was not bound to drain his lot or connect it with a sewer, and that plaintiff could not recover.

No legal right of any kind can be claimed *jure naturæ* in the flow of surface water, so that neither its retention, diversion nor repulsion is an actionable injury, even though damage ensue.

Bowlsby v. *Speer*, 31 N. J. Law, 351.

Where two fields adjoin, but one is lower than the other, the lower must necessarily be subject to the natural flow of water from the upper one. The inconvenience arises from its position and is usually compensated by other circumstances.

Martin v. *Riddle*, 26 Pa. 415.

No action can be maintained for changing the course or obstructing the flow of mere surface water by erections on adjoining land. It makes no difference in the application of this rule that land is naturally wet and swampy. The conterminous proprietor may change the situation or surface of his land by raising or filling it to a higher grade, by the construction of dikes and erection of structures, and by other improvements which cause water to accumulate from natural causes on adjacent lands and prevent it from passing off from the surface. Such consequences are the necessary result of the lawful appropriation of land, whatever may be its nature; and although they may cause detriment and loss to others, it is *damnum absque injuria* and forms no ground of action.

Dickinson v. *Worcester*, 7 Allen, 19; *Parks* v. *Newburyport*, 10 Gray, 28; *Flagg* v. *Worcester*, 13 Gray, 601.

A municipal corporation is not liable in damages for raising the grade of a street and obstructing the flow of surface water from adjacent higher land.

Hoyt v. *City of Hudson*, 27 Wis. 656.

An injury caused to a subterranean supply of water by the lawful acts of the owner of the land, resulting in damage to his neighbor, is *damnum absque injuria*.

Lybes' App. 106 Pa. 626; *Wheatly* v. *Baugh*, 25 Pa. 528; *Haldeman* v. *Bruckhart*, 45 Pa. 514.

Per Curiam:

The evidence of the plaintiff shows that she has no legal cause of action against the defendants. The natural flow of water, from a higher on to a lower lot, cannot as a general rule give a cause of action to one injured thereby. There is nothing proved in this case to take it out of the general rule. There was no error in directing a nonsuit on the unquestioned evidence of the plaintiff.

Judgment affirmed.

LUCAS COAL CO., Limited, *Plff. in Err.*,
v.
HUNT & CONNELL, Limited.

In an action of assumpsit on a book account an **affidavit of defense** which alleges that the plaintiff had by agreement under seal accepted the promise of a third person, in payment of the debt, must set forth the contract in full.

(Argued Feb. —, Decided March 7, 1887.)

JULY TERM, 1886, No. 81, E. D. Error to the Common Pleas of Lackawanna County, to review a judgment for want of a sufficient affidavit of defense in an action of assumpsit. *Affirmed.*

The plaintiff below, Hunt & Connell, Limited, brought this action on a book account for goods sold and delivered to the defendant below, the Lucas Coal Co., Limited. The copy of the book account filed was not signed by the plaintiff's attorney. A formal narr., containing the common counts in assumpsit, was filed with the copy. On this narr. was noted: "For copy of account see statement hereto attached."

The defendant filed the following affidavit of defense:

"The defendant has a just and full defense to the plaintiffs' claim in this case, the nature and character of which is as follows: The Union Coal Company, Limited, 'assumed' and agreed to pay certain debts of the defendant, among which was the claim of the plaintiffs in this case. This agreement was made in consideration of a lease from the defendant to said Union Coal Company, Limited, of the Lucas Colliery and property appurtenant thereto.

"In October, 1884 (the contract does not recite the day of the month), the plaintiff and other creditors of the defendant whose claims were assumed as aforesaid, signed, executed and delivered a contract under seal to said Union Company wherein and whereby the plaintiff agreed to accept payment of the claim which is the subject matter of this suit of the said Union Coal Company, Limited. And the said contract recited as the consideration thereof the agreement of said Union Coal Company, Limited, to pay said indebtedness; and the said plaintiff then agreed to collect the claim demanded in this suit of the said Union Coal Company, Limited, and to accept the agreement of the said Union Coal Company, Limited, in the place and in lieu of the contract and indebtedness of the defendant to the plaintiff; all of which was then consented to, accepted and orally agreed upon by the defendant, by the plaintiff and by said Union Coal Company, Limited, as your deponent verily believes.

"And your deponent is informed and believes that by said agreement a novation of contract was effected and the defendant was released and discharged from the payment of said indebtedness.

"All of which they and your deponent expect to be able to prove on the trial of this case.

"And your deponent is informed and believes that the copy filed in this case is not properly certified by counsel."

The court, HAND, *P. J.*, saying that the contract alleged was not set forth fully and no reason given why it was not, entered judgment for the plaintiffs for want of a sufficient affidavit of defense; and *this was assigned as error.*

Messrs. **S. B. Price** and **James W. Oakford,** for plaintiff in error:

In a suit upon a book account, the copy filed should bear a certificate, signed by plaintiff's counsel upon its face or indorsed in his handwriting, that it is a copy.

Endlich, Affidavits of Defense, 221; *Oakley* v. *Griffith,* 7 Luz. Legal Reg. 191; *Hunt* v. *Clark,* 1 W. N. C. 28; *Kelly* v. *Livingston,* 1 W. N. C. 95.

The agreement between the parties to this suit was and is alleged in the affidavit to have been an oral contract. The Lucas Company did not rely upon the written agreements mentioned in the affidavit, between the Union Company and the Lucas Company, nor the lease. They were matters of inducement leading to the oral contract between the three parties; which effected the novation and released the Lucas Company from the claim demanded in this suit.

If, in an affidavit of defense, the defendant does rely upon a written agreement and sets forth the legal effect thereof, that ought to be sufficient.

The reason why judgment was allowed in *Marsh* v. *Marshall,* 53 Pa. 396, was that the affidavit set forth the contract defectively; in *Birkey* v. *Whitaker,* 4 W. N. C. 137, because the contract was neither set forth nor a copy attached.

In a special count upon a written contract, if the legal effect of the agreement is given, it is sufficient.

1 Chitty, Pl. 306, 14th Am. ed.

If A owes B, and C agrees with A that he will pay B, and B agrees with C that he will accept his promise in lieu of A's indebtedness, and the three parties consent to this arrangement, a novation is thus effected. Novation is the substitution of a new obligation for an old one. The old debt is extinguished—it is an accord executed.

2 Chitty, Cont. 1371–1381, and cases cited; 2 Bouv. Law Dict. 241, 242, *Novation.*

If a *prima facie* case is set forth in the affidavit, judgment should not be ordered.

Thompson v. *Clark,* 56 Pa. 33; *McPherson* v. *Allegheny Nat. Bank,* 96 Pa. 135; *Hugg* v. *Scott,* 6 Whart. 274.

Mr. **A. L. Baker,** for defendant in error:

In an affidavit of defense the facts should not be set forth in any equivocal or evasive manner, but with reasonable precision, so that the plaintiff may be accurately advised of the true nature of the defense, if any exists."

Noble v. *Kreuzkamp,* 1 Cent. Rep. 872.

The affidavit must be construed most favorably for the plaintiff, as it is altogether probable that the defendant will in all cases state the nature and character of the defense as strongly as the facts will justify.

Comly v. *Bryan,* 5 Whart. 261.

The defendant must state his facts so as to be liable to an indictment for perjury if his statements are untrue.

Endlich, Affidavits of Defense, § 369; *Cumberland Bldg. Asso.* v. *Brown,* 4 W. N. C. 494.

Parol agreements intended to vary written instruments must be set out in the affidavit of defense with much particularity; and none of the allegations required to make them effective must be omitted. There should be some explanation or reason given for a departure from the usual course of business.

Biddle v. *Wilhelm,* 40 Legal Int. 382.

An affidavit which attempts to set up a parol contract different from that disclosed by the writing, amounted to a contradiction of the same, and was inadmissible without also averring fraud or mistake.

Hains v. *Rapp,* 2 W. N. C. 595; *Hill* v. *Gaw,* 4 Pa. 493.

The very purpose of authorizing judgment to be given for want of a sufficient affidavit of defense is to save the necessity of a trial which can only result unfavorably to the defendant.

Black v. *Halstead,* 39 Pa. 71.

The affidavit must be a specific statement of facts, not inferences, and the court is to judge of the legal effect of the facts stated.

Mitchell, Motions and Rules, 66, Endlich, § 347.

Filing a copy of the book account is sufficient certification. The filing of an affidavit of defense to the merits is a waiver of mere formal objections; *Laird* v. *Campbell,* 8 W. N. C. 134; even if the objections were otherwise pertinent.

Per Curiam:

The alleged written contract sustains so important a relation to the defense of the defendant below that we think the learned judge committed no error in holding that it should have been fully set forth in the affidavit of defense.

Judgment affirmed.

Herman OSTHAUS, Admr., *Plff. in Err.,*
v.
Thomas W. McANDREW and Wife, In Right of Said Wife.

1. **In a feigned issue to try** the **ownership of** the promissory **note of a third person, claimed** to have been **delivered by a decedent as a gift to** the **holder, it is for** the **jury to determine** whether facts exist showing that the holder took advantage of the gift under circumstances of dependence, feebleness, sickness or possible shame, on the part of the donor, such as amount to undue influence and deprive the transaction of voluntariness and freedom on the part of the donor and of perfect candor between the parties.
2. **Evidence of want of undue influence** and of the delivery of the note held sufficient to submit to the jury.

(Argued Feb.——. Decided March 7, 1887.)

JANUARY Term, 1887, No. 54, E. D.

Error to the Common Pleas of Lackawanna County, to review a judgment on a verdict for the plaintiffs in a feigned issue, to try the ownership of a promissory note. *Affirmed.*

The facts, as they appeared at the trial before

HAND, *P. J.*, were stated in his charge to the jury, which was as follows:

This trial is called a feigned issue. It is a trial to determine the ownership of a note, given by John Handley to James Morahan, dated the 22d day of September, 1882, for $1,726.68, on which there is a balance unpaid of about $1,054.95.

Ordinarily this note would belong to the estate of James Morahan, and should pass to the custody of his administrator. But it is alleged by these plaintiffs that it belongs to Rebecca McAndrew, the wife of Thomas McAndrew, by reason of a gift on the part of James Morahan, while he was living, called a gift *inter vivos;* that is, a gift between living persons.

This, gentlemen of the jury, is the sole question for you to determine: Was this note a gift absolute to Rebecca McAndrew?

It is alleged that about the 8th of January, 1884, James Morahan gave the note to her, under circumstances as detailed by Mrs. Fannie Gross; that this was a gift, as testified to by her, is corroborated by the testimony of P. C. Clark. This transaction occurred a little over a month before the death of Morahan; he died about the 18th of February, 1884.

It is alleged by the defendant that it was not a gift in law, or if it was, that it was made under such circumstances of undue influence, or duress, as to constitute it an inequitable transaction; such a transaction as equity would not allow to be consummated, but will set aside as being unconscionable.

Now, under this simple, sole issue, you will give your close consideration to all of the testimony in the case, and determine it as the evidence shall warrant you. You will render no verdict in this case for any amount of money. The question of compensation for the keeping and board of James Morahan is not before us. It is only: To whom does this note belong? If it belongs to Rebecca McAndrew, your verdict should be simply for the plaintiff; if it does not belong to Rebecca McAndrew, your verdict should be simply for the defendant.

If your verdict should be for the defendant, it does not prevent the plaintiff, T. W. McAndrew, from obtaining his proper compensation upon his bill presented to the administrator.

Now, to the question: Does this note belong to Rebecca McAndrew? The law on this subject you must take from the court; the determination of the fact is for you, under the rules of law.

In Pennsylvania there is no doubt that a person may give a note, or a chose in action, to another person. After the donor is dead, clear and satisfactory proof of the gift (and of the delivery in pursuance of it) is requisite.

Now, what is the evidence in this case? The evidence mainly turns upon the testimony of Fannie Gross, so far as the plaintiffs' allegations are concerned, as they claim, corroborated by P. C. Clark. We will read that evidence; she testified to about the same on cross examination, repeating it. The question was asked her: "I wish you would go on and state what was said." That was at the time that McAndrew, his wife and Morahan were present. Mrs. Gross answered: "Well, my mother told him she would rather have him go; that she didn't want to keep him; there were a great many of the boarders told her they would not stay if she kept him. So they were having a talk about it that day, and he says: 'Well, here,' he says, 'I will give you this paper to pay you for your trouble, and take good care of me while I am sick.' He said, 'I give it to you.'"

Q. "Just repeat again what he said." A. "He says: 'You take this and take care of it, it is yours;' and he says: 'Take good care of me while I am sick.' She told him she would rather not take him; she would rather he would go; she would rather not keep him at all."

P. C. Clark, who was sworn, testified: "He told me (that is Morahan told him) Mrs. McAndrew had objections to keeping him in her house, and that he would have to leave, and he gave her compensation for the necessary trouble."

We read this testimony because it is the main testimony, but not to withdraw any other facts from your consideration which throw any light upon this transaction.

[Now, did Mr. Morahan intend to give to Mrs. McAndrew this note absolutely? And did he deliver it to her as a gift?] If he did, then the plaintiffs can recover. If he did not intend it as a gift, but only as a security in her hands for the board and keeping that was due to her and her husband, out of which her husband could obtain his compensation, then it was not a gift, but to secure the proper and legal compensation for the keeping of Morahan.

[There is some evidence in the case, and its effect is for you, that this note was in the possession of Morahan at the time of his death; that it went into the possession of Mrs. Morahan, and that she delivered it, after his death, to McAndrew, who claimed that he was the executor of Morahan, and should receive it. This evidence, if you believe it, is somewhat corroborated by the evidence of Miss Gannon, that McAndrew said, in the presence of his wife, that this note belonged to the estate of Morahan, and that her mother should receive her share of it in the settlement of the estate, after McAndrew had settled up the estate, he stating at the time that there was a will, and that he was the executor of it.]

There is also evidence that McAndrew did not consider the note as compensation for the keeping of Morahan, by his presenting a bill for his keeping to the administrator, and receiving part pay of the bill from the administrator. This part is not in dispute—the effect of this evidence, on the question of a gift or not, is for you, all to be taken in connection with the evidence on the part of the plaintiffs.

You will understand that in order to consummate the gift, there must be an intention to pass it, to give it to the donee; and there must be actual delivery of it to the donee.

Now, if you believe the evidence that the note was subsequent to that in the possession of Morahan, it would show that it was not in the possession of Mrs. McAndrew. We speak of this because it is a circumstance testified to in the case. And the evidence must be clear and satisfactory that a chose in action was not only intended to be given, but was actually given, and the possession passed over to the donee.

Another part of this investigation is, Was this transaction, under all the circumstances, a voluntary gift made without undue influence? If it was not, then the plaintiffs cannot recover.

It is not that Morahan was of unsound mind, memory or understanding, but was the note obtained under such circumstances as to constitute undue influence? Or such circumstances as would make it wrong for the plaintiffs to keep the note?

It is in evidence that at the time of this transaction Morahan was more or less of feeble body; that he was sick with a loathsome and unrighteous disease; that he had boarded some time with McAndrew and his wife; that he had no home to go to; that McAndrew and wife were about to deny him board and keeping at their house, because of his condition; and that under these circumstances he did that which he would not, and ought not to have done, if left free, and with his full judgment in play.

Now, where facts exist showing that a person takes advantage of a gift under circumstances of dependence, feebleness, sickness, and possibly shame, on the part of the donor, such as to amount to undue influence, and deprive the transaction of voluntariness and freedom on the part of the donor, and of perfect candor between both parties, equity prevents the donee from securing any benefit from the transaction. * * *

[In order to apply this principle of equity in this case, do you find from the evidence that such circumstances exist? Now, these circumstances and these facts are for you to find; that is, it is for you to determine whether the evidence proves them. If you find that they do exist, then the plaintiffs cannot recover. It will be inequitable for the plaintiff to recover if she obtained this gift under undue influence.]

In other words, when a gift is set up after the death of the giver, the evidence must be clear and satisfactory.

The plaintiffs asked the court to charge, *inter alia*:

"That if the jury believe the testimony of Fannie Gross, the giving of the note by Morahan to Mrs. McAndrew was an executed gift."

Ans. We leave that question of fact for you. We cannot decide that. It is for you to determine, under all the evidence, whether this was an executed gift. If you find from the evidence that it was an executed gift, then it was good and your verdict should be for the plaintiffs. But whether it was an executed gift or not is the real question in the case.

As we look at this case it is a question of fact for the jury, to be determined under all the light that is thrown upon the case from the evidence before you. The evidence has been very ably argued before you on both sides, and brought to your attention specifically; it is for you to weigh it carefully and determine what this transaction was. If it was not a gift to Mrs. McAndrew, or if it was under such circumstances that equity would not enforce it on the principles we have laid down, then the verdict should be for the defendant.

The verdict and judgment were for the plaintiffs.

The assignments of error specified the portions of the charge inclosed in brackets, the answer of the court to the plaintiffs' second point, the admission of the testimony of Fannie Gross and the submission of the question of delivery.

Messrs. **W. G. Ward, George S. Horn** and **Herman Osthaus,** *pro. per.*, for plaintiff in error:

The evidence shows that the parties were talking about Morahan either going from McAndrew's or continuing with them, and of pay or compensation for the same. The board and care spoken of was the property of the husband. The wife's labor, etc., belonged to the husband. The compensation or pay for the board and care that was to be afforded to Morahan would belong to the husband.

The evidence tended toward proving a contract with T. W. McAndrew, but in no manner toward establishing a benefaction to Mrs. McAndrew.

There was not sufficient evidence in the case to warrant submitting to the jury the question whether Mr. Morahan intended to give to Mrs. McAndrew the note absolutely, and whether he delivered it to her as a gift.

The doctrine that a scintilla of evidence of a disputed fact must be submitted to the jury is exploded,

Howard's Exp. Co. v. *Wile*, 64 Pa. 205; *Battels* v. *Laudenslager*, 84 Pa. 451.

The confidential relation of the parties and Morahan's condition of dependency, and his physical and mental condition, forbade the plaintiffs to accept so large a gift from Morahan.

Huguenin v. *Baseley*, 14 Ves. 300.

He who bargains in matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence; the rule applies to trustees, attorneys or anyone else.

Gibson v. *Jeyes*, 6 Ves. 278.

The relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another.

Dent v. *Bennett*, 4 Mylne & Cr. 277.

Whenever one person obtains by voluntary donation a large pecuniary benefit from another, the burden of proving that the transaction is righteous falls on the person taking the benefit.

3 Lead. Cas. Eq. 112.

The improvidence of the transaction under all the circumstances furnishes a probable test of undue influence or fraud.

Harvey v. *Mount*, 8 Beav. 439.

That one was anxious to part with his property without receiving an equivalent, and was not in any way biased or influenced by the person with whom the transaction was made, may relieve the latter from the charge of having used actual fraud and artifice, but it shows the incapacity of the former in the strongest colors, and heightens the presumption of that species of fraud which consists in taking advantage of imbecility, ignorance, dependency or necessity.

Doughty v. *Doughty*, 3 Halst. Ch. 227; *Torrey* v. *Buck*, 1 Green, Ch. 367.

Fraud which is *dolus malus* may be actual, arising from facts and circumstances of imposition, or may be apparent from the intrinsic nature and subject of the bargain itself, or may be presumed from the circumstances and condition of the parties contracting.

Earl of Chesterfield v. *Janssen*, 2 Ves. Sr. 155–156.

As to what amounts to undue influence is a question for the judge to decide, upon the circumstances of each particular case and such circumstances as the nonintervention of a disinterested person, or professional adviser on the behalf of the donor, especially if the donor is, from age or sickness or weakness of disposition, likely to be imposed upon.

Griffiths v. *Robins*, 3 Madd. 191; *Dent* v. *Bennett*, 4 Mylne & Cr. 278; *Harvey* v. *Mount*, 8 Beav. 439; *Greenfield's Est.* 14 Pa. 505–507; *Miskey's App.* 107 Pa. 611; *Darlington's App.* 86 Pa. 512.

The conscience of a judge, as chancellor, must be satisfied; and what goes to the jury is to determine the credibility of the witnesses, and to weigh and decide upon the force and effect of conflicting testimony. If the evidence is too vague, uncertain, or doubtful to establish the equity set up, even if believed, it is the duty of the judge to withdraw it from the jury, either by nonsuit or a binding direction in his charge, as the case may be.

Church v. *Ruland*, 64 Pa. 442.

The verdict of a jury in an equity case is always upon a feigned issue—as it is in this case, and is not binding upon the court; when the court is dissatisfied with the verdict, it may disregard it and decide the case contrary to the verdict, when, in the opinion of the court, the case should be so decided; and that, too, without sending the case to another jury.

Sheetz's Appeal, 35 Pa. 94; *Todd* v. *Campbell*, 82 Pa. 252; *Freeman* v. *Staats*, 1 Stock. 821; *Allen* v. *Blunt*, 3 Story, C. C. 746.

Mr. **John F. Connolly,** for defendants in error.

Per Curiam:

The evidence of the alleged gift of the note, and of the delivery thereof, was amply sufficient to submit to the jury. This question, as well as those relating to feebleness of mind of the donor, and undue influence on him, were sent to the jury in a clear and correct charge. We see no error in the record.

Judgment affirmed.

REDSTONE COKE CO., Limited, *Plff. in Err.*,
v.
Isaac G. ROBY.

A mining boss, under the Act of April 28, 1877, is a fellow servant with the miners; and if he was selected with reasonable care, his employers are not liable in damages to miners for injuries resulting from an explosion of fire damp caused by his negligence.

(Argued Feb. 3, Decided March 7, 1887.)

JANUARY Term, 1887, No. 223, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Fayette County, to review a judgment on a verdict for the plaintiff in an action of trespass on the case for personal injuries. *Reversed.*

The facts are stated in the opinion.

The assignments of error were as follows:

"1. The court erred in refusing defendant's first point, which point is as follows: Under all the evidence in this case, the plaintiff is not entitled to recover, and the verdict must be for the defendant.

"2. The court erred in refusing defendant's eighth point, which point is as follows: If the jury believe from the testimony that there were no explosive gases or fire damp known in defendant's mines, prior to the day of the explosion, which caused plaintiff's injuries, the defendant was not compelled to have every working place in said mine carefully examined every morning with a safety lamp by a competent person, before any workmen were allowed to enter.

"3. The court erred in not charging the jury fully on the law applicable to the facts of the case.

"4. The court erred in not directing a verdict for the defendant after affirming defendant's fourth point, which point is as follows: That notice to the mining boss of gas in the mine was no notice to the Company; and if the jury believe that the explosion occurred and the plaintiff was injured by the negligence of said mining boss, the defendant company would not be responsible, and the plaintiff cannot recover; and defendant's seventh point, which point is as follows: That under the Act of Assembly, it was the duty of the mining boss to keep a careful watch over the ventilating apparatus, and to see that the mine was properly ventilated, and his neglect or failure to do so would not render the defendant company liable."

Messrs. **Boyle & Mestrezat,** for plaintiff in error:

There was no testimony tending to establish negligence on the part of the defendant below. It is error to submit to a jury a question of fact of which there is no evidence or of which there is no sufficient evidence to support a verdict.

Raby v. *Cell*, 85 Pa. 82; *Egbert* v. *Payne*, 99 Pa. 244; *Stouffer* v. *Latshaw*, 2 Watts, 165.

The defendant company was not required to have this mine examined every morning before the workmen entered. This is required only in mines generating fire damp.

Act of April 18, 1877, § 4, P. L. 58.

The mining boss is employed to keep a careful watch over the ventilating apparatus, the air ways, etc., to measure the air current at least once a week, at the inlet and outlet, and at or near the face of the heading and report the same to the inspector of the district, once in every month, etc.

Act of April 18, 1877, P. L. 58.

Mine owners or operators are not presumed to have sufficient practical knowledge to manage the inside workings; and hence the law requires them to employ a competent person for that purpose. If the person thus employed is not competent, it is the duty of the miner to so notify the superintendent or mine owner. If, however, due care is used in his selection—and that is presumed until the contrary is shown, *Mansfield Coal etc. Co.* v. *McEnery*, 91 Pa. 191—the mine owner is not responsible for his mistakes or negligence.

A mining boss under the Act of 1877 is a fellow servant with the miners and laborers, and for his negligence the employer is not responsible.

Reese v. *Biddle*, 2 Cent. Rep. 799, 112 Pa. 72; *Waddell* v. *Simoson*, 3 Cent. Rep. 176, 112 Pa. 567; *Del. & Hud. Canal Co.* v. *Carroll*, 89 Pa. 381.

The court below affirmed defendant's fourth point, that if the plaintiff was injured by the negligence of the mining boss he could not recover, and his seventh point, that it was the duty of the mining boss to see that the mine was properly ventilated. This should have taken the case from the jury.

Duncan v. *Madara*, 16 W. N. C. 93.

The plaintiff was entitled to a clear and distinct instruction on the rule of law applicable to his case; and it was error in the court either to omit to give it, or to do it in so imperfect a manner that the jury might be misled or left uninformed on the law.

Slaymaker v. *St. John*, 5 Watts, 32; *Garrett* v. *Jackson*, 20 Pa. 336.

The answer to the points put by counsel of parties is not a sufficient statement of the law. Litigants have a right to expect the court, who is learned in the law, to state the law applicable to the facts of the case in his general charge. In no other way can the law be placed so clearly before the jury. In no other way can it be faithfully administered.

Cauffman v. *Long*, 82 Pa. 80.

Mr. **R. H. Lindsey,** for defendant in error.

Mr. Justice **Paxson** delivered the opinion of the court:

The plaintiff below was injured by an explosion of gas in the mine where he was working, and brought this suit against the mine owners to recover compensation for the injuries thus received.

Under the instructions of the court the jury found a verdict in favor of the plaintiff. It seems difficult to understand how they reached this result in view of the answer of the court to defendant's points, most of which were affirmed without qualification. The first point, however, was refused. It was "That under all the evidence in this case the plaintiff is not entitled to recover."

It was alleged on the part of the plaintiff that the defendant did not furnish proper ventilation for the mine; and if we are to measure its responsibility by the results we would have little difficulty in arriving at a conclusion.

It has been held in a number of recent cases that the mine owners are not responsible for the negligence of their mining boss. *Reese* v. *Biddle*, 2 Cent. Rep. 799, 112 Pa. 72; *Waddell* v. *Simoson*, 3 Cent. Rep. 176, 112 Pa. 567.

Reasonable care must be exercised in selecting a competent person for such position; but when such care has been exercised the cases are clear that the company employing him is not liable for his negligence. This results necessarily from the Act of April 28, 1877, P. L. 58, which imposes upon the company the duty of providing a mining boss.

This Act was passed, as its title shows, to protect the health and safety of the persons employed in the bituminous coal mines, and is a wise and just measure. The one great danger of such mining operations has always been the accumulation of foul air and gases; and it was to avoid this and secure proper ventilation that the fifth section of the Act requires the mine owner, *nolens volens* "to employ a competent and practical inside overseer to be called a mining boss," etc.

The section then proceeds to define his duties, the principal of which is to see that the mine is kept properly ventilated. The mining boss is therefore a creature of the Legislature, selected by the mine owner in obedience to the command of the law, and in the interest and for the protection of the miners themselves. It has therefore been properly held that where the mine owners have exercised reasonable care in the selection of a competent mining boss, they are not liable for injuries resulting from his negligence. His coemployees take the risk of his negligence, precisely as in other cases. If he is incompetent or careless, they can at once discover it and notify the superintendent; while the owners, with every wish to protect the miners, have no such opportunities of information.

It is very plain, as was held in *Waddell* v. *Simoson*, *supra*, that the operator of a coal mine fulfills the measure of his duty to his employees if he commits his work to careful and skillful bosses and superintendents, who conduct the same to the best of their skill and ability. More than this he cannot do; and with such duty performed, whatever of risk or danger remains must rest upon the miners themselves. Their work is always hazardous with the best appliances and the highest degree of care. Their own safety requires that in measuring responsibility for accidents care should be taken to determine it justly, with due regard to the respective rights and duties of the parties, employers and employed.

If the explosion by which the plaintiff was injured was the result of negligence, it was the negligence of the mining boss. The ventilation of the mine was his special duty, made so by the express language of the Act of Assembly. At the time of his injury the plaintiff was driving a flat heading from the slope, and had driven it about 350 feet. It was alleged that there was no way of getting air to the place where he was working, except what might be produced from the burning of his torch, or the passage of a mule wagon. The explosion was caused by the open lamp of the plaintiff coming in contact with the "black damp" that had accumulated in the mine. It was alleged that no examination of the mine was regularly made with a safety lamp, and that no proper measurements were made of the air currents. If we regard these allegations as established by the verdict, it only proves the mining boss to have been negligent; of which fact the miners themselves had ample means of knowledge, while the owners had none.

The first specification of error is sustained. This renders a discussion of the other unnecessary.

Judgment reversed.

William Josiah McMEEN, *Plff. in Err.*,

v.

COMMONWEALTH of Pennsylvania.

1. **On a motion for a reargument** the

court will consider only the record properly before the court for review.

2. An **ex parte affidavit,** made after the judgment is affirmed, will **not** be **considered.**

(Filed March 14, 1887.)

MOTION for reargument of a writ of error to the Oyer and Terminer of Juniata County, to review a conviction of murder in the first degree. *Refused.*

The original opinion affirming the judgment below, is reported in 5 Central Reporter, p. 887.

On a motion for reargument (*Messrs.* **B. F. Junkin** and **George Jacobs** appearing for the motion), the affidavit of Dwight Mead, made since the judgment was affirmed, was presented.

On the trial Mead testified, in substance, that he met the defendant in Harrisburg, at 9 o'clock A. M. on the day of his wife's death, and the defendant then told him that his wife was dead, and that he, the defendant, had received a telegram to that effect. As a fact, the defendant could not have received any communication about it at that time in the day.

The affidavit presented on the reargument was to the effect that the affiant believed that he was mistaken as to the time of day when he met the defendant and conversed with him as stated in his testimony; that he was now convinced that it could not have been earlier than 11 or 12 o'clock.

The motion for a reargument was disposed of as follows, February 21, 1887:

Per Curiam: A majority of the justices being opposed to a reargument of the case, it is refused.

On March 14, 1887, the following opinion was filed:

Per Curiam:

It is proper to say that our action in refusing the motion for a reargument of this case was based solely upon what appears in the record of the court below, and not upon anything that has occurred since the trial in that court.

The *ex parte* affidavit of Dwight Mead, made since the judgment was affirmed, to the effect that, in his testimony on the trial, he was mistaken as to the time he met the prisoner in Harrisburg on the morning of his wife's death, etc., was not considered, for the reason that it is not a part of the record that was before us for review.

Robert FREED, *Plff. in Err.,*

v.

John RICHEY.

Where the **consideration** in a contract **for the sale of land is the conveyance of other land** by the vendee **to a third person,** and the latter deed is duly executed and delivered, the **promise of** the **third person** to the vendor, **to pay** him a certain sum as the consideration for the conveyance of the latter land, is not within the Statute of Frauds, and **need not** therefore **be in writing.**

(Argued Feb. 2, Decided March 14, 1887.)

JANUARY Term, 1887, No. 219, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Fayette County, to review a judgment on a verdict directed for the defendant in an action of assumpsit. *Reversed.*

The facts as they appeared at the trial before INGHRAM, *J.*, are stated in the opinion.

The assignments of error specified the action of the court in giving binding instructions to the jury to find for the defendant, and in not instructing the jury to find for the plaintiff.

Messrs. **John Collins** and **Edward Campbell,** for plaintiff in error:

The delivery of a deed is of itself sufficient to form a consideration for a promise to pay the consideration money.

Baum v. *Tonkin*, 1 Cent. Rep. 638.

Messrs. **Boyle & Mestrezat,** for defendant in error:

An action of assumpsit for purchase money due on a parol contract for the sale of real estate cannot be maintained.

Wilson v. *Clarke*, 1 Watts & S. 554; *Ellet* v. *Paxson*, 2 Watts & S. 418; *Meason* v. *Kaine*, 63 Pa. 335.

An action for damages may be maintained against a vendor of real estate for the breach of a parol sale; but even then only nominal damages can be recovered, unless money has been paid, or expenses incurred.

Thompson v. *Sheplar*, 72 Pa. 165.

But the case at bar is not an action to recover damages for a breach of the parol agreement.

John Richey had a right to a clear and indisputable title. That such is the law in Pennsylvania is settled by numerous decisions.

Colwell v. *Hamilton*, 10 Watts, 413; *Speakman* v. *Forepaugh*, 44 Pa. 363; *Swayne* v. *Lyon*, 67 Pa. 436; *Negley* v. *Lindsay*, 67 Pa. 229.

Mr. Justice **Gordon** delivered the opinion of the court:

We cannot understand why, in this case, the court below gave binding instructions to the jury to find for the defendant. The evidence, had it been submitted, warranted, as we think, a verdict for the plaintiff. By this we mean that, had there been such a submission and a verdict for the plaintiff, the evidence would have justified the court in refusing a new trial.

By articles of agreement dated March 15, 1878, Freed, the plaintiff, agreed to sell to Jacob J. Slonecker twenty acres of land in Bullskin Township, Fayette County, in consideration of which Slonecker agreed to pay Freed $2,100 in cash, and to convey to John and Jacob Richey a house and lot which he claimed to own in the Village of Pennsville.

The evidence on part of the plaintiff further shows that, in consideration of the conveyance as above stated, John Richey agreed to pay to the plaintiff $1,100, to be secured by his note at one year. This deed, according to Slonecker's testimony, was duly executed and delivered as directed by the said John Richey, so that nothing remained to be done to fully complete the contract between the parties, but to make the payment of the $1,100, the purchase money of the house and lot, payable to Freed. This, then, is the plaintiff's case, and we are at a loss to know why it should not have been submitted to the jury.

We cannot agree with the counsel for the defendant that the contract was within the Statute of Frauds and Perjuries, for the entire transaction, except that part of it which related to the payment of the purchase money of the said house and lot, was reduced to writing. As to this, we held in *Tripp* v. *Bishop*, 56 Pa. 424, and more recently in the case of *Baum* v. *Tonkin*, 1 Cent. Rep. 638, that the statute does not require an agreement for purchase money to be in writing.

As to the disposition of this purchase money; that it was to be paid to Freed can certainly not operate to defeat the plaintiff's action, for the execution and delivery of the deed were consideration sufficient to support the defendant's assumption to pay that money to the plaintiff. It is said, however, that Slonecker's title was good for nothing, hence, the consideration for the promise failed. But this was met by the counter allegation that Richey agreed to take what title Slonecker had, and to run the risk of its validity. Moreover, it was said that that was a matter with which Freed had nothing to do; that at all events he was to have his purchase money, and that Richey was to look to Slonecker for any damages resulting from a defect of title.

Upon these matters we refrain from comment; they can only be determined by a jury, and we are not disposed by our opinion to anticipate or forestall the action of that body.

The judgment is reversed, and a new venire *ordered.*

APPEAL OF David FREY, *Re* Estate of Sarah Frey, Deceased.

The **power of** the **orphans' court to set aside a sale of real estate,** made in pursuance of its own order, rests within the sound discretion of the court; and its exercise, as a general rule, will not be reviewed unless the record shows palpable and gross abuse.

(Decided February 28, 1887.)

APPEAL from a decree of the Orphans' Court of Lehigh County, dismissing exceptions and confirming an administrator's sale of land for the payment of debts. *Affirmed.*

From the record and the depositions the following facts appeared:

Sarah Frey died October 25, 1884, leaving to survive her David Frey, her husband, H. W. Hunsicker, James F. Hunsicker, F. P. Hunsicker, Owen Hunsicker and Mary, intermarried with George J. Koch, children begotten with a former husband, and Oscar J. Frey, a child begotten with David Frey. She died seised of a small tract of land. The inventory of her personalty amounted to $21.50. Her debts were two mortgages to Tilghman Mertz, each of $1,000 aggregating with interest about $2,200, the funeral expenses, administration expenses and other debts amounting to about $500. On January 30, 1885, letters of administration were issued to David Frey, who assumed the office of administrator, filed his bond and entered upon his duties.

April 18, 1885, an order for the sale of the real estate was issued to him. In pursuance of it, he advertised the property for sale on August 1, 1885.

About the time of the sale it was rumored in the neighborhood that besides the liens of the two mortgages in favor of Tilghman Mertz each of $1,000, there was also a lien of $700 in favor of the heirs of Owen Hunsicker, a former husband of the deceased, and it was alleged that in consequence of this report persons who had intended to bid on the property were deterred from so doing. Israel Sensinger was one of this number.

The Hunsickers, by George J. Koch, a brother-in-law and their agent, bid $2,600. More could not be obtained, and after a long trial to obtain more, and after much consultation and, as was alleged, upon the promise of the Hunsicker heirs that they would pay all the debts of Sarah Frey, funeral expenses included, David Frey, the administrator, consented to strike down the property to them, and made his return accordingly.

The Hunsicker heirs, however, refused to pay or to give their promise in writing to pay the debts of the deceased. Thereupon exceptions setting up inadequacy of price and the failure of the Hunsicker heirs to comply with their alleged agreement were filed, a rule to take depositions was entered, depositions were taken and a bond, signed and sealed by Elias Frey and Reuben Semmel, to bid $3,000 at a resale of the property, was offered to be filed.

Upon the question of the value of the property the testimony was conflicting, two of the witnesses testifying that $2,600, the price for which it was sold, was a full, fair and adequate price for the same, while the others fix the value at about $3,000.

After the sale and before exceptions were filed thereto, the purchaser, in pursuance of an agreement with the administrator, the appellant, expended money and made improvements upon the property.

The court below, ALBRIGHT, *P. J.*, dismissed the exceptions and confirmed the sale, and this was assigned as error.

Messrs. **Edwin H. Stine** and **E. S. Schwartz,** for appellant:

The court may grant relief by setting aside the sale where the purchaser has bought under the erroneous belief that the lien of a mortgage was discharged by the sale.

Cummings' App. 23 Pa. 509.

Or if a purchaser has bid under a misapprehension of his rights, the sale may be set aside on terms.

Wait's Est. 3 Luz. Legal Obs. 390; *Feury* v. *McLane*, 5 Luz. Legal Reg. 257.

If the purchaser be seriously misled as to the amount of incumbrances by the misrepresentations of the sheriff, he will be relieved, but at the expense of the sale.

Finley v. *McCulley*, 2 Phila. 212.

Orphans' court sales depend upon the approval and confirmation of the court, for their validity.

Demmey's App. 43 Pa. 168.

Until the sale is confirmed, the heirs may seek for purchasers who will give more, and may ask the court to open the biddings and offer the property at auction again, and the court may order a resale. The administrator or heirs may lawfully make an arrangement with their counsel or a stranger before return to have the sale set aside, he agreeing to give more at another sale.

Hamilton's Est. 51 Pa. 58.

It is within the discretion of the court, after having decreed a private sale, under the Act of 1853, to open the decree and receive a more favorable proposition for the estate, before proceedings under the order have been consummated.

Brown's App. 68 Pa. 53.

The orphans' court may set aside a sale of real estate for mere inadequacy of price; but the inadequacy must be a material one, existing at the time of sale, and the application must be promptly made.

Breese's Est. 2 Kulp, 62.

A sale by a master in chancery will be set aside if a higher price be offered; until confirmation the bid is merely deemed an offer to purchase, subject to the approval of the court.

Baptist Church v. *Bailee*, 29 Pittsb. Legal J. 20.

Gross inadequacy of price, if accompanied by other matter of equity is ground for setting aside a sale.

Twells v. *Conrad*, 2 W. N. C. 30. See also *Whitaker* v. *Birkey*, 2 W. N. C. 476.

In *Haslage's Appeal*, 37 Pa. 440, the supreme court has said that "An appeal taken hereafter on such grounds will not be entertained without a special *allocatur.*"

That, however, was a case purely of inadequacy of price. Besides, the supreme court has since entertained the matter brought up in *Hamilton's Estate*, 51 Pa. 58, and *Brown's Appeal*, 68 Pa. 53, and probably other matters, on almost the same grounds.

The Act of June 16, 1836, § 1, gives this court authority to review "all and all manner of pleas, complaints and causes which shall be brought or removed here from any other court by virtue of any process issued by this court or any judge thereof, and to correct all and all manner of error" in their proceedings.

Mr. **John Rupp,** for George Koch, appellee:

This appeal was entered without a special *allocatur*, and therefore should be quashed.

Haslage's App. 37 Pa. 440.

The power of the orphans' court to set aside a sale of real estate, made in pursuance of its own order, rests within the sound discretion of the court, and its exercise as a general rule will not be reviewed unless the record shows palpable and gross abuse.

Bower's App. 84 Pa. 311; *Haslage's App.* 37 Pa. 440; *Nedd's App.* 70 Pa. 113; *Helfenstein* v. *Leonard*, 50 Pa. 461.

Per Curiam:

This case shows no such abuse of the equitable powers of the court as to call for a reversal. No such palpable error is shown as to induce us to overrule the exercise of the sound discretion of the court.

Decree affirmed and appeal dismissed, at the costs of the appellant.

P. J. WHITE, *Plff. in Err.*,
v.
SCHOOL DISTRICT OF ARCHBALD BOROUGH.

1. Where one **board of school directors,** duly elected and qualified, is acting as such and performing the duties of the office, another *de facto* board cannot exist.
2. **Contracts** made **with** a pretended **de facto board** do not bind the school district.

(Argued Feb.—, Decided March 7, 1887.)

JANUARY Term, 1887, No. 76, E. D. Error to the Common Pleas of Lackawanna County, to review a judgment on a verdict for the defendant in an action of assumpsit. *Affirmed.*

Proceedings involving the rights of this school board were before this court in *Gilroy's App.* 100 Pa. 5; *Gilroy* v. *Commonwealth*, 105 Pa. 484, and *Gilroy* v. *Jones, Simpson & Co.*, No. 197, July Term, 1882, not reported.

The facts, as they appeared at the trial before HAND, *P. J.*, were stated in his charge to the jury, which was as follows:

Under the view that is pressed upon the court, by the counsel for the defendant, the court feels that the responsibility of this case is with them. We would be very glad to relieve ourselves of it, but it is one of those duties which is incumbent upon the court; and we will have to dispose of the case, therefore, in a formal charge, and direct a verdict for the defendant.

In order that our views may be understood (and so if any wrong is done to the plaintiff he may have that corrected) we will briefly state our views of the case.

The action of this case is founded upon a claim, that the board of school directors of the Borough of Archbald, called the Gilroy Board, was a *de facto* board; and as such their acts were binding, so far as regards this plaintiff, to such an extent as to hold the District responsible for his services as a school teacher in that district.

The case involves a decision on the part of this court, under the undisputed evidence of the case, of the question as to whether, as between the Miller Board and the Gilroy Board, the Gilroy Board was a *de facto* board. The evidence in this case, so far as it affects it, down to June, 1881, is the same as was adduced in the case of the *quo warranto*, and we therefore reach, under the evidence, the conclusion the same as we did there, that in June, 1881, the board called the Miller Board was the *de jure* board, the only lawful board in existence. This board, under the undisputed evidence in the case, organized in June, 1881, and, as an organization, was lawful. This organization in the successive years, down and through the year 1883 and '4 under the evidence in this case, was a *de jure* board, the individual officers changing from time to time, either by the expiration of their term or by resignation, but not to such an extent as to destroy the character of the board as an organization as a lawful board.

It is possible, that, upon a technical examination, one or more members of the board, individually, might not be found qualified to hold the office, but, as a board, and as an organization, its *de jure* character remained intact down to and throughout the year 1883.

If we are right in this view, the only other question of law and fact is, Did this board from 1881, down to 1883, act in its organized capacity, as a board of school directors for the Borough of Archbald? Under the undisputed evidence in this case, we feel compelled to reach the conclusion that it did. The character of the evidence is such that it does not rest upon the credibility of witnesses; but it is of the same character as that testimony which was adduced in the *quo warranto* case, upon which we decided the same fact; hence, it follows that the question of a rival board, beginning in 1881, unlawfully, and continuing down to the year 1883, being a *de facto* board does not arise in the case; and consequently, inasmuch as the plaintiff holds his office and founds his claim upon the acts of this Board, he cannot recover.

We are asked to charge you upon several points. We will read them and answer them in order to preserve the rights of the parties.

[The court first answers the defendant's points, and then the plaintiff's which were, *inter alia*, these:]

6. "If the men who employed the plaintiff were *de facto* officers, and the jury believe the evidence of the employment contract and services of White for the time he was employed, their verdict should be for the plaintiff for $675, with interest from the first day of June, 1884."

Ans. Under the facts in this case we answer this in the negative.

7. "The Act of 1883, upon which the order of court for the election in 1883 was made, is unconstitutional; and those holding under ward elections for 1883–4, to wit: the 'Miller Board', were not legal directors."

Ans. It is not necessary for us to decide, in this case, whether the Act of 1883 is constitutional or not. We therefore decline to charge as requested.

8. "The voters of the School District of the Borough of Archbald, could not legally vote by wards for school directors in 1883. The provisions of the Acts of Assembly relating to the election of school directors by wards were not complied with in the proceedings purporting to establish ward elections for school directors in that Borough."

Ans. It is not necessary for us to decide this question in this case; and therefore we decline to affirm this point.

Under this view of the court, you will render a verdict for the defendant.

Verdict and judgment accordingly.

The assignments of error specified the answers to the points quoted, the direction to find for the defendant, and the ruling that the organization of the Miller Board in 1882 was legal, and they were the *de jure* board.

Messrs. **S. B. Price** and **James W. Oakford,** for plaintiff in error:

An officer *de facto* seems to be a person who is such by color of election, although ineligible or although the office was not vacant.

M'Gargell v. *Hazelton Coal Co.* 4 Watts & S. 424.

Lord Ellenborough defines an officer *de facto* as one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.

When a person holds an office by color of right he is an officer *de facto*.

Dill. Mun. Corp. 676, § 716; 243, § 114.

As a general rule it may be stated that not only when the corporate power resides in a select body as a city council, but where it has been delegated to a committee or to agents, then in the absence of special provisions otherwise, a minority of the select body, or of the committee or agents, are powerless to bind the majority or do any valid act.

Dill. Mun. Corp. 247, § 221.

The doctrine of the court below in this case appears to be that when there is a contest over municipal officers the public must deal with the *de jure* officers or their contracts are void.

If this is the law, then whenever there is a contest over municipal office the business of the corporation must stop until a decision is reached.

As to the attempt to enjoin the Gilroy Board, see *Gilroy's App.* 100 Pa. 5.

The Act of February 16, 1883, purports to be general. But is it not special and within the prohibition of article 3, section 7 of the Constitution? It provided for a change in the number and mode of election of school directors in a certain class of boroughs, that is, those that had been divided into wards.

The Act of 1874 provided for the division of boroughs into wards; the Supplement of 1876 provided that the court decreeing the division might upon certain conditions increase the number of councilmen and school directors so that each ward should have an equal number. The Act of 1883 provides that from and after such division into wards or when any such division has heretofore been made each ward shall elect not less than one nor more than three school directors.

Probably the only borough upon which this Act became operative at once was the Borough of Archbald, for it had been divided into wards. In all other cases it was necessary to obtain a division under the provisions of the Act of 1874, before a change in the number of and mode of voting for school directors could be made. All our recent decisions are to the effect that if local results either are or may be produced by a piece of legislation it offends against this provision of the Constitution (art. 3, § 7) and is void.

Scranton School District's App. 4 Cent. Rep. 311, 113 Pa. 176; *Commonwealth* v. *Patton*, 88 Pa. 258; *Scowden's App.* 96 Pa. 422; *Davis* v. *Clark*, 15 W. N. C. 209; *McCarthy* v. *Commonwealth*, 1 Cent. Rep. 111; *Scranton* v. *Silkman*, 4 Cent. Rep. 317, 113 Pa. 196; *Commonwealth* v. *Halstead*, 4 Cent. Rep. 315.

The contracts of school directors, although not properly recorded, if performed by the party dealing with them, can be enforced.

School Directors v. *McBride*, 22 Pa. 216; *Genesee Township* v. *McDonald*, 98 Pa. 444.

In actions against public officers it is sufficient to prove that they acted as such.

Neale v. *Overseers*, 5 Watts, 538; *Barnet* v. *School Directors*, 6 Watts & S. 46; *Riddle* v. *Bedford*, 7 Serg. & R. 392.

A certificate of an election is *prima facie* evidence of title to an office.

Dill. Mun. Corp. 667, § 716; *Campbell* v. *Commonwealth*, 96 Pa. 344; *Clark* v. *Commonwealth*, 29 Pa. 129.

The acts of public officers *de facto* are valid, so far as the public or third persons are interested therein.

Keyser v. *McKissan*, 2 Rawle, 139; *Thompson* v. *Ewing*, 1 Brewst. 67; *Neale* v. *Overseers*, 5 Watts, 538.

The claim of the plaintiff is based upon a contract with persons who were acting as school directors and who were apparently authorized by election to make agreements for the municipality. He carried out his agreement in good faith: the District had the benefit of his services, and he insists upon his right to recover the amount due upon his contract.

Messrs. **W. G. Ward, George S. Horn, and Alexander Farnham,** for defendant in error:

The rule is that where there is evidence which alone would justify an inference of the disputed fact, it must go to the jury, no matter how strong or persuasive may be the countervailing proof. A court may set aside a verdict as against the weight of the evidence, but that is the most they can do to assist the party. But in a case in which a court ought to say that there is no evidence sufficient to authorize the inference, then the verdict would be without evidence, not contrary to the weight of it. Whenever this is so they have the right, and it is their duty, to withhold it from the jury.

But where the weight on one side is of such a character as not to incline the beam at all—what the civilians term a mere *adminiculum*; good to help something else—nothing but a conjecture—then it is as much a question for the court as if this scintilla was absent.

Howard Exp. Co. v. *Wile*, 64 Pa. 205; *Webster* v. *Laudenslager*, 84 Pa. 452.

When the evidence is not in conflict upon the question of fact in dispute, the plaintiff's points may assume the facts to be in accordance with the evidence.

Wannamaker v. *Burke*, 2 Cent. Rep. 323, 111 Pa. 430; *Hoag* v. *Lake Shore etc. R. R. Co.* 85 Pa. 298.

When a fact essential to the maintenance of a cause is not established by proof, the judge may order a nonsuit, or direct a verdict for defendant; and when the requisite facts are agreed upon or admitted, he may instruct a finding for plaintiff.

Lehigh Valley R. R. Co. v. *McKean*, 90 Pa. 127.

In the case now before the court the evidence on part of the plaintiff wholly failed to establish any of the essential facts requisite to maintain the action.

All the evidence on part of the plaintiff fails to show that the Gilroy Board was a *de jure* board of school directors of the District; but it does show that there were two boards acting as and each claiming to be a *de jure* board of school directors for the District. Certainly they both were not *de jure* boards.

If both boards were usurpers, each acting under its own illegal and belligerent claim, neither of them was such a *de facto* board as had power to bind the District by contract with third parties. If the one could, then the other could: and if these two could, any indefinite number of usurping boards could do so, which would be such an intolerable and unjust condition as to be ruinous to the District, and which no court should uphold.

Genesee v. *McDonald*, 98 Pa. 448.

A person cannot be a *de facto* officer unless there be an office to be filled; nor when the office exists with an incumbent exercising the franchises and discharging the duties incident to the office. It matters not whether such incumbent be a *de facto* or a *de jure* officer.

Commonwealth v. *Harding*, 87 Pa. 353; *Genesee* v. *McDonald*, 98 Pa. 449.

The constitutionality of the Act of 1883 could not affect the case.

The mode prescribed by the statute for the employment of teachers for the public schools must be strictly complied with.

Dennison School Dist. v. *Padden*, 89 Pa. 395.

The mode prescribed by the statute is that no teacher shall be appointed, except by the affirmative votes of the whole number of the directors or controllers of the District; and in each case the names of the members voting, both in the affirmative and the negative shall be so entered in the minutes of the board by the secretary; and immediately after the annual appointment of teachers in each district, the secretary of the board shall send a written list of the names, and the schools to which they have been respectively appointed, to the proper county superintendent, with a notice of the day upon which the ensuing term of school in the district will commence, and the termination thereof as directed by the board.

Purd. Dig. p. 289, pl. 37.

The directors shall have the appointment of all the teachers of common schools in the district, fix the amount of their salaries, dismiss them, etc.

Purd. Dig. p. 290, pl. 51.

The plaintiff was not employed by the Miller Board; he held it at arm's length and refused to recognize its authority or legality.

In *Kerr* v. *Trego*, 47 Pa. 296, *Chief Justice* Lowrie says: "On the division of a body that ought to be a unit the test of which represents the legitimate social succession is, Which of them has maintained the regular forms of organization according to the laws and usages of the body, or, in the absence of these, according to the laws, customs and usages of similar bodies in like cases, or in analogy to them. This is the uniform rule in such cases. * * * In all cases where part of the public body remains, and is to be completed by the reception of new members, it remains as an organized nucleus, and in its organized form it receives the new members and then proceeds to the election of new officers, if any are then to be elected. The old nucleus is not dissolved by the incoming elements, but these are added to it, and then the whole body proceeds to the exercise of all its functions."

Per Curiam:

There was no error in the court holding the "Miller Board" to be the duly elected and qualified board of directors. It was acting as such and performing the duties of the office. Any other *de facto* board could not bind the

School District. It follows that the plaintiff cannot compel the District to fulfill a contract made with the pretended board. When the plaintiff made a contract with it, he ran the risk of its being declared to be invalid.

Judgment affirmed.

APPEAL OF H. Virginia BAKER *et al.*, *Re* Gustavus C. Wheeler's Estate.

1. Where a testator, having a power of appointment under his father's will and having in his possession some property subject to the power, makes this **will:** "I leave and bequeath all my property (as stated in my father's will) to my wife," etc., nothing passes thereby except property to which the power applies.
2. **Parol testimony** is **not admissible** to show that the testator had other property to which the will applied.

(Argued Feb. 24, Decided March 14, 1887.)

JULY Term, 1886, No. 101, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Clark, *JJ.*

Appeal from a decree of the Orphans' Court of Chester County, dismissing exceptions to an auditor's report and directing distribution. *Reversed.*

Before the auditor, H. T. Fairlamb, Esq., appointed to make distribution of the balance shown by the account of William Kennedy, administrator *c. t. a.* of the will of Gustavus C. Wheeler, deceased, the following facts appeared:

The decedent died April 10, 1884; his will duly probated was as follows:

"Witness, all persons, I, Gus. C. Wheeler, this day second day of October, 1869, if I should be killed or otherwise lose my life, I leave and bequeath all my property (as stated in my father's will) to my wife Mary S. Wheeler.

Gus. C. Wheeler."

He left a widow, Mary S. Wheeler, but no children. His next of kin were his two sisters, H. Virginia Baker and Elizabeth Wheeler, the appellants.

The administrator *c. t. a.* filed his account, showing a balance in his hands of $2,995.30, which sum included, as ascertained by the auditor, the sum of $90, which was derived from the estate of the decedent's father, in Virginia, by a will giving property to trustees for the son for life with power of appointment by him. This sum was all of the estate of the decedent's father that there was to pass by Gustavus' appointment; and the auditor concluded inasmuch as it was so small, compared with the moneys of the decedent in his own right, that he could not have intended his will to pass only the estate over which he had a power of appointment, but that it also passed his own estate, and accordingly the auditor awarded the whole fund to the widow.

The appellants contended that the will above written was merely an execution of the power of appointment, and did not pass the residue of his estate, derived from his uncle and mother, and filed exceptions to the auditor's report. The court dismissed the exceptions and confirmed the report.

Messrs. **John J. Gheen, Thomas W. Pierce** and **Abner Pyle,** for appellants:

The parenthetic clause is part of the will, and limits the property bequeathed.

The law requires every sentence and word in a will to be considered, in forming a judicial opinion upon it.

Turbett v. *Turbett*, 3 Yeates, 187.

The general rule is that parol evidence is admissible only to explain latent ambiguities, so as to apply the provisions of a will to the subject or person intended, when the description is defective, uncertain, or too general to be understood specifically.

Best v. *Hammond*, 55 Pa. 409; *Wusthoff* v. *Dracourt*, 3 Watts, 240; Wigram, Wills, pp. 118, 132, 205.

When the language of a will is plain, the intention is to be gathered from the language.

Bartholomew's App. 75 Pa. 169.

Where the language of a will is clear and unambiguous a doubt, suggested by extrinsic evidence of the testator's intention at the time he wrote the will, cannot be permitted to affect the construction of the will.

Sponsler's App. 107 Pa. 95.

He used precisely the language necessary to execute the power, and no more, making it clear that he intended nothing more. A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, but because it enables him to give the fee to whom he pleases.

NOTE.—Evidence is admissible which, in its nature and effect, merely explained what the testator has written; but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he intended to have written. Funk v. Davis (Ind.) 1 West. Rep. 302; Judy v. Gilbert, 77 Ind. 96; Sherwood v. Sherwood, 45 Wis. 357.

In Cleveland v. Spilman, 25 Ind. 95, the devise being of "my land, being the south half of the northeast quarter," etc., evidence was admitted to show that the land owned by the testator was in the northeast instead of the east quarter as written, and that that was the land intended, on the ground that the word "land" conveyed the land owned by the testator, and the attempt to specifically describe it did not make nugatory the general description.

In Funk v. Davis, *supra*, the devise was of the "northwest quarter of the northwest quarter of section 27." Evidence was not admitted to prove that the testator was not the owner of the land described lying in the northwest quarter of the section, but that the land owned and intended to be devised was the same description lying in the northeast quarter of the section mentioned.

Where there are two claimants for the same legacy, and it is not given to either by the correct name, evidence *dehors* the will may be considered in determining to which it belongs. Washington and Lee University's App. 2 Cent. Rep. 331.

A devise was of "all that my farm and plantation near Cropwell conveyed to me by the heirs of my deceased wife, and where my son Thomas now resides, containing about eighty-five acres more or less." The testator owned two parcels of land near Cropwell, the one containing 72.62 acres, which had been conveyed to him by the heirs of his deceased wife, the other containing 14.73 acres, which had been conveyed to him by another party. These two parcels adjoined each other and had been rented and cultivated together for many years. Thomas resided on the first named parcel, but cultivated and used both. Held, that only those premises which had been conveyed to the testator by the heirs of his deceased wife, passed by the devise, reviewing the authorities English and American.

Griscom v. Evans, 40 N. J. Law, 402; 1 Am. Prob. Rep. 130. [J. M.]

Thompson v. *Garwood*, 3 Whart. 305.

An unlimited power of disposal is sometimes said to be equivalent to ownership, because it enables the person who possesses it to make the property his own.

Commonwealth v. *Duffield*, 12 Pa. 280.

The meaning of the will is not controlled by the value of the respective estates.

Rawle's App. 106 Pa. 199.

The question in expounding a will is not what the testator meant, but what is the meaning of his words.

Hancock's App. 3 Cent. Rep. 527, 112 Pa. 532.

Mr. **Alfred P. Reid**, for appellees:

All the facts and circumstances respecting persons or property to which the will relates, are undoubtedly legitimate, and often necessary, evidence to enable the court to understand the meaning and application of the testator's words.

1 Greenl. Ev. § 289; 1 Jarm. Wills, 5th Am. ed. 733.

All the surrounding circumstances of a testator (his family, the amount and character of his property) may and ought to be taken into consideration in giving a construction to the provisions of his will.

Postlethwaite's App. 68 Pa. 480; *Marshall's App.* 2 Pa. 388; *Earp's Will*, 1 Pars. 453.

It is for the purpose of enabling the court to discover the intention by putting themselves in the place of the party to see how the terms of the instrument affect the property or subject matter.

1 Greenl. Ev. § 287.

Whether a general devise will operate as an appointment may be ascertained from the fact that the instrument cannot have any operation, except upon the ground that the donee intended to execute his power; as where it is a power to dispose of real estate and he has none of his own. Parol evidence that the testator had no other real estate than that covered by the power is held legitimate; and upon such proof a general devise is held to be an execution of the power.

Bingham's App. 64 Pa. 349; 2 Jarm. Wills, 5th Am. ed. 272.

Parol evidence is admissible to explain latent ambiguities in a will, or to apply its provisions to the subject or party intended, when the description is defective, uncertain, or too general to be understood.

Best v. *Hammond*, 55 Pa. 412; *Brownfield* v. *Brownfield*, 20 Pa. 55; *Newell's App.* 24 Pa. 197.

Such evidence is not received to produce a construction against the direct and natural meaning of the words, but to assist the court in determining what really was the meaning of the ambiguous and indefinite expressions, which are capable of different interpretations.

Note to *Baugh* v. *Read*, 1 Ves. 265.

This will is ambiguous on its face. The use of the words, "all my property," indicates an intention to dispose of all he had. Do the words following, "as stated in my father's will," overthrow that intention, and make it simply an exercise of the power of appointment? If so, it must be because the parenthetical clause qualifies the words "all my property," and reduces the meaning of this general comprehensive expression to "all the property mentioned in my father's will." The fact that this clause is in parenthesis shows that something else was in the mind of the writer than a modification of the immediately preceding words. Grammatically the parenthetical clause does not qualify the words "all my property."

Words in general are to be taken in their ordinary and grammatical sense. Punctuation is to be regarded in the construction of wills.

Hawk. Wills, p. 7.

In *Morrall* v. *Sutton*, 1 Phillips, Ch. 533, effect was given to a parenthesis in construing a will. The phrase in parenthesis was referred to another part of the principal sentence for its subject.

In construing a will, it is not necessary for the court to consider the words exactly in the order in which they are placed, if a different arrangement will better answer the apparent intent of the testator.

Ferry's App. 102 Pa. 207.

Thus, by transferring this parenthetical sentence, the apparent intent of the testator is carried out: "I give and bequeath (as stated in my father's will) all my property to my wife Mary S. Wheeler."

The son had no property in the trust fund created by his father's will. The subject of a power is the property of the donor, not of the donee.

Bingham's App. 64 Pa. 345.

It passes as the property of the donor. The appointee takes directly from the donor. The donee is simply the hand that directs it.

Commonwealth v. *Williams*, 13 Pa. 29; *Commonwealth* v. *Duffield*, 12 Pa. 277.

Prior to the Act of June 4, 1879, "The Supplement to the Wills Act," a bequest of all his property would not have been an execution of a power of appointment.

2 Jarm. Wills, 679.

When a will is executed the natural and reasonable presumption is that the testator does not intend to die intestate as to any of his property.

Miller's App. 5 Cent. Rep. 237; *Stehman* v. *Stehman*, 1 Watts, 466; *Raudenbach's App.* 87 Pa. 51; *Hofius* v. *Hofius*, 92 Pa. 305; *Roland* v. *Miller*, 100 Pa. 50; *Ferry's App.* 102 Pa. 207; *Little's App.* 81 Pa. 190; *Appeal of Board of Missions*, 91 Pa. 507; *Axford's Est.* 2 W. N. C. 663.

The presumption therefore is that when Gus. C. Wheeler wrote this will, he intended to dispose of all his property.

An express and positive bequest cannot be controlled by subsequent ambiguous words. The gift of "all my property" is positive. The parenthetical clause is ambiguous. When comprehensive words are used, an enumeration of particulars will not restrict the meaning of the larger words.

Wood's Est. 9 W. N. C. 171.

When the omission or insertion of words has left unexpressed or wrongly expressed, what, from the whole tenor of the will, was the intention of the testator, the court will permit the will to be read as if the words had been inserted or omitted.

McKechan v. *Wilson*, 53 Pa. 74; *Zerbe* v. *Zerbe*, 84 Pa. 147.

Since the Act of June 4, 1879, "The Supplement to the Wills Act," a bequest of all his property will carry that of which he had the power of appointment, even though the will was made prior thereto.

Aubert's App. 1 Cent. Rep. 104.

Mr. Justice **Gordon** delivered the opinion of the court:

The cardinal rule for the construction of wills is that the intent of the testator must be gathered from the will itself. Other than this rule there is probably no one that is supported by so great a multitude of authorities. Moreover, it is said in *Reck's Appeal*, 78 Pa. 432, by *Mr. Justice* Sharswood, that all mere technical rules of construction must give way to the plainly expressed intention of the testator, if that intention be lawful. Again; where there is no ambiguity in the terms of the will, a doubt suggested by extraneous circumstances cannot be permitted to affect its construction. *Sponsler's App.* 107 Pa. 95.

With these rules thus stated for our guide, we turn to the examination of the will before us, which reads in this manner: "Witness, all persons, I, Gus. C. Wheeler, this day second day of October, 1869, if I should be killed or otherwise lose my life, I leave and bequeath all my property (as stated in my father's will) to my wife, Mary S. Wheeler. Gus. C. Wheeler."

Now, confining ourselves, as the authorities require us to do, strictly to the language here set forth, and we cannot perceive the slightest ambiguity. The testator had a "property" in his father's will; a life estate, with the power to dispose of the corpus by appointment. That he referred to this property and intended to dispose of it no one pretends to question, and this would seem to fully cover the testator's design. How, then, are we to get beyond it?

The court below seemed to think that as he had a much larger estate than he thus devised it must be assumed that of it he did not intend to die intestate. But how do we know this? Or how do we know that he had any other estate than that devised? Certainly, we can derive no such knowledge from the will; hence, it must arise from some extraneous proof or circumstance which we are not at liberty to consider. And why is it to be supposed that he did not intend to die intestate as to the balance of his property, if any such he had? Had the devise been to a stranger no one would have entertained the idea that he intended aught but what he wrote—the execution of the power found in his father's will. But because the devise was to his wife, the court determined to read the will without the limitation. But it will be seen at a glance that such a conclusion could have been arrived at only through a total disregard of the above stated rules of construction. It has made a new, and, perhaps, better will for Gus. C. Wheeler, than he made for himself; nevertheless, as it is one that he did not make, we cannot adopt it.

The decree is reversed, at the costs of the appellees, and a redistribution ordered.

George M. BISHOP, *Plff. in Err.*,
v.
Township of SCHUYLKILL.

1. While a **township** is required to construct and maintain its **public roads** in such a manner as to make them safe for usual and ordinary travel, yet it is **not chargeable with damages** resulting **from extraordinary accidents** which may happen on them, and which reasonable skill and care would not be required to guard against.
2. The **running away of a horse** is not a contingency against which the township is bound to provide.
3. Where a public road ends in a steep declivity on another road, long discontinued, without any barrier at the top of the slope, and a horse, driven along the former one, runs away, through no fault of the township, plunges down the declivity and is killed, it is not error for the court to allow the **jury to determine whether** there was **any duty imposed upon** the **township** in its relations to the traveling public, **to erect** such **a barrier.***

(Argued Feb.—, Decided March 7, 1887.)

JANUARY Term, 1887, No. 58, E. D. Error to the Common Pleas of Chester County, to review a judgment on a verdict for the defendant in an action of trespass on the case. *Affirmed.*

The facts as they appeared at the trial before FUTHEY, *P. J.*, are stated in his charge to the jury, which was as follows:

This action is brought by George M. Bishop against the Township of Schuylkill, to recover damages for the death of a horse, occasioned, as he alleges, through the negligence of the supervisors.

It appears from the evidence that there was formerly a public road running east and west along the brow of a hill overlooking the Schuylkill River, near the Borough of Phœnixville, and that another public road, known as the Dayton Street Road, leading from the borough, entered that old road at a point designated on the draft to which you have been referred during the trial.

In 1864 and 1868 the public road along the brow of the hill was vacated. The portion of the road east of where the Dayton Street Road entered, was vacated in 1864, and closed in 1865, and that portion west of where Dayton Street entered was vacated in 1868; so that eventually, by these two vacations, the whole of the road was vacated.

The effect of this vacation was that Dayton Street, which had formerly entered that public road, thus leading the travel in both directions, terminated on the south side of the vacated road; and from that time to the present there has been no travel along that portion of the continuation of Dayton Street, beyond the gate of the cemetery, there being no farm houses to reach, and no occasion to drive that way.

When the road along the brow of the hill was vacated, no portion of the Dayton Street Road was disturbed, it being left just as it had been originally laid out, and as it had been traveled for a number of years.

It is, perhaps, proper to remark that the court would not have laid out the Dayton Street Road

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*See Hubbell v. Yonkers (N. Y.), 6 Cent. Rep. 499; Monk v. New Utrecht (N. Y.), *post*, 240.

in the condition in which it was left by the vacation of the road along the brow of the hill. Public roads are laid out between public points, and usually from road to road; but they may be laid out to points that are not public roads, such as a mill, a church, a graveyard, a schoolhouse, a railroad station, or, perhaps, the foot of a mountain.' While then I have said that the court would not have laid out the Dayton Street Road as it was left by the vacation of the road along the brow of the hill, it does not follow that any portion of the Dayton Street Road was in law vacated, by the vacation of the road along the brow of the hill. The road remained there as a public road, and, although it was not needed for public travel and would not seem for twenty years to have been traveled beyond the gate of the cemetery, it still remained a legal, public highway.

The plaintiff claims that on the day when this accident happened, he sent his son with a horse and sleigh, containing an overbox, to the Catholic cemetery; that owing to a deep fall of snow, which had drifted to some extent, the sleigh was upset; that while his son was attempting to right the sleigh, the horse started; that his son was unable to stop the horse, on account of the depth of the snow; that he fell and let go the reins; that the horse proceeded on out the Dayton Street Road, past the cemetery gate, until it got to the end of the road, and that when it reached the brow of the hill it plunged down the precipice and was killed.

The plaintiff contends that the Township was negligent in not having closed the end of the road where the accident occurred, and that his horse was killed in consequence of this negligence on the part of the supervisors.

It is the duty of the supervisors to keep the highways in a reasonable degree of repair. It is impossible to guard against the occurrence of all accidents upon public roads; but it is the duty of the supervisors, having regard to the safety of the traveling public, to adopt such precautions as will provide against the occurrence of accidents that might be avoided in the ordinary use of the public roads. It is also their duty to keep the roads in such condition that not only may gentle and quiet horses be driven over them, but that even skittish and fractious horses may be driven with comparative safety.

The evidence in this case shows that the runaway did not happen through any fault on the part of the supervisors of Schuylkill Township. A recent fall of snow was upon the ground. There was no duty incumbent upon the Borough of Phœnixville, within whose limits the horse started, to remove the snow from where it had fallen.

It appears that the sleigh upset in consequence of the drifting of the snow; that the horse then started, the driver subsequently losing control of the animal, and then kept on until it plunged over the brow of the hill.

[If the starting of the horse, in the first place, had been occasioned through any fault of the supervisors, then the Township would be liable for negligence, provided the cause of the starting of the horse was proximate, or not too remote; but I instruct you that under the testimony the Township of Schuylkill was clearly not responsible for the starting of the horse, nor its subsequently getting beyond the control of the driver, and finally meeting with the accident. It is not the duty of a township to provide against accidents which may happen to runaway teams.]

The supreme court has said on this subject: "It is true that ordinary provision is not to be made against contingencies so rare as runaway horses. Roads and bridges are constructed for the purpose of ordinary travel; and if they fulfill such purpose, they are sufficient; and those who have them in care are not chargeable with the results of extraordinary accidents which may happen upon them.

This doctrine is, of course, subject to the principles I have stated: that public roads should be maintained in such condition that even skittish and fractious horses may be driven upon them with comparative safety.

[Under ordinary circumstances, a township nót being required to make provision against runaway horses, I have instructed you that the Township of Schuylkill was not responsible for the running away of the plaintiff's horse; and therefore the principles applicable to the circumstances of this case, the negligence of the Township not having been primarily the cause of the horse running away, are those relating to the performance of the ordinary duties devolving upon township supervisors in respect to the public roads.]

The question for your consideration is whether the accident was caused through any negligence on the part of the Township of Schuylkill. [It has been argued that a barrier at the end of the road might have prevented the accident; and yet the Township might not be responsible for the absence of such a precaution. It frequently occurs that stumps, rocks and ditches are on the side of roads; in which event it might be said that if they had not existed at the time of an accident, in all probability it never would have happened; and yet the Township might not be held liable for negligence in not removing such obstructions. If then it is a fact in the case that this accident would never have happened if a fence had been placed across the end of the road, at the brow of the hill, it does not follow that the Township was guilty of negligence in not erecting such a barrier at that point.]

The question is simply whether there was any duty imposed upon the Township, in its relations to the traveling public, to erect a fence at that point of the road where the accident occurred.

It appears that from the evidence that the road in question has not been traveled for twenty years; and yet it still remained a public road. The Township seems to have entirely lost sight of the fact that such a public road existed, there having been no occasion for its use by the public, at least beyond the cemetery gate.

The question of whether the Township was guilty of negligence in not placing a fence across the road, is not a question of law for the court, but one of fact for your determination.

You have heard all the testimony that has been given in the case in respect to the condition of this road, and the character and ending of the Dayton Street Road. There is some dispute as to whether or not the cemetery fence was extended the entire length down to where Dayton Street enters this road; but it is clear that the road ran across the end of Dayton Street; that it was an ordinary public road; that it was sufficiently wide for public travel, and that it was vacated; while it may be presumed that the road was level until it reached the declivity.

The plaintiff's horse, after reaching the end of the road, would seem to have passed diagonally to the right, some forty feet, before it plunged over the cliff. The question therefore arises as to whether it was the duty of the supervisors to have placed a fence or guard at the end of the road, so as to prevent accidents occurring from runaway horses.

[I have instructed you that the Township is not responsible for the running away of this horse, nor for the driver losing control of the animal; that the Township was not bound to provide against such a contingency; that the Township is only responsible for an accident occurring through the neglect of its supervisors, in not providing against contingencies that might be reasonably foreseen.]

If the accident happened through the negligence of the supervisors, in the proper performance of their duties, the plaintiff would be entitled to recover in this action. If they were not thus negligent, then the accident would not have occurred through any fault on their part, and the Township could not be held responsible.

In other words, if the Township had caused the running away of the horse, or been the means of the driver losing control of the horse, then the Township would be liable for whatever accident happened to the horse thereafter, provided it was not too remote in its consequences; but the Township, not having caused the running away of the horse, nor caused the driver to lose control of the animal, was not bound to provide against the running away of the horse, unless the accident which followed was occasioned through the negligence of the supervisors in not providing against a contingency which might have reasonably and properly been presumed would arise under such circumstances.

I do not attribute any importance to the fact that there existed an intervening space of land belonging to private parties. The contingencies townships are to provide against are those that may be reasonably apprehended will arise by those in authority. There may be a precipice along side of a road, or a precipice a short distance from the road, and the township may be required to afford equal protection against accidents occurring by means of one as well as the other source of danger; but from all the evidence in the case it is your duty to determine whether the supervisors were negligent in not guarding against such an accident occurring at the point where the plaintiff's horse was killed.

[If the plaintiff's horse had been under the control of the driver would this accident have happened? The horse was not under the control of the driver, and therefore the Township was not responsible for any accident that happened to the runaway horse. The supervisors were not required to provide against accidents that might happen to runaway horses, but simply against such contingencies as should be foreseen in the proper performance of their duties.]

In cases where accidents happen, even through negligence on the part of the supervisors, the township cannot be held liable, if there had been any contributory negligence on the part of the party seeking to recover damages.

The evidence in this case, however, does not show that the accident occurred through any neligence of the plaintiff, or his son who was driving the horse, at the time of the accident, and therefore the principle of contributory negligence, which sometimes becomes an element for consideration, does not enter into the solution of the questions I have submitted for your determination.

The plaintiff asked the court to charge *inter alia:*

1. "The use of the road leading from Dayton Street to the point of the accident in Schuylkill Township by the public as a highway for more than twenty-one years, made it a public road, just as effectually as though it had been originally laid out and opened by the proper authorities; and the failure of the supervisors to properly guard it at the point where the accident happened is negligence *per se*, and the Township is liable for any damage resulting from such negligence."

Ans. This point consists of two parts: first, I am requested to instruct you that the Dayton Street Road is a public road, which is a question for your determination, and second, that if it is a public road, the failure of the supervisors to place a fence across the end of it, was negligence in itself. I cannot affirm the point in the language in which it is written. I cannot instruct you, as a matter of law, that the failure of the supervisors to place a fence across the end of Dayton Street was negligence in itself, as it is a question of fact I have referred to your consideration. (Adding at the end of the answers to the defendant's point.) The counsel for the plaintiff, has used this language, viz.: "The use of the road leading from DaytonStreet to the point of the accident in Schuylkill Township by the public, as a highway for more than twenty-one years, made it a public road just as effectually as though it had been originally laid out and opened by the proper authorities." There is no doubt but that such is the law on the subject, and therefore that portion of the point is affirmed. That is to say, the use of a road for the length of time Dayton Street appears to have been used by the public as a highway, makes it a public road; and therefore I have referred to Dayton Street as an existing public road from the Borough of Phœnixville to the point where the Dayton Street road would end, on the south side of the vacated road along the brow of the hill. The testimony in the case warrants the court in saying that the Dayton Street Road was an existing road, at the time of the accident to the point that has been designated on the drafts offered in evidence.

3. "If the jury believe that a fence across the end of the road at the top of the precipice would have prevented the accident, and that there was no contributory negligence on the part of the driver of the horse, then the Township is liable for failing to maintain the fence, and your verdict should be for the plaintiff."

Ans. I cannot affirm this point in the language in which it is written. It may be that a fence across the end of the road would have prevented the accident; but it does not follow that because there was no fence there, the Township was therefore guilty of negligence. I have submitted that question of fact to you, and therefore the point, as written, is disaffirmed.

The defendant submitted, *inter alia*, the following points:

3. "The upset and run away began within the limits of the Borough of Phœnixville, as the plaintiff himself alleges; and there being no new intervening defect to the line of the terminus of the road, the Township of Schuylkill was in no manner responsible therefor, or for the consequences thereof."

Ans. I have instructed you that there is no evidence to show that the Township had anything to do with the causing of the horse running away from the driver, or the driver losing control of the animal, and that therefore the Township would not be responsible for any consequences resulting from the horse running away from his driver, unless the Township was guilty of negligence at the point where the accident occurred.

The Township may or may not be responsible for the consequences of the accident, that question depending upon whether or not the supervisors were guilty of negligence at the point where the accident occurred, and whether their negligence caused the accident. The Township, however, is not responsible for the consequences of the accident by reason of anything that happened when the driver lost control of the horse.

6. "If the jury shall find that the horse ran over a bank upon private ground, thirty feet beyond the south line of the roads as vacated, then, whether the horse was driven beyond the line of the public road or ran away from no cause of the Township's, the plaintiff cannot recover in this case."

Ans. This point is affirmed. I have referred to your determination the question as to whether the Township was guilty of negligence, and if so, whether that negligence was the cause of the accident.

7. "The evidence being uncontradicted that the public had no call, actual or by implied invitation, to drive beyond the gate of the cemetery, over 200 feet from any alleged dangerous point such dangerous point being at least the width of the vacated road beyond the end of the public road, there can be no recovery in this case."

Ans. This point I have answered in the instructions I have given the jury.

The assignments of error specified the portions of the charge inclosed in brackets and the answers to the points given above.

***Mr.* H. H. Gilkyson,** for plaintiff in error: The plaintiff was entitled to have the question, whether under all the evidence the Township was guilty of negligence in not placing a fence or barrier across this road, submitted to the jury. It was not a question of law for the court, but one of fact for the jury. The jury have a right, not only to find the facts, but also the inferences fairly deducible from those proved.

Myers v. *Hart*, 10 Watts, 104; *Collins* v. *Barnes*, 83 Pa. 15.

The presumption of a fact in law which carries a case to a jury necessarily leaves them in possession of the case. True, the evidence to rebut the presumption may be very strong; yet it is a matter for the jury and not for the court.

Pa. R. R. Co. v. *Weiss*, 87 Pa. 448.

The question whether borough officers are negligent in permitting a precipice to remain unfenced, and whether a plaintiff's loss resulted from that neglect, is for the jury.

Borough of Pittston v. *Hart*, 7 W. N. C. 165.

Public roads must be kept in such repair that even skittish animals may be employed without risk or danger on them, by reason of the condition of the roads.

Lower Macungie Township v. *Merkhoffer*, 71 Pa. 276.

A road may be perfectly safe under some circumstances, and very unsafe under others. A way, ten feet in width, in the open country may be as secure as one of ten times that width, but along the brow of a precipice such a way would be very insecure. Perhaps, indeed, a steady sure footed team, handled by a cool and skillful driver, may pass over it as securely as over the former; but drivers of only ordinary nerve, with fractious teams, are unsafe upon it: and it is just for this reason that such a road should be protected with guards, which under ordinary circumstances would not be essential.

Hey v. *Philadelphia*, 81 Pa. 44.

If a public road through a township is so dangerous by reason of its proximity to a precipice that common prudence requires extra precaution in order to secure safety to travelers, the township is bound to use such precautions, and the omission to do so is negligence.

Scott Township v. *Montgomery*, 95 Pa. 444.

If a township fails to maintain a road in a proper and safe condition, whereby the plaintiff, without negligence on his part, is damaged, the question of the negligence of the township was proper for the jury.

Lower Windsor v. *Gemmill*, 16 W. N. C. 265.

Although without the frightening of the horse there would have been no accident, the horse is naturally a timid animal, and is so liable to fright that those having charge of the public highways ought to make reasonable provision for a matter so common and so likely to happen at any time.

Pittston v. *Hart*, 7 W. N. C. 165.

Where a barrier is necessary for the proper security of travelers and the road was unsafe to all travelers without it, and the presence of such a barrier would have prevented the injury, the township is liable.

Alger v. *City of Lowell*, 3 Allen, 402; Shearm. & Redf. Neg. § 391; Whart. Neg. § 968; *Newlin Township* v. *Davis*, 77 Pa. 317; *Hey* v. *Philadelphia*, 81 Pa. 44; *Scranton* v. *Dean*, 2 W. N. C. 467.

To submit to the jury the question whether "the use of the road by the public as a highway for more than twenty-one years made it a public road,"—a question clearly of law,—was error. The error in this instruction was not cured by anything subsequently said by the court, by way of correction; for an instruction which may have misled the jury, although subsequently qualified, is ground for reversal.

O'Hara v. *Richardson*, 46 Pa. 385; *Shimer* v. *Jones*, 47 Pa. 268.

Messrs. **R. T. Cornwell** and **B. F. Fisher,** for defendant in error:

The authorities are only to provide safeguards against foreseen dangers to the ordinary traveling public, and not to animals running at large upon the public highway, or those which have broken loose from their drivers.

McCormick v. *Township of Washington*, 2 Cent. Rep. 584, 112 Pa. 185.

In the present case the public had no occasion to go beyond the cemetery gate, 250 feet from the semblance of danger. Ordinary provision is not to be made against contingencies so rare as runaway horses. Roads and bridges are constructed for the purpose of ordinary travel, and if they fulfil such purpose they are sufficient; and those who have them in care are not chargeable with the results of extraordinary accidents which may happen upon them.

Hey v. *Philadelphia*, 81 Pa. 44.

When a horse, while being driven with due care upon a highway which a town is bound to keep in repair, becomes, by reason of fright, disease or viciousness, actually uncontrollable so that his driver cannot stop him or direct his course or exercise or. regain control over his movements, and in this condition comes upon a defect in the highway, by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable.

Titus v. *Northbridge*, 97 Mass. 258.

For the plaintiff to recover, the defect must have been the sole cause of the accident which resulted in the injury; if the plaintiff's horse became uncontrollable, and was so when the accident occurred, the plaintiff could not recover; but if there was only a momentary loss of control, and the control would have been instantly regained if the plaintiff's carriage had not come in contact with the place where the way was defective, then the plaintiff could recover. In order to render the town or city liable, the defect of the way must be the sole cause of the injury.

Babson v. *Rockport*, 101 Mass. 93; *Rowell* v. *City of Lowell*, 7 Gray, 100; *Stickney* v. *Salem*, 3 Allen, 374.

If a horse gets loose and runs upon the highway, the town is not liable.

Richards v. *Enfield*, 13 Gray, 344; *Davis* v. *Dudley*, 4 Allen, 557.

Per Curiam:

We discover no error in this record. While a township is required to construct and maintain its public roads in such a manner as to make them safe for usual and ordinary travel, yet it is not chargeable with damages resulting from extraordinary accidents which may happen on them, and which reasonable skill and care would not be required to guard against.

The case was submitted to the jury in a clear and correct charge. *McCormick* v. *Township of Washington*, 2 Cent. Rep. 584, 112 Pa. 185.

Judgment affirmed.

Charles F. PERRY *et al., Appts.,*
v.
Nancy PERRY.

1. **Where, upon a bill in equity for an account,** the **master** recommends a decree for the plaintiff, and his report is confirmed by the court below, the fact that in reaching his conclusions he **disregarded** considerable **vague** and uncertain **testimony** which, if believed, would have applied more to amounts claimed beyond what he found than to the amount found by him, is **not ground for reversing** the **decree** at the instance of the defendant.
2. Under the evidence, a **transfer** of personal property **held** to **be an absolute gift inter vivos** and **not a donatio mortis causa.**
3. Under the evidence, **possession of a wife's chattels by** her **husband** held not to amount to a transfer of the title from her to him.

(Argued Feb. Decided March 7, 1887.)

JANUARY Term, 1887, No. 304, E. D.

Appeal from a decree of the Common Pleas of Lackawanna County, in favor of the plaintiff in a bill in equity. *Affirmed.*

The bill alleged that the plaintiff, Nancy Perry, had owned property, real and personal, before her marriage to F. H. Perry; that after the marriage she allowed him to manage it and receive the income; that shortly before his death the defendants, his children by a former marriage, induced him to assign to them all his property, and that the property so assigned included some of that of the plaintiff.

The bill prayed that the defendants might be compelled to account for and turn over to the plaintiff all her money transferred to them by F. H. Perry, and also one third of all property transferred to them in fraud of the plaintiff's rights, as wife of F. H. Perry; and that the defendants might be enjoined from assigning, selling, incumbering, etc., any property transferred to them by F. H. Perry.

J. S. Short and J. B. Carpenter, debtors in a mortgage and note respectively, which the bill alleged so to have been assigned by F. H. Perry, were made defendants in the bill; and as to them the bill prayed an injunction to restrain them from paying any money on account of the mortgage and note.

A preliminary injunction was granted according to the prayers of the bill.

The defendants' answer admitted the marriage of F. H. Perry with the plaintiff, and that the plaintiff before the marriage was possessed of a separate estate, but denied that F. H. Perry managed her property or received the income thereof in any such manner as to render the estate of F. H. Perry liable to the plaintiff.

The answer also admitted the transfer of personal property by F. H. Perry to his children shortly before his death, but denied that there was any fraud connected therewith.

The cause was referred to Henry A. Knapp, Esq., as master, and his findings were as follows:

1. Mrs. Nancy Wall, now Mrs. Nancy Perry, plaintiff in this case, and F. H. Perry, were married upon August 30, 1874. Both had previously been married, Mrs. Wall being the widow of Otis Wall, who died in 1859, without

leaving children. The defendants, C. F. Perry and Emeline Stannard, wife of R. H. Stannard, are children of F. H. Perry by a former marriage.

2. F. H. Perry died intestate, upon April 14, 1885, having previously devested himself of all, or very nearly all, his property in the following manner: some time in February or March preceding, he transferred to his son, C. F. Perry, a note for $106, which he held against J. B. Carpenter, which is particularly mentioned in the seventh paragraph of plaintiff's bill; upon March 30, 1885, he transferred to his daughter, Emeline Stannard, a note for $239, which he held against her husband, R. H. Stannard.

Upon April 8, 1885, he assigned a mortgage which he held against J. S. Short, also mentioned in the sixth paragraph of plaintiff's bill, upon which about the sum of $2,000 was at that time unpaid, to his said son, C. F. Perry; and on the same day, by deed, which mentions the consideration of $900, he conveyed to his son, C. F. Perry, a house and lot in Factoryville, Pa., which he had previously purchased from the plaintiff.

These conveyances were made without valuable consideration, moving to said F. H. Perry from his said children; and although they were made while in apprehension of death, or by way of preparation for death, they do not appear to have been conditioned upon his death, but were absolute, and vested all the title of the assignor immediately in the assignees.

It does not appear to be clearly established just what the physical condition of F. H. Perry was when he made these conveyances. He had been in ill health for some few months previously; aud about the time he made the conveyances he became impressed with the idea that life was short, and he took the action that he did in order to arrange his matters to his satisfaction, having in view the devesting of any distributive share which his widow might have in the articles of personal property mentioned, in case she survived him. He lived with the plaintiff up to within about two weeks prior to his death, when he was removed to the house of his daughter, Emeline Stannard, and her husband, R. H. Stannard, a few miles away. This removal was not effected through any fraudulent purpose on the part of the defendants to induce him to convey his property as he did, but in order to afford him more adequate attention than he could receive, or was receiving, at his former home, as he needed the attention of a man.

3. There was no actual fraud on the part of the defendants in obtaining the conveyances mentioned.

Upon this state of facts the question of law is raised whether as to the personal property so voluntarily conveyed the plaintiff can claim any distributive share therein under the intestate laws.

Under the authority of *Pringle* v. *Pringle*, 59 Pa. 281, and *Estate of John Dickerson*, 43 Legal Int. 76, the master is of the opinion that she cannot. In the former case, *Judge* Sharswood uses these words: "In our law, no such gift, otherwise valid, can be impeached as a fraud on a man's wife or children. They have no legal right to any part of his goods; and therefore no fraud can be predicated of any act of the husband or parent to deprive them of the succession."

It is argued on behalf of the plaintiff that the gifts, being made in apprehension of death, are in their nature testamentary, and that the conditions of the Act of 1833 regulating the making of wills, must be applied to them. It is further argued that the distinction between a *donatio mortis causa* and a gift *inter vivos*, is that the former is made in apprehension of death, while the latter is not: and the gifts here established are consequently of the former class, and will not be sustained, because they convey all of the estate of the decedent. *Headley* v. *Kirby*, 18 Pa. 326, is relied upon as an authority for this position. While the point is not free from doubt, the master is of opinion that this case is ruled by *Pringle* v. *Pringle*, *supra*.

A *donatio mortis causa* is that form of gift *inter vivos* which is expressly made conditional upon the death of the donor. It has been judicially declared to be a "gift *inter vivos*, subject to conditions." 2 Kent, Com. 13th ed. 448, *note* y, and cases there cited; *Marshall* v. *Berry*, 13 Allen, 43-46.

In *Headley* v. *Kirby*, *supra*, it is distinctly recognized that such gifts form exceptions to our Statute of Wills; and the court in that case declined to sustain the gifts, more from the uncertainty which surrounded it and the lack of adequate proof of what the gift really was than from any solicitude for any class or classes of persons who might be entitled to succeed to the estate of the decedent. Here there appears no such uncertainty. An assignment of the mortgage was executed, acknowledged, delivered, and recorded, and the notes were passed to the donees. So far as the real estate is concerned, it is not questioned that at least the dower interest of Mrs. Perry still remains therein; and that point is not in controversy here; but as to the personal property, it is believed that the power of F. H. Perry over it was absolute, and that the gifts mentioned are properly classified as gifts *inter vivos*, upon which no fraud can be predicated. Upon this branch of the case the following is found as matter of law:

1. The gifts made by F. H. Perry to his children, mentioned in the second finding of fact, were valid, so far as they conveyed personal property belonging to the donor and not held in trust for his wife; and in the subject matter of such gifts the plaintiff is entitled to no distributive share as widow of the donor.

In proceeding to consider the other branch of this case, the question whether the personal property conveyed by F. H. Perry to his children, as above detailed, was his own property or that of the plaintiff, the following matters of fact are found by the master.

[4. At the time of the marriage of Mr. and Mrs. Perry, or soon after, Mr. Perry was the owner in his own right of a claim against the bankrupt estate of Northrup Brothers of Clark's Green, amounting to about the sum of $1,500.

Upon this claim he afterwards realized about the sum of $1,200. Whether during the coverture he was the owner of any other property is too uncertain to become the subject of a finding of fact, but it is believed by the master that he was not.]

5. When Otis Wall died in 1859 he left (by will) to his widow, now the plaintiff, the use of his farm for her life, lying partly in Lackawanna and partly in Wyoming County. For many years past this farm has had a rental value of $500 per annum.

Certain other real estate was devised to her for the term of her life by the same will; and [it is believed that by some arrangement this property had been sold, and that the principal sum realized therefor was in the plaintiff's hands. This sum was about $1,239. She was entitled to the use of this sum during her life; but one Mr. Campbell appears to have been entitled to receive $825 of the same upon her death. It may be stated, therefore, that she was indebted to Mr. Campbell in the sum of $825, not drawing interest. This state of facts is believed to have existed at the time of the marriage of Mr. and Mrs. Perry, or soon after.

At the same time Mrs. Perry had in her own right at least $900 in money, which was loaned to various parties upon notes—all, it seems, to perfectly good parties, as it was all afterwards paid. She was also the owner of a house and lot in Factoryville, Pa., worth from $1,300 to $1,500.

6. In 1881 the Mr. Campbell mentioned in the last finding of fact being desirous of receiving or having secured to him the principal sum of money aforesaid, it was paid to him by F. H. Perry, and a deed was taken by said F. H. Perry from his wife, Nancy Perry, of her house and lot in Factoryville. This deed is mentioned in the eighth paragraph of plaintiff's bill, wherein it is alleged that the conveyance by plaintiff to F. H. Perry was without consideration. The sixth clause of defendants' answer admits the conveyance, but denies that it was without consideration. It is found as matter of fact that F. H. Perry voluntarily conveyed this property to C. F. Perry by deed dated April 8, 1885, six days before his death.

Upon the hearing no testimony was offered by plaintiff upon the matters alleged in regard to this property, and objection was made to the proof, by defendants, that F. H. Perry had paid $825 to Campbell, as the consideration of the conveyance to said F. H. Perry of this Factoryville lot. The ground of this objection was that the deed from Nancy Perry to F. H. Perry appears to be void in law, because it is the deed of a married woman, not joined by her husband; and the plaintiff does not ask any decree concerning the property. The deed from Mrs. Perry to her husband is not in evidence in this case.

[7. The plaintiff at the time of her marriage to Mr. Perry and during the coverture was a weak, delicate woman. Mr. Perry early impressed upon her mind that a married woman has no right in law to receive or pay out money. It is believed by the master that all her income or sums of principal paid during the coverture came to his hands. It is established beyond dispute that he received the rent paid by B. F. Rifenbury, tenant of the farm, after the coverture. This must have amounted to more than the sum of $1,500, allowing certain sums deducted. It is also established that he received $400 of the $900 which Mrs. Perry is shown to have had out at interest at the time of the marriage. While it is not clearly shown that he received the proceeds of his wife's farm from April 1, 1878, the date when Mr. Rifenbury left it, until his death, yet the testimony strongly points that way; and the master is of the opinion that he did receive it, as well as the other $500 of principal which was paid during the coverture.]

8. The personal property given by Mr. Perry to his children shortly before his death, so far as the same is established by the testimony, may be stated as follows:

Mortgage against J. S. Short, unpaid	$2,043
Note against H. R. Stannard	239
Note against J. B. Carpenter	106
Note against James Frear or Keystone Academy	200
Cash in Scranton Savings Bank & Trust Company	250
Total,	$2,838

9. It is shown that a short time before the death of Mr. Perry an account was presented to him, of items paid out by Mrs. Perry for his use, amounting to about $25, which, after some consideration, was paid to her by J. V. Whitney, Esq., who was acting as legal adviser of Mr. Perry.

It may also be stated as matter of fact that Mr. Perry paid to Mr. Campbell in 1881 $825 to discharge his wife's indebtedness mentioned in the sixth finding of fact.

There is no other testimony showing payments made by F. H. Perry to his wife or for her use, of any of the sums received by him from her private estate. Without entirely crediting all the testimony concerning the scantiness of the living of Mr. and Mrs. Perry during the coverture, it is well established that their living was plain and inexpensive; and the master believes that Mr. Perry did not expend as much as the income of the farm in the support of himself and Mrs. Perry. They lived during the coverture upon the farm, or in the house of Mrs. Perry in Factoryville.

[From all the testimony the Master is of the opinion, and states it as matter of fact, so far as such finding of fact can be predicated upon the evidence, that Mr. Perry received the whole or nearly the whole of the income of Mrs. Perry's estate during the coverture; that he also received the $900 which it was shown was paid during the coverture; that from these moneys he paid Mr. Campbell the $825, and supported himself and Mrs. Perry until the time of his death, and that the difference between the sum he received from the Northrup Brothers' bankrupt estate and the amount he turned over to his children, shortly before his death, represents the amount which he saved out of his receipts from her private estate.]

10. It is not shown that any of the money which Mrs. Perry permitted her husband to receive was intended as a gift to him.

Upon this state of facts what are the rights of these parties?

In *Hamill's Appeal*, 88 Pa., 363, it is held that where a husband receives the property of his wife, it will be presumed that he holds it in trust for her. Woodward, *J.*, in delivering the opinion of the court, says: "But the objection has been made on the part of the apellees that no proof was made of any terms on which Mr. Hamill held the money, and that without some evidence of a loan, they were not required to show that it was a gift. The essential question is whether Mr. Hamill received the money or not. If he did, it will be presumed that he held it in trust for her. The mere possession of a wife's money is no evidence, since the Act of 1848 was passed, that the title to it has been vested in the husband. *Grabill* v. *Moyer*, 45 Pa. 530; *Gicker* v. *Martin*, 50 Pa. 141; *Bergey's App.* 60 Pa. 408. No rights of creditors are involved in this litigation, and it is not to be taken for granted that Mrs. Hamill intended a gift to her husband for the eventual benefit of his children by a former wife."

In the opinion of the Master, F. H. Perry was at the time of his death a trustee for his wife for the amount of her money which came into his hands, less the sum which he had expended for their living or for her use.

What was that amount?

It has been seen that he gave away $2,838 just before he died. Was this his money or that of his wife?

That the money of his wife came to his hands cannot be denied. That he had money of his own until he realized from the Northrup estate is very doubtful; his frequent declarations were that he had lost his all by the Northrup failure.

If he had other property, it does not appear that he used any portion of it in the support of himself and family—as the law would require that he should do before he resorted to the money of his *cestui que trust*, Nancy Perry, for that purpose.

Mr. Perry shortly before his death seems to have undergone a financial transformation; from a poor man who has lost his all by the Northrup failure, and is dependent upon the income of his wife's estate for his living, he suddenly becomes able to give nearly $3,000 in money or good securities to his children. From all the testimony the master deduces the conclusion of fact that Perry had in his own right nothing but the amount which he realized from the bankrupt estate of Northrup Brothers; and that the amount given to his children above that sum was trust property money which he had received from his wife's estate, and which he held in trust for her.]

What amount did he receive from the Northrup estate? The testimony does not clearly show. The plaintiff claims that he only received $820; while by the defendants' showing $1,450 is the most probable figure at which the testimony points. Adopting the latter as the correct figure, it is evident that he gave to his children upon his death bed $1,388 more than he received from the Northrups. In the opinion of the Master this furnishes one basis for arriving at the sum which the plaintiff should rightfully receive from his estate.

Let us now consider the subject from another standpoint, to wit: his receipts of his wife's money and expenditures for her, so far as they are disclosed by the testimony, and see how the account stands. On behalf of defendants it is argued that a husband is not liable for the income of his wife's separate estate received by him, for the reason that it is presumed that it entered into their yearly expenditures and enabled him to provide more bountifully for the family. While the cases cited support this general position, it cannot be held to apply to this case.

The weight of testimony shows that during the coverture the cost of living of Mr. and Mrs. Perry was not above $250 to $300 per year. Allowing $100 per year for matters not taken into account by the witness, the amount reaches $350 to $400. Adopting the larger sum as the correct one, and calling the net income of the farm $500, the following result is reached:

Ten years' profit of farm, at $100 per year	$1,000.00
Received by Mr. Perry, from Mr. Campbell, interest on $825, for three years	148.62
Received by Mr. Perry, of sums of principal belonging to his wife	900.00
Total	$2,048.62
Less amount paid to Mr. Campbell to discharge indebtedness of wife at the time deed was taken by Mr. Perry of property in Factoryville	$ 825.76
	$1,222.86

By the above computation it will be seen that Mr. Perry is given credit for the amount which it is claimed that he paid as a consideration of his wife's property in Factoryville. This credit the defendants are entitled to; for, although no decree is sought or recommended concerning the property, and the sufficiency or validity of their deed cannot be passed upon in this proceeding, as the same is not in evidence, yet it must be borne in mind that their title is disputed by Nancy Perry, and that they are out of possession.

While a husband may not be ordinarily accountable for the interest or income of his wife's property, it is inequitable that he should be allowed to accumulate such income and give it to his children by a former wife, upon his death; and this injustice is emphasized by the fact that he has had his entire living from his wife's estate, and leaves his own property intact to his children, freed by his peculiar manner of distributing it from his widow's statutory portion.

The Master is of the opinion that F. H. Perry was a trustee for his wife for at least $1,222.86, at the time of his death, and that the said sum had been invested by said trustee in the notes, mortgage, etc., which he gave to his children. It is the right of the plaintiff to follow these trust funds, they having been conveyed without consideration. The assignments and transfers made by F. H. Perry to his children, just before his death, were in fraud of his wife, and void, in so far as they conveyed this trust fund of $1,222.86, or the securities in which it had been invested by the trustee; and the said transfers, assignments, or conveyances should be decreed to be null and void in so far as they convey the amount named.

It is recommended [that a decree be made, requiring and directing J. S. Short and J. B. Carpenter to pay plaintiff the several amounts due upon the mortgage and note mentioned in the sixth and seventh paragraphs of plaintiff's bill, and authorizing the plaintiff to give proper acquittances and satisfactions to said J. S. Short and J. B. Carpenter for the amounts so paid; and ordering and directing the defendants, C. F. Perry, Emeline Stannard, and R. H. Stannard, to pay the plaintiff the said sum of $1,222.86 less the amounts which said plaintiff shall receive from J. S. Short and J. B. Carpenter,] as aforesaid.

The court HAND, *P. J.*, confirmed the report and entered a decree as recommended.

The assignments of error specified this action on the part of the court and also the action of the court in overruling the defendants' exceptions to the portions of the report inclosed in brackets.

Messrs. **James H. Torrey** and **M. J. Wilson,** for appellants:

We rely mainly in this case on the principle, *Actore non probante, absolvitur reus.* The testimony to support the plaintiff's claim is vague, uncertain and inconclusive.

It is necessary, for the peace of families and the protection of estates, that one standing in the confidential relation of a wife, should prove her right as a creditor with clearness. In such a case, especially where the husband leaves children by a former marriage, she must show by distinct and clear proof that the transaction was a loan from her own separate estate.

Hause v. *Gilger*, 52 Pa. 412.

The findings of fact of a master, which are merely his inferences or deductions from other facts, will be freely reviewed.

Kutz's App. 12 W. N. C. 27; *Phillips' App.* 68 Pa. 130–138.

Having assumed without evidence that Perry collected $500 per annum for ten years from the income of his wife's estate, the master is confronted with the legal presumption that the income of a wife's estate, received by the husband, is used in the support of the family.

Bardsley's Est. 7 W. N. C. 48; *Cogley's Est.* 13 Phila. 308.

Messrs. **S. B. Price** and **A. D. Dean,** for appellee:

We think the master erred in his first conclusion of law; and, by reason of that error, he materially reduced the amount of the decree which was made in favor of the plaintiff below.

He held that Mr. Perry had the legal right on his death bed to give away to his children all of his own estate, for the very purpose of thereby depriving his wife of her claim upon his estate under the intestate laws.

Neither *Pringle* v. *Pringle*, 59 Pa. 281, nor *Estate of Dickerson*, 43 Legal Int. 76, applies.

Bouvier's Dictionary defines a gift *inter vivos* as "A gift which takes place when the giver is not in any immediate anticipation of death, which distinguishes it from a gift *mortis causa.*"

It is not necessary to a gift *mortis causa* that it should be expressly conditioned on the giver's death. The condition is implied by law.

Wms. Exrs. 685*, 688*, and notes; *Michener* v. *Dale*, 23 Pa. 59; *Wells* v. *Tucker*, 3 Binn. 366–370; *Nicholas* v. *Adams*, 2 Whart. 17–22; 1 Lead. Cas. Eq. 852, 741*.

It is a fraud for a man secretly to dispose of all his property just before his marriage.

Baird v. *Sterne*, 12 W. N. C. 205.

How much greater wrong was here perpetrated in depriving a wife of all share and participation in the husband's estate by giving it secretly to his children on his death bed?

The findings of facts by a master, approved by the court, will be set aside only for plain error.

Kisor's App. 12 Pa. 435.

The credit to be given to the witnesses must depend greatly on their appearance and conduct before the examiner, who was also master, and the impression created by their examinations and oral testimony.

Sproull's App. 71 Pa. 138.

Where the testimony is conflicting, although the merits may appear contrary to his finding, if it has been approved by the court below, as a general rule this court will not reverse.

Kutz's App. 12 W. N. C. 28; *Morgan's App.* 6 Cent. Rep. 158.

Money received by the husband from his wife's estate, since the Act of 1848, is presumed to have been received for her.

Johnston v. *Johnston*, 31 Pa. 450; *Mellinger* v. *Bausman*, 45 Pa. 522; *Grabill* v. *Moyer*, 45 Pa. 530; *Gicker* v. *Martin*, 50 Pa. 140; *Young's Est.* 65 Pa. 105.

The answer in this case does not satisfy the legal requirements. It is a mere denial of the allegations of the bill.

It is a rule of equity practice that the defendant shall apprise a plaintiff, by the answer, of the nature of the case he intends to set up, and that he cannot avail himself of any matter of defense not stated in his answer, even though it should appear in his evidence.

Bright. Eq. Jur. § 676; 1 Dan. Ch. Pr. & Pl. 733, 740 and notes.

The bill and answer are part of the evidence. All affidavits, depositions, etc., previously made, read or used in the case may be used before the master.

Bright. Eq. Jur. § 767.

Per Curiam:

The court concurred with the master in the finding of facts. While much evidence was given, of a vague and uncertain character, it appears to have been disregarded in the conclusion at which both arrived. The learned judge says: "The uncertain and vague character of the testimony applies more to amounts claimed beyond what the master has found than to the amount he has found."

An examination of the evidence satisfies us that this is correct. It is sufficiently clear to justify awarding the sums specified in the decree.

Decree affirmed and appeal dismissed, at the costs of the appellants.

Daniel HEALY, *Plff. in Err.*,

v.

Benjamin F. DETTRA.

1. **Words** spoken of a lawyer, in reference to what he has done in his profession, that he is a "blackmailer," are **actionable** *per se*.
2. H. refused in the presence of several witnesses to shake hands with D., saying: "I don't shake hands with blackmailers; a certain person told me he

had to pay you hush money in the prosecution against me." D. threatened to sue H.; whereupon H. replied: "The sooner the better: I will show that you are a blackmailer and that you have blackmailed me." *Held*, that, in an **action for slander,** upon proof of these facts D. was entitled to recover against H., without proof of special damage.

3. In the absence of malice, compensation is the **measure of damages.**
4. If the words were uttered with special malice **punitive damages** may be awarded; and in estimating such damages the **defendant's means** may be taken into account.
5. **Under the Act of March 30, 1875,** a **change of venue** in civil cases, on the **ground** that the defendant cannot have **an impartial trial, is within the discretion of the court** below; and a refusal to grant the change will not be reversed unless the discretion has been abused.
6. An action for slander for calling an attorney a blackmailer is not a case **where a large number of the inhabitants of the county are interested** adversely to the defendant so as to make it **obligatory on the court to grant a change of venue,** under the Act of 1875, although the words were spoken about a criminal prosecution for alteration of the tax records by the defendant.

(Argued Feb. Decided March 14, 1887.)

JANUARY Term, 1887, No. 88, E. D. Error to the Common Pleas of Berks County, to review a judgment on a verdict for the plaintiff in an action of trespass on the case for slander. *Affirmed.*

After issue joined and before trial the defendant presented a petition for a change of venue, upon the grounds that both the judges of the Common Pleas of Berks County were material witnesses in the case; that the inhabitants thereof were interested in the questions involved, and that a fair trial could not be had by defendant in Berks County. In support of the petition there was filed an abstract of 101 articles in seven English newspapers published in Berks County, from August, 1884, to November, 1885, all reflecting on him.

The application was opposed by the plaintiff, and denied by the court, and the case went to trial on October 18, 1886, ALBRIGHT, *P. J.*, of Lehigh County, presiding.

The facts as they appeared at the trial were stated in the charge of the court which was as follows:

In this action, brought by Benjamin F. Dettra against Daniel Healy, the plaintiff seeks to recover damages which he alleges he has sustained by reason of the defamation of his character by the defendant. In law a man has a right to his good name and reputation: that is, he has an equal right to be protected against false and willful communications, whether written or printed, or by word of mouth made to his prejudice or damage.

The plaintiff alleges that the defendant, without any just cause or excuse, spoke that of him which was false and defamatory, and that he did it unlawfully; and for that he seeks to recover damages. If, under the rules of law which will be stated to you, and the facts as you shall find them from the evidence, the plaintiff has not made out his case, or the defendant has established some sufficient defense, your verdict will be in favor of the defendant; while, [if you find that the plaintiff is entitled to recover, you will return a verdict in favor of the plaintiff for damages in such amount as may be deemed by you proper under the circumstances and under the law.]

For slander, that is, defamation by word of mouth, an action must be brought within one year after the utterance of the words. This action was brought on the third of September, 1885; and it is alleged that the slanderous words complained of were spoken on the second of September, 1885, the day before the action was brought. There is no doubt, therefore, that the action was brought in time.

The plaintiff alleges that at the time of the utterance of these alleged slanders, he was a resident of this city, a member of the Bar of Berks County, and a practicing lawyer, and that the defendant said of him, in substance, that he was a blackmailer and had blackmailed him (the defendant).

Not all words that are spoken are actionable. One man may say that of another which is uncomplimentary and rude and disagreeable to be borne, yet it may not be actionable; and in such a case, the plaintiff cannot recover unless he can show special damage, unless he can show that by reason of the utterance of these words he lost something or sustained some injury.

There is, however, another class of words which are actionable, and for the speaking of which without just cause or excuse a plaintiff is entitled to recover damages without showing specially that he had any particular loss. That class of words is called actionable. For instance, to say of a man that he is the greatest rogue in the world would not be actionable, because it does not charge any particular thing which, if proven, would certainly bring inconvenience upon him; but, to say of a man that he is a thief, or that he is a murderer or a fornicator, is actionable, because, if true, the man could be punished under the law.

To say of a practicing lawyer that in the practice of his profession he has been guilty of blackmailing is actionable. To say of him generally that he was a blackmailer would not subject a man to indictment and punishment; but, [inasmuch as it is considered that it injures the man in his business, and inasmuch as it seems to be taken for granted that in order to practice law a man ought to be an honest man, to say of him that he is a blackmailer is unlawful, and, if it is done without just excuse, actionable.]

[And so in this case, if it is proved that the defendant spoke the words charged against him in the declaration, to which I will call your attention particularly, and that he had no just excuse for it, the plaintiff is entitled to recover, and he is entitled to a verdict—even although no special damage has been shown.]

It is charged that on the second of September, 1885, in this city, Healy, the defendant, and Dettra, the plaintiff, met; that Dettra then extended his hand to Healy and offered to shake hands with him; that Healy said "I don't shake hands with blackmailers," and "A certain citizen of this Commonwealth told me that he had to pay you $325 hush money in the prosecution against me;" that Dettra then said "I will sue you;" and Healy said "That is what I want, and then I will have the opportunity of showing that you are a blackmailer and that you have blackmailed me."

This is the plaintiff's cause of action; and, in order to succeed, the plaintiff must show that these words in substance were uttered. [It need not be proved that the very words thus laid were uttered; but it must be proved substantially that they were uttered,] that words that have the same substantial meaning were uttered.

Witnesses have been called who were present at the interview when it is said the slander was uttered, and the testimony of the witnesses is for you to recollect. I call your attention to some of the testimony as I have it.

Mr. Dettra, the plaintiff, himself says that he said "How do you do, Mr. Healy?" "Healy then said 'I will not shake hands with blackmailers.' I then said to Healy 'What does this mean? Explain yourself.' Mr. Healy said 'I have nothing to explain.' Said I 'I want an explanation, and I demand it before you leave this room.' Says he 'You know all about it;' he then said, 'Mr. Jacobs told me that he had to pay you the $325 hush money in a certain criminal prosecution which was against me.' I of course then said, 'I will sue you; I will make you prove it.' Says he, 'Sue and be damned, and then I will prove that you are a blackmailer and that you blackmailed me.'"

Mr. Banks says: "I heard Healy say to Dettra that he would not shake hands with a blackmailer or blackmailers. Mr. Dettra wanted to know what he meant, wanted to know whether he called him a blackmailer. Healy informed Dettra that J. H. Jacobs had told him that he had received $300 or $325, I don't remember which, hush money. Dettra said he would sue him. Healy told him he could go on, that he would prove what he had said."

Simon P. O'Reilly says: "Dettra extended his hand to Healy, and Healy said 'No sir; I don't want to have anything to do with blackmailers.' Healy says 'I don't want to have anything to do with such as you.' Dettra said, 'I want you to take that back right away; you are a damned liar.' Dettra continued and said: 'Gentlemen, I call you here to witness that this man called me a blackmailer.' Healy said 'I didn't say that; I said I didn't want to have anything to do with blackmailers.' Then Mr. Healy said, 'You got a part of that $300;' and I think there was some odd dollars. Dettra said, 'Who told you that?' Healy said, 'Jacobs told me.' Dettra said, 'Well, I will go right away and see Jacobs, and if Jacobs said that, he is a liar, and I will have you arrested before you leave town.' Healy said, 'The sooner, the better.'"

[Mr. Weaver says that he heard some loud talking, looked up, and heard Dettra say something to Healy; then Healy said he had received hush money, the amount being $325, and said he could prove it; he said Jacobs told him so.]

Then Mr. Healy himself testified to what was said on this occasion.

Now, gentlemen, consider what has been testified on this point; and [if the plaintiff has not proved, by witnesses whom you believe, that the words in substance, having the same meaning as those laid in the declaration, which I read to you, were uttered, you will find in favor of the defendant; while if they have been proved, you will proceed and make further inquiry respecting certain other points arising in the case.]

[In the trial of an action of slander, the meaning of the words is for the jury.]

[The jury are to take it that words have the same signification that is usually attached to them. The way in which the world, the people generally, understand words, you are to understand them.] I believe I have said to you that to say of a lawyer in reference to what he has done in his profession that he is a blackmailer is actionable. If I have not said so, I say so now [and I say to you that if the plaintiff has made out words as laid in his narr. in substance, he is entitled to recover.] He is entitled to recover some damages.

Where a party is sued for a slander, he may prove that what he said was true; and if he convinces a jury of that fact, the plaintiff takes nothing, but loses his case, and the verdict is in favor of the defendant. Here, however, as the case is before you, the defendant does not justify. He does not say: "I said so, and it is true"; but he pleads "not guilty." He does not attempt to say that what he is said to have uttered of Dettra is true. In fact, as counsel have said repeatedly in your hearing here, they do not believe the charge that Mr. Dettra was a blackmailer, or that he received any part of the money which it is alleged Healy had to pay wrongfully.

[The defendant's postion in the first place is that the evidence will not warrant you in finding that the words as stated in the declaration are proved. That point we rule against the defendant, and say to you that from the evidence it may be found, if satisfactory to you, that the words are proved]; and we refer to you the question whether or not the same are proved.

[I will state here that in an action of slander where the words are actionable, and the truth of them is not proved or attempted to be proved, the plaintiff is entitled to recover. He is entitled to something.] The damages may be, in the first place, compensatory; that is, make the plaintiff whole for what he has suffered. Where there are circumstances of aggravation or express malice, the jury can, in addition to that, give punitive damages; that is, an additional and further sum as a punishment to the defendant, such further and additional damages by way of punishment as a jury may deem just.

If you find in favor of the plaintiff, the next inquiry would be as to the amount of the damages. [It has been argued that inasmuch as the plaintiff did not show that he had any special loss, that he lost any particular client, you can, if you find no express malice, find in favor of the plaintiff for only nominal damages: 6¼ cents, or some other small sum. The court instructs you that that is not so; that if these words were uttered, even although the plaintiff has shown no special particular damages, you may award him more than nominal damages.]

[You should take into consideration every consequence which the words would have a natural tendency to produce, but not merely problematical or eventual damages, which may possibly happen or possibly may not.]

[You are to take into consideration fairly in this case the plaintiff's rank in his profession of the law, the manner in which the alleged slander was uttered, the extent of the circulation and publicity that was given to the words —and by this, I mean the publicity that was given by the defendant when he uttered it, as to who was by, how many were by, whether he afterwards spoke words of the same effect not in themselves actionable]; and then, whether or not the attack by the uttering of the words was provoked or unprovoked.

[So that you are not bound to give nominal damages only, but you may consider the slander, if it is proved, and all the attending circumstances, and then give such damages as will compensate the plaintiff for the defamation.]

[If you find in favor of the plaintiff, and if you should find that there was special malice in the defendant, that is, that he had a special ill will against the plaintiff, a bad intent or a wicked motive, then, in addition to the damages of which I have just now spoken, you may give a further sum as a punishment upon him, within just bounds, bearing in mind all the circumstances, including his estate.]

You remember that the plaintiff showed what the defendant is worth in dollars. The defendant said that he was worth $50,000 or $60,000. It does not necessarily follow that if a rich man utters a slander, he should be compelled to pay more than a poor man; but, if the jury reach the question of inflicting damages as a punishment, then the degree of his estate may be considered; because a smaller, moderate sum inflicted upon a poor man would be grievous to be borne by him, and hard to pay, while that same small or moderate sum inflicted upon a man of large estate would be considered a trifle or almost nothing. In that way, in a certain contingency, you can consider the amount of the defendant's estate, and in no other.

The defendant takes the ground, in the first place, that he had reasonable cause to suspect that Dettra was guilty of what he is alleged to have been charged with by the slanderous words. And here I may briefly refer to the origin of this difficulty.

The plaintiff, after proving as he alleges, the slanderous words, in order to give the jury to understand to what the words referred, and what he complains of, showed that there was a certain prosecution. It is alleged here that about May, 1883, Mr. Healy, who was the owner of real estate and a tax payer in this county, went into the office of the commissioners and changed certain figures in an assessment of his property; and that nearly two years afterwards there was an information made before an alderman of this city, and he was arrested, bound over to appear at court to be tried on that charge of falsifying and altering the record. Then Mr. Healy, it seems, brought about what is called a settlement of that case, and paid certain money to certain individuals, in the first place, to one or several gentlemen who it seems acted as his attorneys. It is claimed by the plaintiff that the defendant, by the alleged slanderous words, intended to charge that he had been blackmailed, that money had been extorted from him to settle this prosecution, and that Mr. Dettra, the plaintiff, got a portion of it. It appears that at the time that this prosecution was brought, and for some time before and some time afterwards, Mr. Dettra was acting as counsel to the county commissioners.

I do not remember any evidence in this case from which you would find that Mr. Dettra had anything to do with the settling of the case. In fact, I do not remember any evidence from which you could find that he had anything to do with starting the prosecution. It is said that when Mr. Healy asked him to change the figures, or to have them changed back again he said that he could not do that; and it is also said that when the county detective, who, it is said here, made an information at Healy's own request, came to Dettra and said that Healy wanted to be arrested, Dettra said that he had changed the record, and that he might proceed and arrest him.

I understand the defendant's position to be that Dettra had nothing to do, as it turns out now, with starting the prosecution, or settling it; and that is the position they take before you for the purpose of doing justice, as they concede, and very properly, to Mr. Dettra, and also as a reason why you should not act with severity if you find in favor of the plaintiff. But they do say that the circumstances surrounding the defendant at the time the settlement of the criminal case was made, and the saying of what he did say against Dettra, gave him grounds for suspicion that Dettra was involved in it.

[When a man is charged with having slandered another, the law is that although he cannot prove that what he said was true, yet if he can convince a jury that he had good grounds to supect that what he said was true, the damages against him shall not be so heavy as they otherwise would be].

[The verdict must be against him, if he said what he had no right to say;] but you can very well see that a man who had good grounds to believe that what he said was true ought not to be punished as severely as one who, either knowing that what he says is false says it, or who recklessly says it whether he has any reason to believe it is true or not.

Now in the trial of this case, in the examination of the witnesses, and in the argument before you, a great deal of prominence has been given to the changing of this record in the commissioners' office, as to how this prosecution was started and how it was settled. That has nothing at all to do with the case, except so far as it may explain the words that are said to have been uttered, and so far as it may explain the motives of Mr. Healy; for there is no allegation here that Mr. Dettra received any portion of the money that was paid on the settlement; and there is no allegation by the defendant now that Dettra was guilty of what he charged against him. What the defendant does say, and says in extenuation of damages, if you find against him, is that he had good ground to believe that what he said was so; and if you find that that is the fact, you ought to give him the benefit of it in estimating the damages.

[The law provides that if any one shall alter, deface or falsify any minute, document, book, or any proceeding whatever of or belonging to any public office within this Commonwealth, he shall be guilty of a misdemeanor, and shall be punished in the criminal courts].

This matter of settling the charge against Healy has been spoken of in such a way as perhaps to give you a wrong impression about it; and to correct that, I will briefly refer to a certain phase of it. Kershner, the county detective, made the information against Healy, and it is said, and I believe by Healy himself or by his counsel, that he (Healy) wished him to do it, in order, I believe, that he might have the complaint made by his friends and not by his enemies. It is said that he was afraid somebody else would arrest him, and that after this matter was adjusted in some way, and money paid, Kershner went and withdrew the charge on the justice's docket, and the costs were paid.

It has been said also that the county commissioners did not want to prosecute, and that therefore nobody should have prosecuted, and consequently that Healy was wrongfully dealt with.

If a man defaces or alters a public record, or commits a crime of that class, anybody may prosecute, and until a man has been tried and punished or acquitted within the time limited by law, he may be prosecuted once, twice or a dozen times, provided the prosecutions are taken up by the prosecutor and he is never tried. The county commissioners had not the control to say (if a record in their office was corrupted and altered) that there should be no prosecution and that if they did not prosecute, the man is to go unpunished. The county detective cannot say that successfully, nor the district attorney, nor any man living. It is the class of criminal cases that the prosecutor can settle, but his settling it does not free the defendant.

If an assault and battery is committed, or cheating by false pretenses, so that nobody is particularly injured but the person beaten or cheated, there the law says there may be a settlement; because the prosecutor has a remedy by civil action for damages. But that is not the case in larceny, murder, forging or falsifying records which affects not anyone individual or body of men, but the people generally. So far as that may throw any light upon the motives of the actors in this prosecution, you can consider it; and outside of that, it has nothing to do with the case. There was a criminal prosecution which, if it had not been ended, would have come into the court, and the defendant in that prosecution (Healy) would have been tried, and either convicted and punished, or acquitted. That criminal prosecution was settled although the parties had no power to settle it. And, as all agree, what Healy said of Dettra was said in regard to the settlement of that criminal prosecution.

Now Healy says that he had reason to believe that Dettra was involved in what he alleged was the unrighteous extorting from him of a sum of money. [If he has convinced you that he had good ground to believe that, although it turned out afterwards that he was mistaken, then you will receive that in mitigation of damages]; you will receive that as the reason why damages against him should not be so severe. If he has not made out that defense, of course you will give it no weight, and find damages the same as if that defense had not been set up.

Healy testifies, and I believe other witnesses, that it was said that he had been blackmailed, and that this prosecution was stirred up against him for the purpose of blackmailing. It is proper, of course, to receive that; [and if that and the other testimony bearing on the point convinces you that he had reason to believe that Dettra had something to do with it, you may treat it in the manner I have just now pointed out. But if not, you cannot give it such effect]; because if Healy was blackmailed and if he had reason to believe that certain people had blackmailed him but had no reason to believe that Dettra had anything to do with it, then he would not have been warranted in making the charge that Dettra had blackmailed him.

Healy says that when he paid the $325 Jacobs said: "This money is not all for me; this has to be divided into seven or eight shares;" and that the two Rothermels have some of it to get—these are members of the bar, one of them district attorney; and to the other Healy had given a fee to represent him in that prosecution —and that the two Kershners had some of the money to get, and that Bland and Dettra had some to get, and then, I believe, it is said that certain others were mentioned also. Healy says that Jacobs said to him that thus the money was to be divided. Mr. Jacobs denies it totally, says there was nothing of the kind said; but that what Healy paid there, he paid him and John Rothermel, the other lawyer whom Healy had employed.

Now, which of these two men remembers correctly what was said? Which of them do you believe, if they remember correctly what was said? If Healy's testimony is taken and Jacobs' is rejected, then you may well say that Healy had reason to believe that Dettra had shared in the division of the money, because he had been told so by a man whom he had employed as his attorney. But if Mr. Jacobs' statement is believed to be true and Healy's untrue, then, so far as that is concerned, he had no reason to believe that Dettra had received part of the money paid.

Healy testifies that at Bissinger's saloon one of the county commissioners had said that if he (Healy) would give Dettra $20 or $25, Dettra would settle the case; and that Dettra had told him (Keller) so. If that is true, Healy had reason to believe that Dettra was implicated in the matter; and therefore he would have an excuse to have the damages reduced. But Colonel Keller says that is not true, that no word of the kind was said that he mentioned nothing to Healy about Dettra's wanting to settle the case, or that it would take $20 or $25.

Which of these two men remembers what was said there? And if they remember equally, which of the two will you believe? This is material upon the question of damages. If what Healy says is true and what Keller says is untrue, then Healy had reason to believe that Dettra was a partner in the transaction of extorting, of sharing in the money; but if Colonel Keller is believed, and Mr. Healy is not believed, then that ground of defense falls.

Now is there anything else in the case as it was developed before you by which Healy can convince you that he had reason to believe that Dettra had shared in the money paid? I believe they all agree in saying that Dettra was never at Jacobs' office, or at any of the places where they met to settle the case, nor was he at the 'squire's when the prosecution was brought or settled.

If on the points to which I have specially directed your attention, you find that Healy is not borne out, but that Jacobs' and Colonel Keller's statements are believed, and if you cannot find any other evidence to lead you to believe that Healy had cause to think that Dettra was involved in getting money from him and shared in it, and [if you find that the words alleged were spoken of the plaintiff regarding his profession as a lawyer and something he had done in it, then the plaintiff is entitled to recover]; and if he has convinced you that on the defendant's part there was any express malice, you can find punitive damages. On the other hand, if you believe Mr. Healy, you can give him the benefit of his belief in the way I have indicated.

[As a further defense, the defendant says that at the time he uttered these words he was not responsible; that he had been sick in body and in mind, and that his mind was affected in such a way that on the second of September, 1885, when he is alleged to have uttered these words, he was not responsible; that he was unable to control his utterance by the exercise of his will, in other words that his mind was so much affected that he could not by the exercise of his will power control his own words. If that is proved, then you would have the position of a man who was either insane, or for all practical purposes so far as it relates to these questions the same as insane, and ought not to be held responsible for his acts. If that is true, your verdict would still have to be in favor of the plaintiff; because my opinion is, as a matter of law, that that would not turn the plaintiff out of court; but the plaintiff would be entitled to only nominal damages, six cents or some other small sum.]

But, before that defense can avail the defendant, he must prove to you that he was of unsound mind or had no control of his utterances; that he could not help what he spoke. If it does not amount to that, it is no defense; although if there was weakness to a less degree than that, it might be received in mitigation of damages.

Certain persons, the defendant, members of his family, certain physicians and others, have testified to this condition of Mr. Healy. He had been sick years ago, afflicted in body and mind; and it is alleged that he is not a well man now, and that he has certain physical and mental troubles under which he labors. All this evidence you will consider, and you will consider how he was in September, 1885.

When we come to consider the state of health, whether of body or mind, of an individual, at a certain day, we can, of course, consider how it was before and afterwards, but only in order to throw some light upon his condition at the point of time in question. Here the question is how Mr. Healy was at the time of the alleged uttering of the slanderous words. If he was irresponsible, could not help what he said, could not control his words, you will give it the effect I have already indicated, and find only nominal damages for the plaintiff, some small sum. [But if the defendant has not satisfied you of that fact—that his condition was such that he is not to be held responsible, then of course, he would not be benefited by that point which he has made in this case.]

Because a man may be irritable, or inclined to get angry, or excitable, will not excuse him when he is sought to be charged with the consequences of his slander. Actions for slander lie not only where the slanderers are cool and deliberate; but the consequences are visited upon men generally, provided they are in their right mind and have control of their utterances. It will not do for a man to say: "Simply because I am excitable, irritable, and get angry soon, and then talk too much, if I slander another, he shall recover nothing, or shall recover only a small sum;" but that immunity only is given to men who have lost their reason, who cannot control their utterances, and who are to be held irresponsible by reason of mental deficiency. You will consider all that the witnesses said on this point, how Mr. Healy was, referring to his mental condition years ago, and how he is now; and from all this, if you can, you shall say how he was at the time the alleged slander was uttered. If he was irresponsible, you will give him the benefit of it; [if he has not convinced you of that fact, you will treat the case the same as if that particular defense had not been made.]

I believe that after I have answered the points of the parties, all the instructions have been given to you which are required. You will understand that wherever the court announces a rule of law, it is your duty to receive that as the law; because, if the court should be wrong in stating the law, it could be corrected in a higher court. What the court says is reduced to writing, and may be reduced to print and reviewed in the supreme court. While if the jury should disregard it, and make a law of their own, there would be no record as to what rules they had laid down and acted upon, and the party injured by your mistake, if you made a mistake, would have no redress. When the court speaks of matters of fact, and indicates to you how you should regard them, that instruction is not binding; because all questions of fact are for the jury, and they have entire control of them.

I will now answer the points submitted on the part of the defendant. * * *

2. "If the jury believe that, from information derived from any other person or persons, or from any circumstances which connected the plaintiff with the prosecution instituted against Healy, Healy believed that the plaintiff had received a portion of the money that Healy had paid to settle that prosecution—such belief would disprove the allegation of malice in the utterance of the words claimed by the plaintiff to have been uttered by defendant on September 2, 1885; and as the plaintiff has proved no special

damage suffered by him in consequence of the utterance of such words, he is not entitled to a verdict for more than nominal damages."

Ans. Negatived. I cannot affirm that in such event nominal damages—that is a trivial sum such as 6¼ cents only can be given.

3. "If the jury believe that Healy, the defendant, at the time of the utterance of the words charged as slanderous in this case, was, and had been, for some time prior thereto, laboring under great excitement of mind, in consequence of the annoyance and disgrace of the charge preferred against him, of altering the assessment of his property, and the prosecution against him for such act; that he was in a condition bordering upon mental aberration, and was thereby unable, by reason of physical and nervous disability, to control the operations of his mind, he was thereby rendered irresponsible, and the verdict of the jury should be for the defendant."

Ans. Negatived.

4. "Under the pleadings and evidence in this case, there can be no recovery against the defendant."

Ans. Negatived.

The defendant's counsel has suggested that considerable has been said before you about a certain plea of justification which at one time was on the record. In an action of slander a defendant may plead "Not guilty," or he may plead "Justification," which substantially is saying: "I have said the words, and they are true;" or he may plead both.

In this case it appeared in your presence that there had been a plea of justification placed on record by the defendant; and at the time this trial was begun, that plea was withdrawn by the defendant, by leave of the court. It is now complained that it was argued before you that inasmuch as the defendant had put in that plea and left it on record for thirteen months, it was an additional injury to the plaintiff, and therefore perhaps you ought to be more severe on the defendant. You ought not to give it that effect. The parties put that plea upon the record, and they afterwards withdrew it, and so for all legal purposes and for all purposes which you may consider, it is the same as if they had not put it on record at all.

Verdict and judgment were for the plaintiff, for $3,000.

The assignments of error specified the action of the court in refusing a change of venue; the portions of the charge inclosed in brackets; the answers to the defendant's points; the rejection of certain testimony on behalf of the defendant; and that the charge did not adequately present the case but prejudiced the jury against the defendant.

Messrs. **G. A. Endlich** and **J. W. Ryon,** for plaintiff in error:

Under the Act of March 30, 1875 (P. L. 35, 2 Purd. Dig. 1355), changes of venue shall be made in any civil cause in law or equity depending in any of the courts of this Commonwealth in the cases following, to wit: Whenever a large number of the inhabitants of the county, in which such case is pending, have an interest in the question involved therein, adverse to the applicant, and it shall appear by the oath of such applicant that he believes he cannot have a fair and impartial trial; whenever it shall be made to appear to the court that a fair and impartial trial cannot be had in the county in which such cause is pending.

In the present case, the utterance sued for as slanderous arose out of the circumstances attending the criminal prosecution against Healy for changing the figure 9 to 0 in the assessment book. All these circumstances were bound to be inquired into upon the trial of the cause. In this inquiry, one of the principal questions involved in the case, every tax payer and citizen of the county was essentially interested adversely to the petitioner.

A defendant is responsible only for the meaning which the words used by him, reasonably interpreted, convey to the understanding of the persons in whose presence they were uttered.

Brettun v. *Anthony*, 103 Mass. 39, 40; *Fowle* v. *Robbins*, 12 Mass. 148.

"When the words are susceptible of a harmless meaning, it is for the plaintiff to show that they were used in a libelous and not in a harmless sense. If the plaintiff attributes to them a much wider and more extensive meaning than they fairly warrant, or the words do not fairly bear the meaning imputed to them, the defendant will be entitled to a verdict."

2 Add. Torts, § 1158, citing *Broome* v. *Gosden*, 1 Man. G. & S. 728; *Williams* v. *Gardiner*, 1 Mees. & W. 249.

The natural meaning and effect of the words spoken, as interpreted and understood in themselves, cannot be enlarged by the innuendo.

Shaffer v. *Kintzer*, 1 Binn. 537; *Packer* v. *Spangler*, 2 Binn. 60; *Gosling* v. *Morgan*, 32 Pa. 273; *Hill* v. *Boswell*, 2 Pittsb. Reports, 336; *Adams* v. *Stone*, 131 Mass. 433; *Brown* v. *Piner*, 6 Bush (Ky.) 518; *Weil* v. *Altenhofen*, 26 Wis. 708.

This meaning and effect are to be gathered, not only from the particular phrase complained of as slanderous, but from its context, as well; and if the context negatives the idea that the meaning contended for by plaintiff was that in which the words were spoken—if the "poisonous words are accompanied with the antidote to the poison"—no action lies.

Colbert v. *Caldwell*, 3 Grant, 181; *Stitzwell* v. *Reynolds*, 67 Pa. 54; *Hall* v. *Adkins*, 59 Mo. 144; *McCaleb* v. *Smith*, 22 Iowa, 242; *Hayes* v. *Ball*, 72 N. Y. 418; *Edie* v. *Brooks*, 2 Bright. Dig. 2188, 5; *Castleman* v. *Hobbs*, Cro. Eliz. 428.

The action given to professional men and tradesmen on account of words spoken of them in relation to and to the injury of their business is not meant to extend to them and their characters a higher protection than is secured to other citizens, but for the purpose of affording equal security to all.

Goodenow v. *Tappan*, 1 Ohio, 60.

They may be assailed in their profession or trade in a manner, and are exposed to attacks to which others are not liable. For such cases this action gives redress. It cannot be used for a term of general obloquy and reproach applied to the plaintiff as a citizen merely, any more than if he did not follow his particular profession or trade. *Id.*

Being called a "blackmailer" might, it is conceivable, prove an injury to a person in any avocation; and if he can show that it did so, and that it was untrue, he may recover; but it charges no indictable and infamous crime; and hence, without such proof, is not generally actionable.

Stitzell v. *Reynolds*, 67 Pa. 54; *Kimmis* v. *Stiles*, 44 Vt. 351. *McKee* v. *Wilson*, 87 N. C. 300.

In every reported case that it has been possible to find, in which an attorney was permitted to recover in such an action, the slander was directly and explicitly connected with his professional character.

Rush v. *Cavenaugh*, 2 Pa. 187; *Garr* v. *Selden*, 6 Barb. (N.Y.) 416; *Goodenow* v. *Tappan*, 1 Ohio, 60; *Chipman* v. *Cook*, 2 Tyler (Vt.) 456.

There was nothing of the kind in this case. Mr. Dettra's profession as an attorney at law was not referred to. No such reference can be fairly gathered from the allegations of the declaration, and though judge and jury think the publication proved libelous, yet, if on the record it appears not to be so, judgment must be arrested.

Hearne v. *Stowell*, 12 Ad. & Ell. 731; *Goldstein* v. *Foss*, 6 Barn. & C. 159; *Solomon* v. *Lawson*, 8 Q. B. N. S. 837.

The *colloquium*, which sets forth the matter to which the conversation relates, and the *innuendo*, which alleges the meaning of it, must both be established as true, before the plaintiff can show a right of action.

Barger v. *Barger*, 18 Pa. 489, 492.

But even if there were something in the character of the charge of blackmailing or in the evidence, to connect it with Dettra's profession as a lawyer, the word "blackmailer" was so qualified, by the context, as to rob it of its sting. "Blackmail" is defined as "Extortion of money from a person by threats of accusation or exposure, or of opposition in the public prints."

Webster.

"Money extorted from a person as a condition for refraining from making charge of offense against him, or publishing something to his prejudice * * * in common parlance, and in general acceptation, equivalent to and synonymous with extortion—the exaction of money either for the performance of a duty, the prevention of an injury, or the exercise of an influence. It supposes the service to be unlawful, and the payment involuntary."

1 Abb. Law Dic. 151.

"Money extorted from persons under the threat of exposure in print for an alleged [offense."

Edsall v. *Brooks*, 3 Robt. (N. Y.) 298.

Healy said: "You are a blackmailer; I mean thereby that, as Jacobs told me, you received a part of the \$825 I paid to settle a criminal prosecution." To "receive" does not mean to "extort." Hence it is said in *Edsall* v. *Brooks*, 17 Abb. Pr. (N.Y.) 221; S. C. 2 Robt. (N.Y.) 29, that a charge of blackmailing "imports criminal exaction of money, and is not justified by evidence that the plaintiff (a policeman in that case) received a gratuity in violation of a rule of the department."

In slander it is sufficient if the substantial slanderous words are laid and proved.

Hersh v. *Ringwalt*, 3 Yeates, 508.

But it is not permitted to drop altogether both the language and ideas uttered, and sum up all in one round charge, and then leave it to the jury to say whether the words proved amounted to that charge.

Tipton v. *Kahle*, 3 Watts, 90, 93.

Hence, a witness cannot be permitted to state the impression produced on his mind by the whole conversation.

Harrison v. *Bevington*, 8 Carr. & P. 708.

Damages can be recovered only for the words charged in the declaration.

Ward v. *Dick*, 47 Conn. 300.

It could not be allowed to the plaintiff to support an averment that defendant had said "he is guilty of perjury" by words altogether different, even if they imported that charge.

Tipton v. *Kahle*, 3 Watts, 90, 93; *Bundy* v. *Hart*, 46 Mo. 460; *Tucker* v. *Call*, 45 Ind. 31; *McConnell* v. *McKenna*, 10 Irish C. L. 511; *Armitage* v. *Dunster*, 4 Doug. 291.

The substance of the words laid, *i. e.*, the material words conveying the slander, must be proved; *Johnston* v. *Tait*, 6 Binn. 120; and their sense and the manner of speaking them, must be the same as laid in the declaration.

Long v. *Fleming*, 2 Miles, 104.

Whether the proofs vary from the allegations is always a matter for the court.

Oxley v. *Storer*, 54 Ill. 159; *Hendrick* v. *Kellogg*, 3 Greene (Ia.), 215; *Birch* v. *Benton*, 26 Mo. 153.

The very words need not be proved; but where they are in fact proved, they must, it seems, correspond with the very words laid.

Foster v. *Small*, 3 Whart. 141.

In the present case the words proved did not correspond with the very words laid. Instructions, correct in the abstract, may be erroneous as applied to the issue.

Mitchell v. *Mitchell* (Pa.) 5 Cent. Rep. 277.

A jury is to decide upon the basis of evidence, legally brought before them, not upon the basis of their own knowledge of the circumstances connected with the case acquired by them, individually, outside of it.

Clarke v. *Robinson*, 5 B. Mon. 55.

Where actionable words are laid in the declaration and have been proved, evidence of the repetition of the same words after suit brought may be admitted in aggravation of damages.

Kean v. *M'Laughlin*, 2 Serg. & R. 469.

It was said in *Wallis* v. *Mease*, 3 Binn. 546, 549, that, after proving the words laid in the declaration (which were actionable) plaintiff might give in evidence other words, not actionable, to show malice.

Anger: *Freeman* v. *Tinsley*, 50 Ill. 497; sudden passion: *Flagg* v. *Roberts*, 67 Ill. 485; heat of passion and excitement: *Mousler* v. *Harding*, 33 Ind. 176; have always been regarded as elements in mitigation of damages.

It must be shown, in order to a recovery, that words uttered in a case of mutual provocation, affected the standing and reputation of the aggrieved party.

Johnston v. *Barrett*, 36 La. Ann. 320.

If the actual damages are merely nominal, punitive damages are not recoverable.

Stacy v. *Portland Pub. Co.* 68 Maine, 279.

Instructions must be interpreted in connection with the evidence.

Wood v. *Pennell*, 51 Maine, 52.

Probable cause for suspicion and honest belief in its correctness are uniformly held to be potent factors in mitigation of damages.

Porter v. *Botkins*, 59 Pa. 484; *Minesinger* v. *Kerr*, 9 Pa. 312; *Williams* v. *Mayer*, 1 Binn. 92, note; *Beehler* v. *Steever*, 2 Whart. 313; *Kellogg* v. *Cary*, 3 Penr. & W. 102; *Doe* v. *Roe*, 32 Hun (N.Y.) 628; *Hudson* v. *Dale*, 19 Mich. 17; *Knobell* v. *Fuller*, Peake's Add. Cases, 139.

In all civil cases the degree of proof required from a party to sustain his allegations is only such as results from a preponderance of evidence. An instruction to the jury that even a slight preponderance of proof will be sufficient to justify a verdict for the party in whose favor it is found has been held correct.

Chapman v. *McAdams*, 1 Lea (Tenn.) 500.

So an instruction that all that is required is a "fair" preponderance of proof.

Bryan v. *Chicago etc. R. Co.* 63 Iowa, 464; *Zonker* v. *Cowan*, 84 Ind. 395.

On the other hand it has been held error to charge the jury that a party's case must be established by a clear preponderance: *Bitter* v. *Saathoff*, 98 Ill. 266; or by testimony in which the jury had implicit confidence: *Ott* v. *Oyer*, 106 Pa. 6; or by weight of the evidence: *Shinn* v. *Tucker*, 37 Ark. 580; or that the party must clearly prove his case: *Beach* v. *Clark*, 51 Conn. 200; or clearly and fairly: *Hall* v. *Wolff*, 61 Iowa, 559; or that the jury must be well satisfied of the truth of his case: *Monaghan* v. *Agricultural Fire Ins. Co.* 53 Mich. 238; or that he must satisfactorily prove it by a preponderance of evidence: *Bauchwitz* v. *Tyman*, 11 Ill. App. 186; or that the jury must be satisfied from a preponderance of evidence: *Brent* v. *Brent*, *White* v. *Gale*, and *Balohradsky* v. *Carlisle*, 14 Ill. App. 256, 275, 289.

That, taken singly, no part of a charge may be pronounced to be clearly erroneous, and yet that as a whole it may mislead, is a matter familiar to the minds of lawyers and judges.

Wenger v. *Barnhart*, 55 Pa. 300, 310, citing *Philadelphia etc. R. R. Co.* v. *Spearen*, 47 Pa. 303; *Reeves* v. *Delaware etc. R. R. Co.* 30 Pa. 460; and hence such general tenor is ground for reversal: *Washington etc. Ins. Co.* v. *Rosenberger*, 3 W. N. C. 16; 33 Legal Int. 338.

Messrs. **Henry C. G. Reber** and **H. Willis Bland**, for defendant in error:

The power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law.

Const. art. 3, § 23.

Under the Act of March 30, 1875, the court is not compelled to change the venue in civil cases, if any of the causes for a change mentioned in the Act are regularly averred, unless satisfied of the truth of them. Whether the facts alleged are true or not is left to the decision of the court.

Pa. R. R. Co. v. *Phila. R. R. Co.* 2 Pearson, 299.

Error cannot be assigned on a matter in the discretion of the court below; *Pringle* v. *Pringle*, 59 Pa. 281; *Waldron* v. *Waldron*, 55 Pa. 231; *Dubois* v. *Glaub*, 52 Pa. 238; *Helfenstein* v. *Leonard*, 50 Pa. 461; unless in a clear case of abuse of the discretion vested in the court.

Gallagher v. *Miller*, 34 Legal Int. 355; *Commonwealth* v. *Bartilson*, 85 Pa. 482.

Words spoken of a plaintiff in the way of his profession or trade are actionable, without proof of any special damages.

Rush v. *Cavenaugh*, 2 Pa. 189; *M'Clurg* v. *Ross*, 5 Binn. 218; *Sanderson* v. *Caldwell*, 45 N. Y. 398; *White* v. *Carroll*, 42 N. Y. 161; *Foot* v. *Brown*,* 8 Johns. (N.Y.) 64; *Chipman* v. *Cook*, 2 Tyler, (Vt.) 456.

It must injure the plaintiff's reputation to disparage him in his very means of livelihood.

Odger, Libel, * p. 64.

To render words actionable it must appear they were spoken of the plaintiff in his profession, business or vocation; "As, to say of an attorney, you are well known to be a corrupt man and to deal corruptly." 4 Rep. 16; or to charge an attorney with being a "common barrator."

Cro. Car. 192.

Any words tending to impair his credit, spoken of a person in relation to his trade or profession, are actionable.

Davis v. *Davis*, 1 Nott & McC. 290.

Where the court sees that the words spoken affect the plaintiff in his office, profession or trade, and directly tend to prejudice him, then they ask for no further proof of damages.

Odger, Libel, * p. 64.

Words to be actionable on this ground "must touch the plaintiff in his office, profession or trade;" that is, they must have been shown to have been spoken of the plaintiff in relation thereto, and to be such as would prejudice him therein. They must impeach either his skill or knowledge, or his official or professional conduct.

Odger, Libel, * p. 65.

It must always be averred on the record that the words were spoken of the plaintiff in the way of his business, and in relation to his office, profession and trade, and that he held such office, or was actively engaged in such profession at the time the words were spoken.

Odger, Libel, * pp. 64, 68; *Bellamy* v. *Burch*, 16 Mees. & W. 590; *Forward* v. *Adams*, 7 Wend. 204; *Van Tassell* v. *Capron*, 1 Denio, 250.

Where words clearly refer to the plaintiff's office and his conduct therein, or otherwise touch and injure him therein, it is unnecessary that the defendant shall expressly name his office or restrict his words thereto; it shall be intended that he was speaking of him in the way of his office or trade.

Odger, Libel, * p. 124; *Kinney* v. *Nash*, 3 N. Y. 177.

The words must impute to him misconduct in that character.

Ireland v. *McGarwich*, 1 Sandf. 155.

But it is by no means necessary that the defendant should expressly name the plaintiff's office or trade at the time he spoke, if the words would necessarily affect the plaintiff in his office or business, his credit and reputation therein.

Jones v. *Littler*, 7 Mees. & W. 423; Odger, Libel, * p. 543.

Blackmail in common parlance, is synonymous with extortion, the exaction of money, either for the performance of a duty, the prevention of an injury, or the exercise of an influence; it supposes the service to be unlawful and the payment involuntary.

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*See note to this case, Lawyers' edition. [Ed.]

Edsall v. *Brooks*, 2 Robt. (N. Y.) 29; 26 How. Pr. (N. Y.) 326; 17 Abb. Pr. (N. Y.) 221; 3 Robt. (N. Y.) 286.

Proof of speaking the slander is by calling those who heard the defendant speak the words.

Odger, Libel, * p. 538.

It was never necessary to prove all the words laid in the declaration, if the words that are proved are intelligible and actionable by themselves.

It is sufficient if the words alleged and those proved are the same in substance.

Estes v. *Antrobus*, 1 Mo. 197.

The plaintiff is not bound to prove the slanderous words precisely as said; the substance of the charge will be sufficient.

Hume v. *Arrasmith*, 1 Bibb, 165; *Williams* v. *Miner*, 18 Conn. 464, 474; *Hersh* v. *Ringwalt*, 3 Yeates, 508; *Cummin* v. *Smith*, 2 Serg. & R. 441; *M'Connell* v. *M'Coy*, 7 Serg. & R. 226; *Foster* v. *Small*, 3 Whart. 140.

The plaintiff may give evidence of all "surrounding circumstances," *i. e.* the cause and occasion of publication, later statements made by the defendant, and other extraneous facts which will explain and point the allusion.

Odger, Libel, * p. 540; *Broome* v. *Gosden*, 1 Man. G. & S. 728.

What the speaker intended to convey is immaterial in all actions of defamation.

Odger, Libel, * p. 93; *Hankinson* v. *Bilby*, 16 Mees. & W. 445.

It will then be for the jury to say whether the plaintiff's construction of the words is borne out by the evidence.

Odger, Libel, * p. 102.

The general rule as to the interpretation of words is that the words spoken are to be construed in the sense in which they are understood by those who hear them.

Backus v. *Richardson*, 5 Johns. 476.

The meaning of words not unavoidably imputing something derogatory to the person of whom they are published must be submitted to the jury.

Lewis v. *Chapman*, 16 N. Y. 369.

The court can only pronounce them *prima facie* libelous.

Cooper v. *Stone*, 24 Wend. 434.

Nice exceptions are never allowed to prevail against a reasonable interpretation and common understanding of slander.

2 Wils. 87, 114, 300.

The words shall be taken in the same sense as they would be understood by those who hear or read them.

Bull, *N. P.* 3, 4.

Words are not to be received in *mitiori sensu*, but in the plain and popular sense in which the world in general understands them.

Lukehart v. *Byerly*, 53 Pa. 418; *Brown* v. *Reiter*, 21 Pitts. 143; *Peters* v. *Ulmer*, 32 Legal Int. 441; *Dorland* v. *Patterson*, 23 Wend. 422; *Woolnoth* v. *Meadows*, 5 East, 468.

It is the duty of a judge to say whether a publication is capable of the meaning ascribed to it; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has that meaning or not.

Add. Torts, § 1169, p. 391; *Sturt* v. *Bragg*, 10 Q. B. N. S. 908; Odger, Libel, * p. 101.

The court will take notice of the import of words in popular parlance.

Call v. *Foresman*, 5 Watts, 331.

It must appear to the court from the words set out in the declaration that they are capable of conveying or bearing the defamatory meaning assigned to them, and if so it is for the jury to determine whether in point of fact the construction put upon the words by the plaintiff is borne out by the evidence.

2 Add. Torts, § 1153.

"The sense in which words are received by the world is the sense which courts of justice ought to ascribe to them on the trial of an action for slander."

Rue v. *Mitchell*, 2 Dall. 58 (2 U. S. bk. 1, L. ed. 288.)

In civil cases the court is bound to instruct the jury as to whether the publication is libelous, supposing the *innuendoes* to be true.

M'Corkle v. *Binns*, 340; *Hays* v. *Brierly*, 4 Watts, 392; *Snyder* v. *Andrew*, 6 Barb. 43; *Green* v. *Telfair*, 20 Barb. 11; *Hunt* v. *Bennett*, 90 N. Y. 173; *Pittock* v. *O'Niell*, 63 Pa. 257, 258.

The only criterion of the meaning of words as used on any occasion is the understood meaning in the community, society or individuals to whom they are addressed.

Edsall v. *Brooks*, 3 Robt. (N. Y.) 284.

It is for the judge to decide whether the language is capable of the meaning ascribed to it by the *innuendo*, and for the jury to decide whether such meaning is truly ascribed.

Vanderlip v. *Roe*, 23 Pa. 82; *Barger* v. *Barger*, 18 Pa. 489; *Pittock* v. *O'Niell*, 63 Pa. 253.

In Pennsylvania the court is bound to instruct the jury whether the publication is libelous or not.

Townshend, Slander, 530; *Pittock* v. *O'Niell*, 63 Pa. 253.

An *innuendo* may be defined to be an averment which explains the meaning of the defendant's publication, by reference to facts previously ascertained by averment or otherwise.

Starkie, Slander, p. 256; 1 Lord Raym. 256.

Whether the language is capable of bearing the meaning assigned by the *innuendo* is for the court; whether the meaning is truly assigned to the language is for the jury.

Blagg v. *Sturt*, 10 Q. B. N. S. 899; 3 H. L. Cas. 395.

And if the court is of the opinion that the words were capable of the meaning ascribed to them by the *innuendo*, and there is any evidence to go to the jury, that they were used with that meaning, then it will be for the jury to decide whether in fact the words were understood in that sense by those who heard or read them.

Odger, Libel, * p. 540.

The charge must be taken as a whole.

Reeves v. *Delaware etc. R. R. Co.* 30 Pa. 460; *Lehigh Valley R. R. Co.* v. *Brandtmaier*, 5 Cent. Rep. 144, 113 Pa. 619; *Watts* v. *Cummins*, 59 Pa. 88; *Kerr* v. *Sharp*, 14 Serg. & R. 403; *Carothers* v. *Dunning*, 3 Serg. & R. 373.

The jury take into consideration every consequence which the words used would have a tendency to produce, but not merely problematical or eventual damages which may possibly happen, or possibly may not.

Odger, Libel, *p. 293; *Onslow* v. *Horne*, 3 Wils. 188; *Lumby* v. *Allday*, 1 Cromp. & J. 305; *Doyley* v. *Roberts*, 3 Bing. N. C. 835.

Even if no evidence be offered by the plaintiff, as to damages, the jury are in no way bound to give nominal damages only; they may give such substantial damages as will compensate the plaintiff for such defamation.

Tripp v. *Thomas*, 3 Barn. & Cress. 427; Odger, Libel, *p. 293.

Where the derangement was great and notorious, so that speaking the words could produce no effect on the hearers, it was manifest that no damage would be incurred; but where the degree of insanity was slight, or not uniform, the slander might have its effect, and it would be for the jury to judge upon the evidence before them, and measure the damages accordingly.

Dickinson v. *Barber*, 9 Mass. 225; Odger, Libel, *p. 354.

It is a common-law principle that a lunatic is liable for any tort he may commit, although he is not punishable criminally. When one receives an injury from the act of another, this is a trespass, although done by mistake or without design; consequently there is no reason why a lunatic should not be held liable.

Morse v. *Crawford*, 17 Vt. 502.

Ordinarily in an action for a personal injury, the damages are graduated by the intent of the party committing the injury; but when the defendant is a lunatic, as he has properly no will, the only correct measure of damages is the mere compensation of the party injured.

Krom v. *Schoonmaker*, 3 Barb. (N. Y.) 647; *Bush* v. *Pettibone*, 4 N. Y. 300.

The general rule is that lunatics are liable civilly for all torts or wrongs committed. But there is one exception to this rule, which is that a lunatic is not liable for slanderous words uttered by him while totally deranged.

Bryant v. *Jackson*, 6 Humph. 199.

In this case there was no attempt to prove that the defendant's mind had become so weakened by disease that no one regarded what he said.

Gates v. *Meredith*, 7 Ind. 440.

The law presumes sanity when an act is done.

Lynch v. *Commonwealth*, 77 Pa. 213.

A reasonable doubt of the fact of insanity cannot be a true basis of the finding of it, as a fact and as a ground of acquittal and of legal custody.

Ortwein v. *Commonwealth*, 76 Pa. 423.

Where insanity is alleged, the burden of proof is on the party making the allegation, notwithstanding its negative character.

1 Greenl. Ev. § 81, pp. 113, 114; *Coyle* v. *Commonwealth*, 100 Pa. 580.

The measure of proof must be determined by the character of the issue being tried, and not by the character of an issue which is not being tried. The amount of evidence required must depend, in a great measure, upon the character of the issue to be tried. If there are no opposing presumptions, a mere preponderance of evidence, however slight, must necessarily turn the scale. The strength of the preponderating evidence must be in proportion to the strength of the presumption to be overcome; or perhaps it is more accurate to say that there is no preponderance, unless the evidence is sufficient to overcome the opposing presumption as well as the opposing evidence.

Knowles v. *Scribner*, 57 Me. 495.

By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt.

1 Greenl. Ev. § 2, p. 4; 1 Starkie, Ev. 514; *Young* v. *Edwards*, 72 Pa. 267.

Convinced is defined "to satisfy by proof." Webster.

The word positive is defined by Webster to mean "direct," "express," opposed to "circumstantial." The proof should be "satisfactory;" it may be such without being "positive."

Schrack v. *McKnight*, 84 Pa. 30.

The phrases "if you believe," "if you are satisfied," "if you are convinced," only imply the existence of a state of mind involving the assumption of a fact as proved to such a degree of belief that the believing subject would act upon the belief in the common concerns of life.

Hiester v. *Laird*, 1 Watts & S. 250.

If the charge taken as a whole fairly leaves the question of fact to the jury, it is sufficient.

Little Schuylkill Nav. Co. v. *French*, 81* Pa. 366; *Reese* v. *Reese*, 90 Pa. 89.

Error cannot be assigned to the charge of the court upon matters of fact if the facts be submitted to the jury.

Thompson v. *Franks*, 37 Pa. 327; *McDowell* v. *Oyer*, 21 Pa. 417; *Levers* v. *Van Buskirk*, 4 Pa. 309; *Hamet* v. *Dundass*, 4 Pa. 178.

A portion of a charge which, if taken by itself, might be exceptionable may be free from error because of the context.

Alexander v. *Commonwealth*, 105 Pa. 10.

The court will not reverse on a critical objection to the charge, if the judge has expressed himself so as to be understood by the jury.

Kerr v. *Sharp*, 14 Serg. & R. 399; *Lackawanna etc. R. R. Co.* v. *Chenewith*, 52 Pa. 382.

The supreme court will not reverse a judgment merely because of a slight error in the instruction of the court below to the jury, which could have done no injury to the plaintiff in error.

Knapp v. *Hortung*, 103 Pa. 403.

Instructions as to the measure of damages, which were not followed by the jury and which consequently did no harm to the plaintiff, are not sufficient grounds upon which to reverse a judgment.

Sayer v. *Shroeder*, 2 Pennyp. 83.

It is not error in the court to express an opinion that mere nominal damages should be given in case of recovery, if the amount be left to the jury.

Oswald v. *Kennedy*, 48 Pa. 9.

An error in the charge which the verdict has rendered immaterial is not ground for reversal.

Deford v. *Reynolds*, 36 Pa. 325; *Eldred* v. *Hazlett*, 38 Pa. 16.

A strong expression of opinion upon the facts which, taken in connection with the whole charge, does not amount to a binding instruction, is not ground for reversal.

Johnston v. *Commonwealth*, 85 Pa. 54.

It is not error for the court to comment on the evidence, nor to express an opinion on the weight thereof, if the facts be left to the jury.

Bonner v. *Herrick*, 99 Pa. 220.

The refusal of a point which might properly have been affirmed, but the affirmance of which would not have benefited the party submitting it, is not cause for reversal of the judgment against said party.

Pardee v. *Orvis*, 103 Pa. 451.

Per Curiam:

It is clear that a large number of the inhabitants of the county did not have an interest in the question involved in the trial, adverse to the defendant below, so as to make it obligatory on the court to order the change of venue. When the change is asked for on the alleged ground that a fair and impartial trial cannot be had in the county in which the suit is pending, a reasonable discretion must be left to the court in ascertaining the truth of the averment. No such clear abuse of that discretion is shown in this case as to justify us in holding there was any error in the refusal.

Notwithstanding the able and zealous argument of the counsel for the plaintiff in error, we are not able to sustain any of the thirty-five specifications of error.

We discover no error relating to the admission of evidence. The points were correctly answered and the testimony was submitted to the jury in a fair charge.

Judgment affirmed.

WHEELER & WILSON MANUFACTURING Co., *Plff. in Err.*, *v.* Walter HEIL and Maria Heil.

1. For a **tort committed by a married woman** both in the presence and in the absence of her husband, the husband and wife are jointly liable.
2. The refusal to deliver up another's chattel on demand is a **tortious conversion** of the chattel.
3. *It seems* that a **contract** expressly "of renting only and not a sale, conditional or otherwise," **by which a sewing machine** "valued at $50" **is "rented"** for fourteen months for the sum of $10, and the further sum of $3 per month, by the "party of the first part" to "the party of the second part," the latter not to move the machine from his residence without the consent of the former, but to be the "agent" of the former "in holding and keeping possession of said machine," to have the machine "so long as it is properly used and kept at the place agreed upon, and so long as the rent shall be faithfully and promptly paid," and to deliver the machine to the former "at the expiration of the time for which the machine is rented" with the "option" on the part of the latter to "purchase" it within ten days thereafter for $1—— is to all intents and purposes **a bailment.**
4. *Doubted* whether the Act of February 29, 1872, authorizes a **married woman** to make such a contract.

(Argued Feb. 18, Decided March 7, 1887.)

JULY Term, 1886, No. 116, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Lehigh County, to review a judgment of compulsory nonsuit in an action of trover. *Reversed.*

The facts, as they appeared at the trial before Albright, *P. J.*, were as follows:

On May 24, 1884, the defendant Maria Heil, wife of the defendant Walter Heil, entered into the following written agreement with the plaintiff for the purchase of a sewing machine for her own use:

"This agreement, made and entered into by and between Wheeler & Wilson Manufacturing Company, of the first part, and Mary Heil, of Zionsville, Pa., of the second part.

"*Witnesseth*, that the party of the first part has this day rented to the party of the second part a Wheeler & Wilson sewing machine, No. 480825, style K. B. E., valued at $50, for the period of fourteen months, from the date hereof, for the sum of $10, the receipt of which is hereby acknowledged, and the further sum of $3, to be paid promptly at the office of said Company in Allentown, Pa., on the 24th day of each month, consecutively, during the continuance of this agreement, commencing on the 24th day of June next.

"And the party of the second part agrees to pay said several sums promptly, and not to move said machine from her present residence, without the consent in writing of the party of the first part.

"It is distinctly understood and agreed between the parties hereto, that this is a contract of renting only, and not a sale, conditional or otherwise, and the whole of the contract between the parties is expressed in this instrument.

"And it is further understood and agreed, that the party of the second part is to be the agent of the party of the first part, in holding and keeping possession of said machine, and that it is to be well preserved and carefully used by the said party of the second part, and delivered up to the party of the first part, on demand; but the party of the first part agrees not to demand a return of said property so long as it is properly used and kept at the place agreed upon, and so long as the rent shall be faithfully and promptly paid in the terms and spirit of this contract.

"At the expiration of the time for which the said machine is rented, the party of second part shall return and deliver the same to the party of the first part in good order, save reasonable wear. If the party of the second part

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Note.—In Richel v. Munn, 2 Pa. C. C. R. 267, in the Common Pleas of Bradford County, it was held that a married woman was not empowered to confess a judgment under the Act of February 29, 1872, distinguishing McQuillen v. Singer Mfg. Co. 99 Pa. 586. This decision is in direct conflict with Singer Mfg. Co. v. Baker, cited by plaintiff in error.

In Shaw v. Dickey, 3 Pa. C. C. R., the Common Pleas of Mercer County decided the same way, holding that as, under the decisions, a married woman cannot confess judgment for necessaries, for which she would be liable by suit under the Act of 1848, for the same reason she cannot confess judgment under the Act of 1872; that under both Acts the husband is primarily liable. [J. M.]

shall faithfully keep and perform this agreement, and make all the payments therein stipulated when due, then and not otherwise, the second party may at her option purchase said machine within ten days after the time for which the same is rented, and not afterwards, by paying to the party of the first part $1 purchase money; and upon such payment the party of the first part shall sell and deliver said machine by a good and sufficient bill of sale to the party of the second part. Nothing in this agreement contained, and no payment of money pursuant hereto, excepting the payment of the purchase money as above provided, shall in anywise vest, or be understood or construed to vest, in the second party any title, legal or equitable, to said machine, or any property therein for any term whatever, or shall prevent or hinder the party of the first part from reclaiming possession of said machine whenever the party of the second part fails to pay the rent above stipulated to be paid."

In pursuance of this agreement the machine designated was put into the possession of Maria Heil in her house in Upper Milford Township, Lehigh County. The down money was paid in the surrender of an old machine, and four monthly payments were made as stipulated in the contract. By December, 1884, however, Mrs. Heil was in arrears in her monthly payments; and on the 5th of that month. Mr. E. H. Leon, the general agent of the plaintiff, and Mr. William F. Kengott, the district agent, called upon Maria Heil at her house and demanded of her the rent in arrears on the machine. She refused to pay it. The agents then demanded the machine, being prepared with a team to take it along, and Mrs. Heil refused to surrender it.

Mr. Leon then lifted the top part of the machine off the stand and took it along to Allentown, leaving the stand, including the iron wheel, treadle and head on which the machine rests, with Mrs. Heil, who made no more payments on the machine. Afterwards, and before this action was brought, Mr. Kengott went to the house of Mrs. Heil and again demanded this stand of the machine, first of Mrs. Heil, and then of Mr. Heil, and both in turn refused to surrender it, and this action was then brought to recover damages. The part of the machine detained from the plaintiff was worth $25.

At the conclusion of the plaintiff's testimony the court entered a compulsory nonsuit, saying:

"A married woman is incapable of making a contract, except where she is specially authorized by Act of Assembly to do so, and in certain exceptional cases based upon constructions of the Act of 1848. If a married woman were sued upon this contract and by way of affirmance of it, it is probable that, under the Act of 1872, a judgment in some form could be obtained. That, however, is not the effort here; but the effort is to obtain a judgment based upon a tort, trover and conversion, against these two defendants. It is evident from the plaintiff's case that the sewing machine was placed in the hands of a married woman in pursuance of the written contract in evidence; and whether her contract be treated as an absolute sale, or as a lease, it cannot be found from this evidence that these two defendants or any one of them has been guilty of a tort.

The motion for a nonsuit is allowed, and on the same day a motion entered to take off the same."

Afterward the court refused to take off the nonsuit and this was assigned as error.

Messrs. **Jas. S. Biery,** and **John Sparhawk Jr.,** for plaintiff in error:

Under the Act of February 29, 1872 (P. L. 21), a married woman may legally contract to purchase a sewing machine for her own use, on such terms as she pleases, the Legislature having set no limits as to the terms on which she may contract.

The contract in question contemplates and in terms provides for the ultimate purchase of the sewing machine and not for a bailment only. The agreement for a temporary bailment in this contract of purchase is authorized by the language of the statute. It authorizes married women, not only to purchase sewing machines for their own use, for that power they had before the passage of the Act of 1872; but it provides that "All contracts made by married women, in the purchase of sewing machines for their own use, shall be valid and binding," etc. The temporary bailment, to secure the payment by installments, and the other provisions to be observed before the final consummation of the sale, are but so many elements of the one contract in the purchase of the machine, and are necessary in order to protect the vendor of the machine, and also to conserve to the purchaser the benefits of the Act, without which she would be deprived of its beneficent provisions.

The Act should be liberally construed.

McQuillen v. *Singer Mfg. Co.* 99 Pa. 590.

Ordinarily the bond or other personal obligation of a married woman is void; and yet, without any enabling statute, it has been held that her bond given to secure the purchase money of land sold to her is binding upon the land and can be enforced.

Shnyder v. *Noble,* 94 Pa. 286; *Brunner's App.* 47 Pa. 67.

It matters not what the character of the purchase money obligation may be, whether mortgage, bond or notes, or whether judgment be obtained thereon by confession or suit, the result is the same.

Christner v. *Hochstetler,* 16 W. N. C. 369; *Shnyder* v. *Noble, supra.*

Under the Act of 1848, a married woman's power to purchase gives her a right to contract for the payment of the consideration money, so far as to charge the property with such incumbrances as may be agreed upon to secure its payment.

Patterson v. *Robinson,* 25 Pa. 81.

Where a married woman lives apart from her husband, and is an actual and has been decreed a *feme sole* trader, she is liable for an indebtedness incurred by herself in the repair and improvement of her separate estate, and suit may be maintained therefore against her alone, without joining her husband.

Winternitz v. *Porter,* 86 Pa. 85.

A judgment note with warrant of attorney to confess judgment, given by a married woman in the purchase of a sewing machine, is valid and binding under the Act of February 29, 1872, without the husband joining in it.

Singer Mfg. Co. v. *Baker*, 2 Pa. C. C. R. 118.

That this contract is an entirety cannot be controverted. There is but a single article contracted for and only a single consideration to be paid; and the intention of the parties is manifest from the terms of the contract.

The question whether a contract is entire or separable, like most other questions of construction, depends upon the intention of the parties; and this must be discovered in each case by considering the language employed and the subject matter of the contract.

2 Pars. Cont. 517, § 4; *Schinn* v. *Bodine*, 60 Pa. 182.

Whether a contract be entire or severable depends upon the intention of the parties, as gathered from the whole instrument, more than upon the specific method of performance or payment.

Quigley v. *De Haas*, 82 Pa. 273; *Carmalt* v. *Platt*, 7 Watts, 318.

If the consideration to be paid is single and entire, the contract must be held as entire, although the subject of the contract may consist of several distinct and wholly independent items.

2 Pars. Cont. 519; *Miner* v. *Bradley*, 22 Pick. 457.

Even purchases of a number of articles at different prices at an auction constitute an entire contract.

Tompkins v. *Haas*, 2 Pa. 74; *Kerr* v. *Shrader*, 1 W. N. C. 33; *Coffman* v. *Hampton*, 2 Watts & S. 377.

The plaintiff had not parted with its property in the machine, except as a bailment, at the time when its surrender was demanded on account of the nonpayment of the monthly dues, and was therefore entitled to its immediate possession under the contract; and Mrs. Heil's refusal to surrender the machine upon demand, after her default, rendered her liable in an action of trover.

A bailee is liable to his bailor in an action of trover and conversion of the property bailed.

Etter v. *Bailey*, 8 Pa. 442.

Whenever a person has not parted with the property, then he can assert his right, as well against an infant as an adult, as in every kind of bailment; and if the conversion is the nondelivery of the thing bailed, the owner may sustain detinue, replevin or trover.

Penrose v. *Curren*, 3 Rawle, 354.

If an infant take property wrongfully, this is an actionable conversion; and if it be bailed to him, and he use it for a different purpose from that for which it was bailed, the bailment is determined, and he is liable in trover.

Green v. *Sperry*, 16 Vt. 390; 2 Hill. Torts, 102.

Infants are generally responsible for torts, although they are not bound by their contracts.

Infancy is no defense to an action of trover or trespass for the unlawful conversion of property.

2 Hill. Torts, 521; *Baxter* v. *Bush*, 29 Vt. 465.

An infant, in an action *ex delicto* for an injury to property, is as fully liable for the damages as if he had been of full age.

Conklin v. *Thompson*, 29 Barb. 218; 2 Hill. Torts, 521.

The question of the liability in actions for torts more or less nearly connected with contracts is similar in the case of married women and of infants.

2 Kent, Com. 5th ed. 149, note 1; *Id.* 241, note 1.

Messrs. **Henninger & DeWalt,** for defendants in error:

If it is true (as the plaintiff in error contends) that the contract is an agreement of purchase, then the plaintiff's right of action in trover and conversion must fail; then the title to the machine vested in Mrs. Heil, and the only remedy left the plaintiff would be to sue for the purchase money; and in this case there is no allegation that the husband joined in the agreement; and therefore under the decision in *McQuillen* v. *Singer Mfg. Co.* 99 Pa. 586, there would be no liability as against him. No right of action would lie as against him.

If it is claimed that it is a contract of bailment or of renting, then we say that no action lies against Mrs. Heil to enforce it, because of her inability to make such a contract.

The Act of February 29, 1872, must be strictly construed; and it cannot be held that a married woman is by virtue thereof authorized to lease a sewing machine, or that her contract of renting is binding upon her. Purchase alone is mentioned and contemplated by the Act.

Although an action may be in form as for a tort, yet if the subject of it be based upon a contract there can be no recovery, when an action on the contract directly would fail; and this whether the defendant be an infant or an adult.

Keen v. *Hartman*, 48 Pa. 497.

Mr. Justice **Clark** delivered the opinion of the court:

That the contract of May 24, 1884, between the Wheeler & Wilson Manufacturing Company and Maria Heil, wife of Walter Heil, is in terms a bailment and not a sale of the sewing machine, we think cannot be doubted.

By the terms of the contract the Company "rented" the sewing machine to Mrs. Heil for a definite period at a certain rent; she agreed to become the agent of the Company in holding and keeping the possession of it, and not to remove it from the place where she then resided without the Company's consent; and at the expiration of the term or upon failure to pay the rent on demand, to deliver up the possession to the Company. On payment of the rent for the entire term specified in the contract, however, she had an option to buy, at a nominal price; but there was no present sale with a reservation of the title to secure payment.

Moreover, by the express provisions of the contract it was "distinctly understood and agreed between the parties," that the contract was "a contract of renting only, and not a sale, conditioned or otherwise," and that "no payment of money pursuant thereto, excepting the payment of the purchase money as provided, shall in anywise vest, or be understood or construed to vest, in the second party, any title legal or equitable," or "shall prevent or hinder the party of the first part from reclaiming possession of said machine," etc.

Under the very recent rulings of this court in *Edward's App.* and *Dando* v. *Foulds*, 105 Pa. 74, 103, and in *Forrest* v. *Nelson*, 108 Pa. 481, it must be conceded that the contract was to all intents and purposes, a bailment. Whether a given transaction is a bailment or a sale is in some cases obscure; but we think there can be no doubt as to the effect of the contract in this case.

Besides, this is a contention arising between the parties to the contract; the nature and effect of the transaction is not questioned by creditors or third parties; and if the parties were *sui juris*, they would of course be bound by the exact terms of their agreement, whether a technical bailment existed or not.

It may be doubted, perhaps, whether a contract of this character was authorized to be made by a married woman, under the Act of February 29, 1872. Whether it was or not, however, is we think wholly immaterial in this case. One thing is certain, that Mrs. Heil did not own the machine; she either held it upon the terms of the contract under which it came into her custody, or she did not; and in either event, the title to the sewing machine was in the Wheeler & Wilson Manufacturing Company and upon failure on her part to comply with the conditions of the contract the Company had a clear right to reclaim its property.

Assuming that the Company was bound by the contract and that Mrs. Heil was not, there could, of course, be no personal obligation on her part to pay the rent; but the right of property remained in the Company, subject to the conditions of the contract.

The rent for the machine was not paid as provided, and the Company demanded the possession of Mrs. Heil, in whose custody the Company had placed it; she refused to surrender it, not only in the presence of her husband, but in his absence; there is therefore neither proof nor presumption of coercion on his part. The Company, upon demand made, was entitled to the possession and her refusal was a tortious conversion of the property.

When a tort is committed by a wife she is personally liable, unless her husband is both present and directs the doing of it, at the time; *Franklin's App.* 18 W. N. C. 245, 4 Cent. Rep. 322; his presence furnishes evidence and raises a presumption of his direction, but it is not conclusive, and the truth may be established by competent evidence. *Cassin* v. *Delany*, 38 N. Y. 178.

"The true view is, when the husband is present during the commission of a tort by the wife, whether himself actively participating in it or not, *prima facie* the wrong shall be deemed his alone, but both in civil and criminal causes this *prima facie* case may be rebutted, and each of the two may be deemed in law the doer of the wrong, the same as though they were unmarried." Cord, Rights of Married Women, 1154.

They may both, therefore, be guilty of the conversion of a chattel. "Except where otherwise provided by statute, the husband is liable for the tort of the wife, during coverture; if committed in his company, and by his order, he alone is liable; if not, they are jointly liable, and the wife must be joined in the suit with her husband. And when the remedy for the tort is only damages by suit, the husband is liable with the wife." 2 Kent, Com. 149; *Franklin's App. supra.*

The judgment is, therefore, reversed, and a venire facias de novo *awarded.*

Re Division of BERN TOWNSHIP.

1. Under article VIII, § 11, of the Constitution the **division of townships, wards** of cities, and boroughs **into election districts** is entirely within the discretion of the court of quarter sessions.
2. The **Act of May 18, 1876,** in so far as it prescribes the procedure by which the division shall be made, is **unconstitutional** and void.

(Argued March 3, Decided March 14, 1887.)

JANUARY Term, 1887, No. 318, E. D. *Certiorari* to the Quarter Sessions of Berks County, to review a judgment dividing Bern Township into two election precincts. *Affirmed.*

On January 31, 1887, a number of citizens of Bern Township presented a petition to the court of quarter sessions naming themselves as residents and voters of the Township, setting forth that at present the whole of said Bern Township constituted but one election district or precinct, and that it would be a great convenience to the voters of said Township to have the same divided into two election districts, and praying the said court to do so in the manner therein described and designated.

On February 7, 1887, a second or supplemental petition was presented by other citizens of said Bern Township, asking to join in the original petition.

On the same day the exceptants or remonstrants also presented their petition, protesting against the proposed division, and especially excepting to the manner of procedure, for the

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NOTE.—*As to the effect of the above decision.* An important consideration, in connection with the above decision, may be the effect which it has upon proceedings heretofore conducted under the above Act.

It will be observed that this case simply involved *the refusal* of the court to follow the Act of 1876. If, however, the court *should direct* the proceedings in accordance with the provisions of that Act, might they not be sustained under the power given by the Constitution? While the Act itself is nugatory, the decree of the court would be an execution of the power conferred by the Constitution. If this position is correct, it will sustain proceedings heretofore conducted in accordance with the provisions of the Act of 1876.

In North Chester Borough Election District, 3 Pa. C. C. Rep. Clayton, *P. J.*, of Delaware Co., says: "For the sake of uniformity in all legal proceedings of the same nature the Act ought to be observed."

The Act of May 10, 1878, P. L. 51, entitled "A Supplement to an Act Entitled 'An Act to Prescribe the Manner in Which the Courts May Divide Boroughs into Wards,' Approved May 14, 1874," provides that "Whenever any borough in this Commonwealth may be divided into wards, in accordance with the provisions of the Act to which this is a supplement, every such ward from and after such division shall be a separate election district," etc. It seems that this Act must fall, under the decision in the above case; and any election district, organized under the operation of this Act, without a decree of the court, creating it an election district, would be illegal. If, however, a decree of the court has been entered establishing the election district *eo nomine* it would seem to be valid, for the reasons before stated. [J. M.]

reason that it was not in conformity with the Act of May 18, 1876, P. L. 178.

The court below, ERMENTROUT, *J.*, being of the opinion that the Act of May 18, 1876, did not apply to the division of townships into election districts or precincts, and without formally disposing of the remonstrance or exceptions, made the order dividing said Bern Township as prayed for.

The assignments of error specified the action of the court, 1, in granting the prayer of the petitioners; 2, in making the division without appointing commissioners, etc.; 3, in not proceeding by view, etc.; 4, in making the division upon the application of the petitioners who do not aver that they or any twenty of their number are freeholders, resident in said Township.

Mr. **Adam B. Rieser,** for appellants:

Article VIII, section 11 of the Constitution of Pennsylvania provides that "townships, and wards of cities or boroughs, shall form or be divided into election districts of compact and contiguous territory, in such manner as the court of quarter sessions of the city or county in which the same are located may direct; but districts in cities of over 100,000 inhabitants shall be divided by the courts of quarter sessions, having jurisdiction therein, whenever, at the next preceding election, more than 250 votes shall have been polled therein; and other election districts, whenever the court of the proper county shall be of opinion that the convenience of the electors and the public interests will be promoted thereby."

Under and by virtue of this section of the Constitution the courts of quarter sessions derive general jurisdiction of the subject matter.

The Constitution, however, does not point out how such divisions shall be made, nor the manner by which said court is to determine when the convenience of the electors requires such a division.

The Act of May 18, 1876, P. L. 178 entitled: "An Act to Prescribe the Manner by which the Courts of Quarter Sessions may Change the Boundaries of Election Districts and Townships" provides as follows:

Sec. 1. "That the several courts of quarter sessions of this Commonwealth shall have authority within their respective counties to divide townships into two or more election districts so as to suit the convenience of the inhabitants thereof."

Sec. 2. "That upon application by petition of at least twenty freeholders, resident in the township, to said court of quarter sessions, for the purpose of dividing any township into election districts, said court shall appoint three impartial men to inquire into the propriety of granting the prayer of the petition; and it shall be the duty of the commissioners so appointed, or any two of them, to make a plot or draft of the proposed new election district or districts, if the same cannot be fully designated by natural lines or boundaries, all of which they or any two of them shall report to the next court of quarter sessions together with their opinion of the same."

Sec. 3. "That when a report has been made by said commissioners, it shall be confirmed *nisi* by said court, which confirmation shall become absolute, unless exceptions be filed to the same not later than the third day of the next term of said court, and should exceptions be filed as aforesaid, they shall be disposed of on evidence as said court shall deem just; *Provided*, That if desired, a review may be had if in the opinion of the court it may be necessary to secure a fair adjudication of the same; said review to be asked for before the report has been absolutely confirmed however."

Sec. 4. "That whenever said report shall have been confirmed by the court, said court shall at the same time decree or establish the place for holding the election in the said new election district, and appoint the election board for holding the elections in said new election district till an election board shall be elected for the same as provided by law."

In *Re Division of Boggs Township*, 2 Cent. Rep. 376, 112 Pa. 145, although the question was not raised whether the court of quarter sessions must proceed according to the provisions of the Act of 1876, or whether it has arbitrary power under the Constitution, yet sufficient appears in the opinion of the court to indicate that the Act of Assembly must be followed, and that it is not in conflict with the Constitution.

Re Shultz, 41 Legal Int. 16.

The Act of May 18, 1876, was passed to carry out the provisions of the Constitution of 1874.

Buckalew, Constitution, 204, 205; *Re Division of Nescopeck Township*, 1 Kulp, 130; *Re Division of Jackson Township*, 2 Kulp, 340.

The Act of May 18, 1876, P. L. 178, applies not only to a general division of a township into election districts, but also to the creation of an additional district out of a part of one of the districts, into which a township has already been divided.

Re Erection of Additional Election District in Huntington Township, 3 Kulp, 367; 14 Luz. Legal Reg. 287.

The words "townships" and "election district" in the Act of Assembly are identical with those of the Constitution. Their meaning in the one must be the meaning in the other. Sift the Act as you please, and you will not find in it a single word or idea that is repugnant or inconsistent with the Constitution. Neither does it take away from the courts of quarter sessions any power conferred by the Constitution. It simply directs how the power of the courts shall be exercised.

Messrs. **Ermentrout & Ruhl,** for appellees:

The Constitution lodges the exclusive power to divide election districts in the hands of the court. In the constitutional convention of 1873, Mr. White said: "I am willing to confer the power upon the court to divide election precincts whenever it becomes necessary in their judgment to have a division. * * * Just say that the court of the proper county may divide, or shall divide a district whenever the convenience of the electors and the public interests may require a division."

5 Debates, 179.

Prior to the adoption of the present Constitution, there were numerous statutes pointing out the method of dividing wards, boroughs and townships into election precincts, which required all of the paraphernalia pointed out by the petitioners in their argument; and no such division could ordinarily be made in less than six months—two terms of the sessions, and frequently more, where the same was contested. All these laws are abrogated; they no longer have existence, but are virtually repealed.

Re Contested Election of District Attorney of Dauphin County, 11 Phila. 645.

The Act of May 18, 1876, is clearly unconstitutional so far as the purposes of these proceedings are concerned.

In *Re Boggs Township,* 2 Cent. Rep. 376, 112 Pa. 147, the validity of the Act of 1876 was not called in question, was not raised in any form, and consequently was not passed upon by this court.

The title of this Act shows that the legislative mind overlooked the constitutional provision; there was no necessity to grant a power already conferred, nor was there need for any legislation to prescribe the manner in which the courts might make the change; for the power, being given to their discretion, necessarily carried with it the use of any means they saw fit to employ to effect the purpose.

This Act is also unconstitutional for the further reason that it is in violation of section 3 of article III, of the Constitution which requires that "no bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title."

The avowed object in the title is to prescribe the manner of changing the boundaries of election districts and townships. A division into election precincts is one subject matter. A change of boundaries of a township is another and different subject matter.

A formal overruling of the exceptions was not necessary; the power to form election precincts being discretionary, there existed no right of exception, but simply an appeal from the rightful use of that discretion.

The order of the court was a virtual disposition of the exceptions, and was the only official act contemplated by the law. The method of procedure was satisfactory to the court; and it must be presumed that the court believed that the public interests required the division.

Mr. **Adam B. Rieser,** in reply:

Nothing but a clear violation of the Constitution, a clear usurpation of the powers prohibited, will justify the courts in pronouncing an Act of the Legislature unconstitutional and void.

Speer v. *School Directors,* 50 Pa. 150; *Hilbish* v. *Catherman,* 64 Pa. 154; *Pa. R. R. Co.* v. *Riblet,* 66 Pa. 164; *Commonwealth* v. *Butler,* 11 W. N. C. 241.

All presumptions are in favor of the constitutionality of an Act of Assembly.

Craig v. *First Presby. Church,* 88 Pa. 46; *Powell* v. *Commonwealth,* 5 Cent. Rep. 890.

Our Constitution is a limitation and not a grant of power. The Legislature possesses all powers inherent in legislative bodies, unless expressly prohibited; and the prohibition must be so clear as to preclude all doubt.

Kilgore v. *Magee,* 85 Pa. 401.

The provision of the Constitution, prohibiting a bill from containing more than one subject, did not intend that the title of an Act should be a complete index of its contents.

Commonwealth v. *Green,* 58 Pa. 226; *Yeager* v. *Weaver,* 64 Pa. 425.

All that is required is that the title fairly give notice of the subject of the Act, so as reasonably to lead to an inquiry into its body. It should not mislead.

Allegheny County Home's Case, 77 Pa. 77; *Juniata R. R. Co's App.* 77 Pa. 429; *Mauch Chunk* v. *McGee,* 81 Pa. 433; *Myers* v. *Commonwealth,* 17 W. N. C. 9; *Re Airy Street,* 4 Cent. Rep. 303, 113 Pa. 231.

The Act of 1876 contains only one subject, to wit: changing the boundaries of election districts and townships. This may be done by a division into election precincts or by annexing one district or township to another.

If the title of an Act be simple, it is only those provisions that are not covered by it that are void.

77 Pa. 77; 80 Pa. 118; 95 Pa. 437.

Per Curiam:

Inasmuch as article VIII, section 11 of the Constitution declares that "Townships * * * shall form or be divided * * * in such manner as the court of quarter sessions in which the same is located, may direct," it lies not within legislative discretion to take that power from the court.

The Act of May 18, 1876, which is now invoked, is so framed as by its terms to command the quarter sessions to confirm the report of commissioners unless exceptions be filed within a given time. The court correctly held that the power still rests with the court of quarter sessions, where the Constitution placed it.

Judgment affirmed.

Charles ADAM, *Plff. in Err.,*
v.
Samuel MENGEL, Admr. of Mary Mengel, Deceased.

1. The acts of **public officers de facto,** coming in by color of title, are good and valid when they concern the public or the rights of third persons who have an interest in the act done.
2. An **acknowledgment** of a mortgage **before a justice** of the peace **who has qualified as clerk** of the oyer and terminer and quarter sessions **is valid,** although the Act of May 15, 1874, declares that no person shall be capable of holding and exercising both offices at the same time, and provides a fine for violation.
3. *It seems* that the **acceptance of** the **money** secured by the mortgage would **estop** the **mortgagor** from denying the validity of the acknowledgment.

(Argued March 2, Decided March 14, 1887.)

JANUARY Term, 1887, No. 17, E. D., before Mercur, *Ch. J.,* Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Berks County, to review a judgment for the plaintiff for want of a sufficient affidavit of defense in an action of *scire facias sur* mortgage. *Affirmed.*

The facts are stated in the following opinion, delivered by ERMENTROUT, *J.*, upon making absolute the rule for judgment:

The defendant seeks to avoid judgment upon the *scire facias* by alleging that Mahlon A. Sellers, Esq., the justice of the peace before whom the mortgage was acknowledged, was incompetent to do so because he was at the time of the acknowledgement also the duly commissioned and acting clerk of the Court of Oyer and Terminer and Quarter Sessions of the Peace of Berks County; that the offices of justice and clerk are incompatible; that acceptance of the latter worked a forfeiture of the former; that therefore the mortgage was void for want of a valid acknowledgment.

It is admitted that his commission as justice by its terms had not expired, and that he had neither resigned nor was removed from such office.

The Act of Assembly declaring what offices are incompatible was passed May 15, 1874, P. L. 1874, p. 187.

Section 4 of this Act, says: "No person hereafter elected shall be capable of holding and exercising at the same time the office of justice of the peace and that of prothonotary and clerk of any court." There is no provision declaring which office shall be declared forfeited. In the second section of the Act, as between state and national offices, which are declared incompatible, it is provided that the commission under the state authority shall be void.

Section 8 says: "If any person after the expiration of six months from the passage of this Act shall exercise any office or appointment, the exercise of which is by this Act declared incompatible, every person so offending shall for every such offense, upon being legally convicted, forfeit and pay any sum not less than $50, nor more than $500. Nowhere in express terms is the office declared void, nor is it in any way indicated by express words in the Act how the incumbent shall be required to make his choice between the two incompatible offices, or what action the courts of law are required to take.

Mahlon A. Sellers, Esq., was admittedly a legally commissioned and acting justice of the peace, whose commission by its terms had not yet expired, for he was commissioned March 30, 1874, for a term of five years, and the date of acknowledgment of mortgage is March 28, 1876.

Had a writ of *quo warranto* issued at the instance of the proper authorities, the disputed right of office might have been settled, but in the absence of any guide in the Act of Assembly, we cannot in this collateral proceeding try a question of this kind; nor has any decision been presented to us to show that performing the duties of clerk was *per se* a forfeiture of that of the office of justice. This question, however, it is unnecessary to decide.

So far as the public is concerned, his official acts in both capacities are good. It is a well settled principle of law that the acts of public officers *de facto*, coming in by color of title, are good and valid, when they concern the public or the rights of third persons who have an interest in the act done.

The case of *M'Kim* v. *Somers*, 1 Penr. & W. 302, is directly in point. The admission in evidence of a deposition was objected to because the justice before whom it was taken was not a justice of the peace, that his commission had been vacated by his removal out of the county within which he had been commissioned, and that consequently he had no power to administer the oath to the witnesses. The court held that it was sufficient that he held a commission from competent authority, and that in taking the deposition, which is an official act, he was acting in the district for which he was appointed; that this constituted him a justice *de facto*, with at least colorable authority, and that as long as the commission remained without being superseded by the proper authorities the validity of his acts could not be questioned; that wherever persons who have color of authority acting under commissions from the appointing power, but which it may be alleged have been forfeited by some act which may perhaps be of an equivocal nature, in all such cases the validity of the commissions cannot be examined in a suit in which they are not a party. The regular and indeed the only mode is by information.

In the case of *Campbell* v. *Commonwealth*, 96 Pa. 344, this principle is also sustained. The plaintiffs in error were tried and convicted of arson. Objection was made that two associate judges who participated in the trial and sentence had no legal title to their offices, because, under the Conttitution of 1874 and subsequent legislation, the people had no power to elect associate judges in that particular county. They had, however, been elected and commissioned by the Governor. It was held that they were judges *de facto* and as against all persons but the Commonwealth they were judges *de jure*. Having at least a colorable title to these offices their right thereto cannot be questioned in any other form than by writ of *quo warranto* at the suit of the Commonwealth. To the same effect are *Riddle* v. *County of Bedford*, 7 Serg. & R. 390; *Keyser* v. *M'Kissan*, 2 Rawle, 140; *County of Luzerne* v. *Trimmer*, 95 Pa. 97.

The allegations that the successor of Mahlon A. Sellers had been appointed and was holding and exercising the office of justice at the time of acknowledgment cannot avail defendant. Sellers never having resigned, no competent authority having declared a vacancy or made a removal, an election of a so-called successor and certificate of the prothonotary were powerless to create vacancy or succession; the acknowledgment of the mortgage must, therefore, be held good; the mortgage was not void and was properly recorded.

We may also add that the defendant, having upon the faith and credit of the mortgage by him thus acknowledged, obtained from the decedent $3,800, is in law, morals and common honesty estopped from denying the validity of the acknowledgment and mortgage. This is one of the cases forcibly illustrating the justice of the doctrine of estoppel: "A party shall not controvert that which was done by himself or with his assent into a wrong."

The assignment of error specified the action of the court in directing the entry of judgment in favor of the plaintiff below, for want of a sufficient affidavit of defense.

Mr. **D. N. Schaeffer,** for plaintiff in error: Mahlon A. Sellers, under the Act of May 15, 1874, by having accepted the office of clerk of the said courts, impliedly resigned, and *ipso facto*, vacated the office of justice of the peace, as fully and effectually as if he had presented his written resignation to the Governor, or had been ousted by a proceeding under a writ of *quo warranto*.

Dill. Mun. Corp. § 164; Ang. & A. Corp. § 434; Willcock, Mun. Corp. 240; *Verrior* v. *Sandwitch*, 1 Sid. 305; *Rex* v. *Godwin*, Doug. 397; *Milward* v. *Thatcher*, and *Rex* v. *Pateman*, 2 Term. Rep. 87, 779; *People* v. *Carrique*, 2 Hill (N. Y.) 93; *Rex* v. *Patterson*, 4 Barn. & Adol. 9; *Regents of the University* v. *Williams*, 9 Gill & J. 365.

M'Kim v. *Somers*, 1 Penr. & W. 302, was a case where the justice of the peace had moved out of the county for which he had been commissioned and subsequently returned, and then continued to exercise his official functions; and it was held not to be an implied resignation, and no vacation of office *ipso facto*, as is the acceptance of an incompatible office. The same reasoning applies to the other cases cited by the court below.

The acknowledgment to the mortgage in question is a nullity. The mortgage for this reason is without an acknowledgment. No estate or interest in land passes by an unacknowledged mortgage. If no estate passes, no *scire facias* will issue on it, because a *sci. fa.* on a mortgage is strictly a proceeding *in rem*.

Wilson v. *McCullough*, 19 Pa. 77.

An unrecorded mortgage when properly acknowledged is valid between the parties to it, and a *sci. fa.* will lie on it.

Lancaster v. *Smith*, 67 Pa. 427.

But a mortgage without an acknowledgment, is of no validity between the parties. The Act of May 28, 1715, § 8, provides: "That no deed or mortgage or defeasible deed in the nature of mortgages hereafter to be made, shall be good or sufficient to convey or pass any freehold or inheritance, or grant any estate therein for life or years, unless such deed be acknowledged or proved and recorded (within six months after the date thereof), where such lands lie, as hereinbefore directed for other deeds." The words "deed or mortgage," relate solely to "mortgages and defeasible deeds in the nature of mortgages."

Burke v. *Allen*, 3 Yeates, 355.

The provisions requiring mortgages to be recorded within six months after the date thereof was changed by the Act of March 28, 1820, and is now only useful for the purpose of giving notice and of regulating the priority of liens. But that portion of the Act regulating the execution of a mortgage or defeasible deed is still in force; and unless a mortgage is acknowledged as therein directed it is of no effect. While in a deed an acknowledgment is only necessary for the purpose of recording it, yet in a mortgage an acknowledgment is necessary to make it efficacious.

Myers v. *Boyd*, 96 Pa. 428.

An acknowledgment of a mortgage by the mortgagor before a competent officer being therefore absolutely necessary to give it any validity, nothing can be substituted for it.

Enterprise Transit Co's App. 9 W. N. C. 226.

Messrs. **Ermentrout & Ruhl,** for defendant in error:

The allegations in an affidavit of defense, to prevent judgment, must be such as under the rules of evidence the defendant could be permitted to prove, upon a trial of the cause.

Tatman v. *Been*, 1 W. N. C. 107; *Leonard* v. *Fuller*, 1 Pennyp. 387.

The record shows that the defendant below delivered to the plaintiff's decedent, Mary Mengel, on the 28th of March, 1876, the mortgage in question, and received from her the sum of $3,600.

In the absence of fraud, imposition or mistake, the acknowledgment, by a grantor, of the receipt of the purchase money mentioned in the deed, estops him from denying its payment, as against the grantee.

McMullen v. *Glass*, 27 Pa. 151.

Where one by his words or conduct willfully causes another to believe in the existence of a state of things, and induces him to act on the belief so as to alter his own previous condition, the former is concluded from averring against the latter a different state of things as existing at the same time.

Pickard v. *Sears*, 6 Ad. & Ell. 469; *Reel* v. *Elder*, 62 Pa. 317; *Commonwealth* v. *Moltz*, 10 Pa. 527; *Ayres* v. *Wattson*, 57 Pa. 360.

A defendant whose land was sold under an execution, and who has received part of the proceeds of sale is estopped from denying the validity of the sale, although under a void judgment.

Duff v. *Wyncoop*, 74 Pa. 300.

In courts of law estoppels are for the most part reconcilable to the purest morality; and when they produce neither hardship nor injustice they merit indulgence if not favor.

Martin v. *Ives*, 17 Serg. & R. 364.

A defendant whose indorsement upon a promissory note is a forgery, cannot be permitted to prove the forgery, he having admitted to the holder (before he purchased it) that it was genuine.

Cohen v. *Keller*, 93 Pa. 123.

We do not contend that since the Act of May 15, 1874, a man may exercise both offices at the same time, and assert a legal right to take the fees and emoluments arising therefrom; but we hold that any official act which he may do for third persons in either capacity, so long as his commission has not been vacated by the courts, or superseded by the Governor, is valid, he being an officer *de facto* with at least colorable authority. The distinction is whether third persons or the officer himself is affected thereby. If the former, they are valid. If the latter, and he thereby seeks some advantage, personal to himself, he may not do it.

M'Kim v. *Somers*, 1 Penr. & W. 297; *Riddle* v. *Bedford Co.* 7 Serg. & R. 392; *People* v. *Collins*, 7 Johns. 549; *Fowler* v. *Beebee*, 9 Mass. 231; *Commonwealth* v. *Slifer*, 25 Pa. 23.

The reason that the act of an officer *de facto*, where it is for his own benefit, is void, is because he shall not take advantage of his own want of title, which he must be conusant of; but where it is for the benefit of strangers, or the public, who are presumed to be ignorant of such defect of title, it is good.

Keyser v. *M'Kissan*, 2 Rawle, 140.

In *Clark* v. *Commonwealth*, 29 Pa. 129, the defendant was indicted for murder; before trial he interposed a plea to the jurisdiction of the court, in which was averred that the Hon.

Alexander Jordan, acting as President Judge of the Court of Oyer and Terminer of Montour County, had not been elected according to the provisions of the Constitution. The court sustained the Commonwealth's demurrer to this plea.

In *Campbell* v. *Commonwealth*, 96 Pa. 344, the defendant after conviction in the court of oyer and terminer, moved for a new trial, and in arrest of judgment, averring that the two associate justices who sat during the trial were not legally qualified judges of the court, their offices having been abolished in that county by the Constitution of 1874. The motion was overruled.

The mortgage evidences the fact that Mr. Sellers held his office of justice of the peace by a title regular upon its face. The affidavit of defense admits that he at that time held a commission as such officer; all inquiry, therefore, into the validity of his title to such office and whether his acceptance of an office incompatible therewith worked a forfeiture thereof, is immaterial to this controversy.

Per Curiam:

The able and satisfactory opinion of the learned judge fully sustains the conclusion at which he arrived.

Judgment affirmed.

John R. GONSER, *Plff. in Err.*,
v.
Lewis S. SMITH *et al.*, Surviving Members of Firm of D. Clapp & Co.

1. A **writ of error to a reference under** the **Act of** April 22, **1874,** brings up only questions of law arising on bills of exception to the rulings of the judge, and his **conclusions** on the facts of the case must be **regarded** in the same manner **as** the **verdict** of a jury.
2. Although the **right of a vendor to rescind a sale,** because of the failure of the vendee or his refusal to pay, continues so long as any weighing, measuring or other things remain to be done on his part*, yet this test does not apply to the question of the vesting of the title in a case where the vendor has no cause of rescission.
3. Where the lawful form of contracting is pursued the **vesting of** the **title** always **depends on** the **intention** of the parties, to be derived from the contract and its circumstances.
4. Actual delivery, weighing and setting aside are only **circumstances from which** the **intention** may be **inferred.**
5. Plaintiffs gave defendant written agreements, reciting that plaintiffs thereby agreed to sell and had sold to defendant "and agreed to deliver on board of cars at siding" all lumber thereinafter mentioned, whenever defendant should so direct. The lumber was described as being in piles of about a certain number of feet each. The price per foot and the aggregate sum were given, "more or less, whatever it may be," to be paid for as specified. The receipt of hand money was acknowledged "as part payment on above balance, whatever it may be, to be settled likewise as soon as the correct amount can be arrived at." The piles were marked as defendant's. Defendant pointed them out as his to several persons, wrote about them as his, ordered them covered and would not permit plaintiffs to fill other orders from them without replacing the quantity taken out. Defendant also gave his notes for the estimated amounts and paid them when they fell due. Part of the lumber was shipped to defendant, the rest was destroyed by fire. Plaintiffs brought assumpsit for the value of the lumber destroyed. *Held*, that plaintiffs were entitled to recover. **Delivery was complete and the title passed when the piles were estimated and marked to defendant.**

Mercur, *Ch. J.*, dissented, on the ground that something remained to be done according to the terms of the contract.

(Argued Feb. 16, Decided March 14, 1887.)

JANUARY Term, 1886, No. 310, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Lycoming County, to review a judgment on a finding for the plaintiffs in an action of assumpsit. *Affirmed.*

This action was tried before the court, CUMMIN, *P. J.*, without a jury.

His finding was as follows:

I. The plaintiffs were extensive manufacturers of lumber at Muncy, in this county, where their mill and lumber yard were located. The defendant was an extensive dealer in lumber, and resided in Kutztown, Berks County.

II. In October, 1879, the defendant came to the plaintiffs' place of business to buy lumber. One of the plaintiffs', now deceased, went with the defendant into the lumber yard, and after examination the defendant selected six or seven piles and parts of piles of different grades of lumber, at prices per thousand then agreed upon. The piles thus selected were then marked with the name of the defendant, "J. R. Gonser."

The exact amount contained in the piles was not known, but for the purposes of the sale a careful estimate was made by the parties. A person was called up to witness the sale. Shortly afterwards the defendant reduced to writing his understanding of the sale and sent the following bill of sale to the plaintiffs to be executed by them and returned to him, which was accordingly done:

"Muncy, Oct. 17, 1879.

We hereby agree to sell and have sold to John R. Gonser, of Kutztown, Pa., and agree to deliver on board of cars at our siding all such lumber as hereinafter mentioned whenever said Gonser may order and direct to have the same loaded within a reasonable time given for loading, all white pine lumber, being the same, or more, as mentioned as follows, to wit-

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*See Cornell v. Clark (N. Y.) 6 Cent. Rep. 506.

1 pile 5-4, about 20,000 feet, called shop, at $20.50	$ 410.00
1 pile 6-4, about 15,000 feet, called shop, at $20.50	307.50
1½ pile 4-4, about 20,000 feet, called barn, at $14	280.00
1½ pile 4-4, about 30,000 feet, called culls, at $11	330.00
The whole amounting to about	$1,327.50

more or less, whatever it may be, to be paid by note, dated Nov. 5, five months after date, due on 1st of April, 1880, for which we hereby acknowledge receipt of said John R. Gonser's note, as above stated, for $1,300; also $10 in cash, as part payment on above balance, whatever it may be, to be settled likewise as soon as the correct amount can be arrived at.

(Signed) D. Clapp & Co."

III. In December, 1879, the defendant again came to the plaintiffs' place of business to buy more lumber. Terms of sale were agreed upon at the office in the evening, and the next day the defendant and one of the plaintiffs went on the yard; and after careful inspection and examination, the defendant selected the piles of lumber he wanted. The piles so selected were then marked "J. R. Gonser."

The exact amount contained in the piles was not known, but for the purposes of the sale a careful estimate was made by the parties. Some time afterwards the defendant reduced to writing his understanding of the sale, and sent the following bill of sale to the plaintiffs, to be executed by them and returned to him, which was accordingly done:

"Kutztown, Jan. 6, 1880.

We hereby agree to sell and have sold to John R. Gonser, of Kutztown, Pa., and agree to deliver on board of car at our siding, all such lumber hereinafter mentioned whenever said Gonser may order and direct to have the same loaded, all white pine lumber, being the same, more or less, mentioned as follows, to wit: four piles of 12-inch stock culls, about 100,000 feet, all that the four piles contain, whatever culls or barn that are in the piles marked may contain, at $14 per thousand feet, $1,400; also one pile 6-4 selects and better, containing about 14,000 feet, more or less, at $30, $420.00; total amounts to about $1,820.00 more or less, whatever it may be, to be paid by note dated Jan. 5, 1880, four months after date, due on the 5th of May, 1880, for which we hereby acknowledge receipt of his note due May 5, 1880, for $1,000 (one thousand dollars), as part payment on the above, balance to be paid in the same way as soon as the exact amount can be arrived at, which becomes all due May 5, 1880.

(Signed) D. Clapp & Co."

IV. Subsequently, from time to time, portions of this lumber were shipped as ordered by the defendant, and payments were made by him of the notes which he had given as part payment of the same. The defendant pointed out to another member of the firm plaintiff, and also to their employee, the piles of lumber he had bought, speaking of them as his lumber, saying, "this is my pile," "that is my pile," etc. In his letters the defendant always ordered his lumber to be shipped and gave directions how he wanted his lumber covered to protect it from the weather. When plaintiffs sold lumber of same grade to another party, defendant refused to allow them to fill the order from his lumber, unless they would replace the quantity as he might desire. Thus the defendant from the dates of the sales exercised acts of ownership of the lumber sold.

V. April 10, 1880, a destructive fire broke out in the plaintiffs' lumber yard, and all the lumber therein was destroyed, including what remained of the lumber sold to the defendant. Neither party had any insurance on the lumber sold.

VI. The plaintiffs, alleging that the transactions were and were intended to be perfect sales on the days named in the bills of sale, and that the title to the lumber sold then rested in the defendant, now claim from him the balance of the consideration named in the bills of sale. The defendant, alleging that the transactions were and were intended to be executory agreements to sell lumber; that the lumber destroyed by fire was in the same condition as when the agreements were made; that the exact quantity of lumber sold and the exact amount of the whole consideration to be paid has never been ascertained and fixed, now claims that he has overpaid the plaintiffs for all the lumber he has received from them.

VII. The statements of accounts submitted by the parties include other sales and shipments by the plaintiffs to the defendant. At the argument of this case it was conceded that if plaintiffs were entitled to be paid for the lumber in question, which, as destroyed by fire, the balance due from the defendant would be $1,666.10, with interest from May 5, 1880; and that if plaintiffs were not entitled to be paid for the said lumber, then there would be a balance due from the plaintiffs to the defendant of $376.60, with interest from April 6, 1880.

VIII. The only question in dispute in this case is, Which of the parties shall bear the loss of the lumber sold by the plaintiffs to the defendant, which remained in plaintiffs' lumber yard and was destroyed by fire April 10, 1880? This question is to be answered by ascertaining from all the evidence whose lumber it was at the time of the fire. If at that time the lumber was the property of the plaintiffs, they must bear the loss. If it was the property of the defendant, he must bear the loss. The loss follows the title.

IX. In *Bigley* v. *Risher*, 63 Pa. 155, a sale is thus defined: "'Sale,' said *Mr. Justice* Wayne in *Williamson* v. *Berry*, 8 How. 544 [49 U. S. bk. 12, L. ed. 1191], 'is a word of precise legal import both at law and in equity. It means, at all times, a contract between parties to give and to pass rights of property for money—which the buyer pays or promises to pay to the seller for the thing bought and sold.'" *Huthmacher* v. *Harris*, 38 Pa. 498; *Bowen* v. *Burk*, 13 Pa. 148.

In Benjamin, Sales, 4th Am. ed., Vol. 1, p. 315, the law of England on the sale of a chattel, as declared by Park, *J.*, in *Dixon* v. *Yates*, 5 Barn. & Adol. 313-340, is thus stated: "I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. * * * Where there is a sale of goods, generally, no property in them passes till delivery, because until then the very goods sold are not ascertained. But where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor; and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."

In the same volume, page 330, the rule deducible from the American decisions is thus stated: "In the absence of an express agreement, the intent that title shall pass at once by the contract, although the seller is to deliver, is inferred where the buyer is to give notice of time and place of delivery, where payment in full is made, where the buyer employs the seller to remove the property, or where there is other evidence that the continued possession of the seller is merely for the convenience of the buyer, or that the removal of the goods is made by the seller as agent for the buyer."

X. In this State, as between vendor and vendee, I find the law to be as follows: "If any part of the price is paid down, if it be but a penny, or any portion of the goods delivered, by way of earnest, the property of the goods is absolutely bound by it; and the vendee may recover the goods by action as well as the vendor may the price of them." Gibson, *C. J.*, in *Hazard* v. *Hamlin*, 5 Watts, 202.

Property in a chattel is not changed by a sale and delivery on conditions to be afterward performed if they are not performed; but where the delivery is absolute, and the bargain is perfect or capable of being made so by reference to something else or an arbiter, the ownership is transferred. It is certain enough when the price can be obtained by mere computation; therefore, a sale of a large raft at so much per 1,000 feet, and delivery to the buyer, changed the property, although it was to be counted, and that was not done, there being nothing more to be done by the seller. Opinion by Gibson, *C. J.*, in *Scott* v. *Wells*, 6 Watts & S. 357.

In *Winslow* v. *Leonard*, 24 Pa. 14, which is the leading case in this State, and seems to be a leading case in all the States and cited with approval in England, it was decided as follows: "Though the right of a vendor of goods to rescind the sale, because of the failure of the vendee, or of his refusal to pay, continues so long as any weighing, measuring or other thing remains to be done on his part, yet this test does not apply to the question of the vesting of the title in a case where the vendor has no cause of rescission. Weighing and marking goods and setting them aside are evidence of a perfect sale, so as to vest the title in the vendee, but not proof of it nor essential to it. As between vendor and vendee it is specification and not delivery that is necessary to the vesting of the title. That the bargain is by words in past or present time is not conclusive evidence of a perfect sale: for if it appears that the vendor did not then own the article contracted for, or that it was not yet in existence or not selected out of a lot of similar articles, then the subject matter of the contract remains undefined, and it is incompatible with the very nature of things to call it a perfect sale. Where a contract of sale is in lawful form the vesting of the title depends upon the intention of the parties, to be derived from the contract and its circumstances."

XI. In the case at bar the plaintiffs were the owners of lumber sold; the thing sold was in existence and was selected out of a lot of similar articles, was distinctly marked and designated. The exact quantity being unknown, a careful estimate was made by the parties and substituted for the purpose of the sale, so that a full price might be stated. The defendant (vendee) prepared bills of sale which were executed by the plaintiffs, in which appropriate words were used to specify and designate the subject matter of the sale, and to make a perfect sale whereby the title would pass to the vendee; the defendant paid the earnest money and afterwards paid the notes as they became due; from time to time he ordered portions of his lumber shipped to his customers, which was done; and he exercised and continued to exercise unquestioned rights of ownership over the lumber sold, up to the time it was destroyed.

XII. After careful examination and consideration of the law and all the evidence in this case, I arrive at the conclusion and find that the title to the lumber in question vested and was intended by all the parties to vest in the defendant at the time the sales were consummated. The circumstances that the plaintiffs were to load the lumber on cars as ordered by the defendant, and that if the estimate of quantity was afterwards found to be incorrect, money was to be paid or refunded, as the case might be, in no way affect this intention of the parties that the title should vest in the defendant. It may also be observed here that it does not appear in the evidence how the exact amount of lumber sold was to be ascertained.

XIII. The points of fact submitted by the counsel for plaintiffs are affirmed.

All the points of law submitted by the counsel for plaintiffs are affirmed.

As to the five points of fact submitted by counsel for the defendant, they are all affirmed, except the third, which is refused; as it does not appear in the evidence that payments were made in the manner indicated. As to the five points of law submitted by counsel for the defendant, they are all refused, except the first, which is affirmed.

XIV. I find for the plaintiffs the sum of $1,666.10, with interest from May 5, 1880, making a total of $2,237.57.

XV. It is ordered that judgment be entered in this case in favor of the plaintiffs and against the defendant, for the sum of $2,237.57 unless exceptions are filed *sec. reg.*

The defendant's points of law which were refused were these:

2. That the two contracts dated October 17, 1879, and July 6, 1880, are executory.

3. That both of the said contracts provide that the lumber was to remain upon the mill yard of the plaintiffs; that the same was to be shipped upon the order of defendant, and that the amount to be paid by him for the said lumber was to be ascertained only when the said lumber was shipped according to his orders.

4. That when said lumber was destroyed by fire it was in precisely the same position as when the defendant purchased it; it was in the same piles and parts of piles; it had not been shipped, and neither the quantity of lumber nor the amount to be paid therefor had been ascertained, nor could they be ascertained until the lumber was shipped as provided for by the said contracts. The risk, therefore, remained with the vendors, and they cannot recover in this action.

5. That under the law and the evidence the plaintiffs are not entitled to recover, and judgment must be for the defendant.

The assignments of error specified the refusal of these points, and also the conclusion of the court set forth in paragraph XII of the finding.

Mr. **Henry C. Parsons,** for plaintiff in error:

So long as anything remains to be done as between the vendor and the vendee for the purpose of ascertaining the amount and price of the article, the property and risk remain in the vendor; it is not changed.

Nicholson v. *Taylor*, 31 Pa. 130; *Scott* v. *Wells*, 6 Watts & S. 368; *Thompson* v. *Franks*, 37 Pa. 329.

Nor does earnest or part payment aid in vesting the title where the quantity is yet to be ascertained and there is no delivery. Under such circumstances the contract is essentially executory, and the part payment only shows a concluded and binding agreement.

Nesbit v. *Burry*, 25 Pa. 210; *Hanson* v. *Meyer*, 6 East, 614; *Shepley* v. *Davis*, 5 Taunt. 617.

If Mr. Gonser had failed, is it conceivable that the vendors would have delivered him the lumber?

Mr. **J. A. Beeber,** for defendants in error:

The findings of fact by the court below when trial by jury is waived will not be disturbed by this court.

Brown v. *Susquehanna Boom Co.* 1 Cent. Rep. 56; *Jamison* v. *Collins*, 83 Pa. 359; *Lee* v. *Keys*, 88 Pa. 175; *Brown* v. *Dempsey*, 95 Pa. 243.

As between the vendor and vendee, where the lawful form of contracting is pursued, the vesting of the title to personal property always depends upon the intention of the parties, and is to be derived from the contract and its circumstances, and when the property has been specified and selected, when the contract has a distinct subject matter, when the vendor has title, when the price has been agreed upon, and payment made on account, then all the elements of a perfect and complete sale exist and the title to the personal property immediately vests in the vendee; and if afterwards destroyed by fire, the loss is that of the vendee.

1 Benj. Sales, 4th Am. ed. 328, 336; *Hazard* v. *Hamlin*, 5 Watts, 202.

Applying this principle to the case at bar, the piles of lumber became the property of plaintiff in error, because he paid in money and notes at the time the bargain was made; and portions of the piles were shipped to him and his customers on his orders.

The question is whether the parties have agreed upon all the terms and done all the things which they intended should enter into the contract and be preliminary to the transfer of the property and this is a question of fact. The meaning of the parties must be ascertained from what they said and did.

Scott v. *Wells*, 6 Watts & S. 357.

In the case at bar the vesting of the title to the piles of lumber has been decided by the court below from what the parties did and said at the time the bargain was made; and if it be a question of fact, under the authority of *Scott* v. *Wells*, it cannot now be disturbed, and must be as conclusive as the verdict of a jury.

Although the right of a vendor of goods to rescind the sale, because of the failure of the vendee or of his refusal to pay, continues so long as any weighing, measuring or other thing remains to be done on his part, yet this test does not apply to the question of the vesting of the title in a case where the vendor has no cause of rescission. Weighing and marking goods and setting them aside are evidence of a perfect sale, so as to vest the title in the vendee, but not proof of it nor essential to it. As between vendor and vendee it is specification and not delivery that is necessary to the vesting of the title. That the bargain is by words in past or present time is not conclusive evidence of a perfect sale; for if it appears that the vendor did not then own the article contracted for, or that it was not yet in existence or not selected out of a lot of similar articles, then the subject matter of the contract remains undefined, and it is incompatible with the very nature of things to call it a perfect sale. Where a contract of sale is in lawful form, the vesting of the title depends upon the intention of the parties, to be derived from the contract and its circumstances.

Winslow v. *Leonard*, 24 Pa. 14; *McCandlish* v. *Newman*, 22 Pa. 465; *Nicholson* v. *Taylor*, 31 Pa. 130; *White* v. *Welsh*, 38 Pa. 420; *Pa. R. R. Co.* v. *Hughes*, 39 Pa. 527; *Rochester Oil Co.* v. *Hughey*, 56 Pa. 325; *Rietz's App.* 64 Pa. 165.

Sale is a word of precise legal import in law and equity; it means at all times a contract between parties to pass rights of property for money which the buyer pays or promises to pay to the seller for the thing bought and sold.

Huthmacher v. *Harris*, 38 Pa. 498; *Bowen* v. *Burk*, 13 Pa. 146; *Bigley* v. *Risher*, 63 Pa. 155.

Nicholson v. *Taylor*, 31 Pa. 130, was expressly decided upon the written bill of sale.

Thompson v. *Franks*, 37 Pa. 329, was a contest between an execution creditor of a vendor and the vendee.

Nesbit v. *Burry*, 25 Pa. 208, was decided upon the point that the contract required the cattle to be weighed on scales particularly named, which was not done.

Even if the contracts in the case at bar for the purchase of the piles of lumber were only executory, yet as more than one half of the lumber was shipped to the plaintiff in error before the fire, this was an appropriation of part of the goods to the fulfillment of the contract, which will convert an executory contract of sale into an executed one.

Records v. *Phila. etc. R. R. Co.* 9 Phila. 55.

Mr. Justice **Gordon,** delivered the opinion of the court:

In *Lee* v. *Keys*, 88 Pa. 175, we held, following *Jamison* v. *Collins*, 83 Pa. 359, that a writ of error to a reference under the Act of April 22, 1874, brought up only questions of law arising on bills of exceptions to the rulings of the judge, and that his conclusions on the facts of the case must be regarded in the same manner as the verdict of a jury.

This case has since been followed by *Brown* v. *Dempsey*, 95 Pa. 243, so that we may regard it as established that this court will not reinvestigate the facts as found by the judicial referee. Such being the case, our task in the matter in hand is an easy one.

According to the finding of the learned judge, we understand that the plaintiffs were the owners of the lumber sold; that this lumber was actually manufactured, and placed in separate piles; that it was selected by the defendant, and distinctly marked and designated; that as the exact quantity was unknown an estimate was made by the parties for the purposes of sale; that bills of sale were prepared by the vendee, and were signed by the vendors, in which appropriate words were used to specify and designate the subject matter of the sale, and to perfect the sale and title to the vendee.

The defendant paid the earnest money, gave his notes for the estimated amounts, and paid them as they became due; that portions of the lumber were shipped, from time to time, on his orders, and he exercised and continued to exercise unquestionable rights of ownership over the lumber up to the time it was destroyed by fire.

What we have here stated is the substance of the findings; and an examination of the evidence satisfies us that they were warranted by the testimony. Now, if there be any doubt as to the law governing this case, it may be dissipated by reference to *Winslow* v. *Leonard*, 24 Pa. 14, where it was held, that though the right of a vendor to rescind a sale, because of the failure of the vendee, or his refusal to pay, continues so long as any weighing, measuring or other thing remains to be done on his part, yet this test does not apply to the question of the vesting of the title in a case where the vendor has no cause of rescission.

It is further said in the same case that where the lawful form of contracting is pursued, the vesting of the title always depends upon the intention of the parties, to be derived from the contract and its circumstances, and that actual delivery, weighing and setting aside are only circumstances from which the intention may be inferred. When these undoubted rules of law are applied to the defendant's contention it is found to have no substantial foundation. Not only selection and marking of the lumber, but the bills of sale and the delivery of the defendant's notes, expressed the fixed intention of the parties to make the sale a present and positive one.

Nothing of any materiality remained to be done; the delivery was complete when the piles were estimated and marked to Gonser; and that they deferred a full settlement until the quantity was exactly ascertained upon shipment was of no consequence in the way of passing title. That the plaintiffs may have had the right to have refused to allow the boards to be taken from their yard, had the defendant neglected to comply with his contract, is possible; but as there was no such neglect and, therefore, no necessity for the exercise of such right, we need not discuss what might have been under different circumstances.

From what we have before us we are free to say that the rulings and judgment of the court below were in all particulars correct.

The judgment is affirmed.

Mercur, *Ch. J.*, dissents as something remained to be done according *to the terms* of the contract.

William H. DIMMICK, Owner or Reputed Owner and Contractor *et al.*, *Plffs. in Err.*,
v.
E. H. COOK CO., Limited.

1. Under the Act of June 16, 1836, a **mechanics' lien** may be filed for articles consisting of heating, laundry and cooking apparatus furnished in the construction of a hotel.
2. Such **articles** are permanent in their character, and **necessary for** the use to which the **building** is to be applied.

(Argued Feb. 24. Decided March 14, 1887.)

JANUARY Term, 1887, No. 285, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Clark, *JJ.*

Error to the Common Pleas of Wayne County, to review a judgment on a finding for plaintiff in an action of *scire facias* on a mechanics' lien. *Affirmed.*

The facts, as found by Seely, *P. J.*, on trial before the court, without a jury, are stated in the opinion.

The assignments of error specified the action of the court in holding the building subject to a lien for the various articles, and in entering judgment accordingly.

Messrs. **W. H. Dimmick** and **H. Wilson,** for plaintiffs in error:

There is no Act of Assembly giving a lien, specifically, for any of the materials furnished for the building in the present case. The nearest approach to this is the Act of 1855, giving a lien for the erection of grates and furnaces; and the plaintiff below seeks to extend this to steam heating apparatus.

The law does not give a lien for everything done to make a building ready for the business which the owner intends to engage in. A lien for certain materials is given, not because they are necessary to equip the building in all particulars for the purpose for which it is designed, but because they are intended for use in the erection or construction of the building, to become thereby an integral and component part of the structure.

The question here is not whether certain articles were so attached to the freehold as to become realty, but whether the Mechanics' Lien Law gives a lien for furnishing them. If it does not, then the circumstance that they have become part of the realty is of no consequence.

Mr. **George G. Waller,** for defendant in error:

In so far as the steam heating apparatus and engine are concerned, if they are not covered by the Act of April 14, 1855, extending liens to plumbing, gas fitting and furnishing and erection of grates and furnaces, they are covered by the Act of 1836.

An engine, machinery and case, constituting a hoisting machine or elevator, are realty, when put in by the owner as a part of his building. *Schenck* v. *Uber*, 81 Pa. 34.

All of the machinery and fixtures, put in by defendant in error, are so attached to the building that they would necessarily pass with a sale of the realty.

Ege v. *Kille*, 84 Pa. 333; *Morris' App.* 88 Pa. 368; *Justice* v. *Nesquehoning Valley R. R. Co.* 87 Pa. 28; *Seeger* v. *Pettit*, 77 Pa. 437; *Hill* v. *Sewald*, 53 Pa. 271.

Mr. Justice **Paxson** delivered the opinion of the court:

This was a *scire facias* upon a mechanics' claim. The articles in dispute consisted of heating, laundry and cooking apparatus, including a large stock or soup kettle. The building in which they were placed was a large hotel; and they were a part of the original construction of said building, the contracts therefor having been made while it was being erected. They were not temporary fixtures such as a tenant would place in the building for his own convenience, but were permanent in their character, and placed there by the owner as necessary for the use to which the building was to be applied.

Neither the Act of 1836 nor any of its supplements gives a lien specifically for the articles above mentioned. The nearest approach to it is the Act of 1855 which gives a lien for "the erection of grates and furnaces." The heating apparatus, however, in this case did not consist of either grates or furnaces, but of boilers with steam pipes running through the building. Much less could grates and furnaces be held to include laundry and cooking apparatus.

We are of opinion, however, that this claim can be sustained under the Act of June 16, 1836. By the first section of said Act it is provided that "Every building erected within the several counties of this Commonwealth * * * shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the erection or construction of the same."

It has always been conceded that for engines and machinery, constituting a part of a new mill, there was a lien under the Act of 1836; but if placed in the mill or about it, and no constituent part of the erection, they were not within the lien laws. *Summerville* v. *Wann*, 37 Pa. 182.

The test is whether they are a part of the original erection, and necessary for the purposes for which the building was intended.

This was a large hotel, capable of accommodating 200 guests. For such a building, permanant apparatus for heating, washing and cooking are as essential as are engines and boilers in a mill. It is true you can eat, wash and cook without them. So you can grind flour and saw lumber by hand; but the world has outgrown such a mode of doing business, and it is proper that both legislation and judicial decision should keep abreast of the times. A building with only walls and a roof is neither a hotel nor a factory. It is a building, nothing more. When a man constructs a building for a hotel, everything of a permanent character which will pass as a part of the freehold, and which is reasonably necessary to equip it for the purpose for which it is erected, is a part of such building, and therefore comes within the Act of 1836. This has often been said before, and we now repeat it.

Judgment affirmed.

EASTON BOROUGH, *Plff. in Err.*,

v.

John RINEK *et al.*

1. In an **action to recover damages** by the owner of land against a municipality for damages for the taking of the land for a street, a **reference to the street** as a boundary **in a deed** to private parties, *held*, **not** to operate **as a dedication,** so as to prevent the recovery of damages.
2. The right to **damages** did not **accrue** until the **street was opened.**

(Argued March 10, Decided March 21, 1887.)

JANUARY Term, 1887, No. 224, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Clark, *JJ.*

Error to Common Pleas of Northampton County, to review a judgment on a verdict in an appeal from the report of reviewers assessing damages for land appropriated for a street. *Affirmed.*

The plaintiffs, John, Thomas and Henry Rinek, offered in evidence deeds to Jacob Rinek, one dated in 1839 and another in 1856; also the record of proceedings in partition in the estate of Jacob Rinek, to show that the property in question became vested in John Rinek; also, deeds of John Rinek and wife to Henry Rinek, and deeds of John Rinek and wife to Thomas Rinek, for the undivided third part. It was then admitted by the defendant that, by proceedings in partition, the property in question became vested in John Rinek and by him the two thirds undivided interest in it was conveyed to Thomas and Henry Rinek.

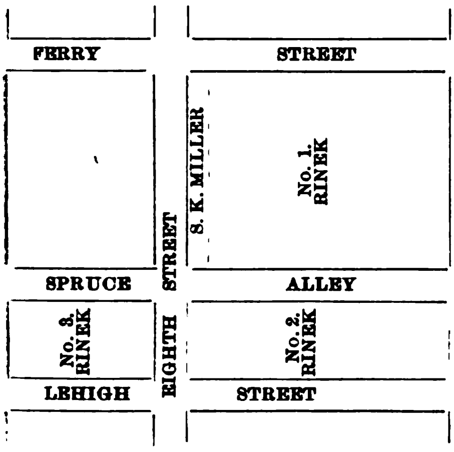
The defendant offered in evidence the records of the recorder's office, to show that Jacob Rinek, during his lifetime, made conveyances by which he recognized the existence of Eighth Street; also the official borough map of the Borough of Easton, for the purpose of showing the jury that Eighth Street had been marked on the borough chart for many years, and that it has the official stamp of the Corporation of the Borough of Easton upon it, and that if Jacob Rinek in his lifetime sold any lots on Eighth Street, or that if he made any conveyances by which he recognized the existence of Eighth Street, that is a fact which in itself dedicates Eighth Street to public use, and that these plaintiffs who claim title to this property through Jacob Rinek are estopped from setting up any claim for damages for the taking of any land for the opening of Eighth Street.

Objected to, for the reason that the record of the deed which is offered in evidence is not a record of the conveyance of any part of the property in question, and for the reason that the grantee in that deed is not a party to this suit nor interested in the result of it, and generally that it is incompetent and irrelevant, and that the defendant cannot prove the dedication of Eighth Street, from Lehigh to Spruce Street, by offering the record of the conveyances of another property situated on that street in evidence—a property not between the same two points—that is, not between Spruce Street and Lehigh Street;—and objected to further—that the borough map appears to have been made in 1873, after the death of Jacob Rinek.

By the Court:

"The objection is sustained and bill sealed for the defendant."

The only deed from Jacob Rinek referred to in the evidence, was that to S. K. Miller, for land indicated in the following draft of the premises:



This deed described the lot as "situated on the northeast corner of Ferry and Eighth Street as laid out on a new plan of said town; thence, etc. to said Eighth Street, thence along the east line of said Eighth Street," etc.

The deeds from John Rinek and wife to Henry Rinek and Thomas Rinek, dated March 18, 1869, described lot No. 3 as "situated on the west side of Eighth Street."

The charge of the court to the jury by SCHUYLER, *P. J.*, was as follows:

The undisputed facts are that on May 4, 1885, the authorities of the Borough of Easton opened Eighth Street, in this Borough, between Lehigh and Spruce Streets, and that in so doing they took for the purposes of the new street a strip of land belonging to the plaintiffs, sixty feet in with by 196 feet in depth.

The present proceeding has been instituted under the Act of Assembly, to recover damages which plaintiffs allege they have sustained by reason of this action on the part of the defendant Borough.

Plaintiffs claim that they are entitled to be compensated in damages, to the extent of the value of the land thus taken by the defendant and we so say to you, subject to the qualification to be presently mentioned. [You have heard the testimony as to the value of the land taken. The witnesses differ widely in their estimates; but it is your duty to reconcile these differences as best you may, and to say what this value was at the time the street was opened; and your verdict will be for that sum, together with interest to the present time, unless you find that the property of the plaintiffs, which remained after the opening of Eighth Street, was benefited by the opening of said street.]

Defendant contends that the opening of Eighth Street enables plaintiffs to cut up their remaining property to better advantage and that its value was thereby enhanced. It is for you to determine how the fact is. [If you find that the remaining property has been benefited by the opening of the new street, you will next find how much; and your verdict will be for the value of the property taken, less the enhanced value of the property not taken, together with interest on the balance from May 4, 1885, to the present time.]

The assignments of error specified the portions of the charge inclosed in brackets, and also the following:

1. The court erred in rejecting the offer of the record in evidence, showing that Jacob Rinek in his lifetime made sundry conveyances of lots, with reference to the official plan of said Borough, by which he recognized the existence of Eighth Street as a public street.
2. The court erred in rejecting the offer of the record in evidence of the official map of the said Borough, showing that said Eighth Street was marked and designated thereon as a public street, prior to the said conveyances made by Jacob Rinek, and also prior to the conveyances made by John Rinek to Thomas Rinek and Henry Rinek.

The court below dismissed the rule for a new trial in the following opinion:

"None of the authorities cited by the learned counsel for the defendant go to the length that the sale of a lot described as bounded by a street is sufficient evidence of the dedication of such street to public use no matter how long the street may be or how many streets may intersect it; and I should hesitate to be the first to announce such a doctrine. In the case in hand Ferry and Spruce Streets furnish an outlet to the vendees of Jacob Rinek both ways, and this is all that can fairly be said to have been within the contemplation of the parties. By holding that the dedication extends to all the lots within the same block, it is going as far as there is precedent and as far, I am of opinion, as the justice of the present case requires. See 1 Hill, 189."

Mr. **Wm. Beidelman,** for plaintiff in error:

The record of these conveyances should have been admitted in evidence to prove the dedication of Eighth Street to public use by the plaintiffs' predecessor in title.

Re Pearl Street, 2 Cent. Rep. 308, 111 Pa. 565.

Re Thirty-Second Street, 19 Wend. 128, decides that where a street is designated on a commissioner's map as passing over certain lands and the owner of the lands subsequently sells them on such street, such act alone, without any user by the public, is deemed a dedication of the whole street, so far as it passes through his land, to public use.

Schenley v. *Commonwealth*, 36 Pa. 62, holds that if a lot owner lease or sell lots, describing them as bounded by certain streets, this is sufficient evidence of the dedication of such street to public use.

In *Re Thirty-Ninth Street*, 1 Hill, 191, it is held that by such a conveyance the owner dedicates his adjoining land in the site of the street.

In *City* v. *Ash*, 38 Legal Int. 292, where the description in a deed was "to a street intended to be opened" it was held to be a dedication.

In *Re Story Street*, 11 Phila. 456, the same doctrine is held: that where the owner of land sells lots on a street designated on a confirmed plan of a city, no recovery can be had for damages by reason of the opening of such streets.

In estimating the damages sustained by the opening of a street the proper measure is the difference between what the property would bring in the market before the improvement and what after the improvement was made, without reference to the purpose for which it may be used.

Cummings v. *Williamsport*, 84 Pa. 472; *Shenango etc. R. R. Co.* v. *Braham*, 79 Pa. 447.

Mr. **Russell C. Stewart,** for defendant in error:

In *Re Opening of Pearl St.* 2 Cent. Rep. 308, 111 Pa. 565, there was a formal dedication of the street.

In *Re Story Street*, 11 Phila. 456, the street was laid out of the width of twenty feet. Afterwards it was put on the city plan as of thirty feet in width. One Freeman sold to one Pierson, on Story Street, a lot described as situate on the north side of Story Street, as laid out and opened, of the width of thirty feet. This was part of the same block as the strip of ten feet for which he claimed damages. Having covenanted for a thirty foot wide street in that block he was presumed to have dedicated the remining strip of ten feet in front of his other lots in the block from Thirty-Fifth to Thirty-Sixth Street.

In *Keilly's Case* the grant was also after the street had been widened to thirty feet.

In *Schenley* v. *Commonwealth*, 36 Pa. 63, the streets were all opened and had been for a period of over twenty-one years.

In *City* v. *Ash*, 38 Legal Int. 292, there had been a dedication in 1855, and the deed to Ash contained notice in its words of this dedication.

In *Re Thirty-Second Street*, 19 Wend. 128, the deeds of the properties contained clauses as follows: "The said last mentioned piece of land and the said piece of land herein before described which on said map are laid out as a part of Thirty-Second Street are not to be inclosed but always to be and remain open as public highways." Two of the other lots were sold with reference to a map which was made by the original owner and which proved to be afterwards identical with the official map. This reference to the original map appears from the opinion of the court.

In *Re Thirty-Ninth Street*, 1 Hill, 101, the rule is laid down that the dedication will extend to all the lots in the same block.

In Massachusetts the rule is directly opposed to the above cases. No intention on the part of the proprietors to dedicate a street could be inferred from such facts.

Bowers v. *Suffolk Mfg. Co.* 4 Cush. 332.

In *McCall* v. *Davis*, 56 Pa. 434, Agnew, *J.*, says: "Where an owner of ground lays it off into town lots, with streets and alleys for their convenient use, and sells his lots accordingly, it is a dedication of these ways to the use of the purchasers."

But this does not in all cases make them public highways.

Hall v. *McCaughey*, 51 Pa. 43.

In *Re District of Pittsburgh*, 2 Watts & S. 320, it is held the mere laying out streets, etc., for a city, under the Act of June 16, 1836, and its supplements, or under the general road law, is not of itself a taking of the property of individuals by the right of eminent domain recognized in the Constitution; and it is only when they are actually opened and applied to public use that the owners are entitled to compensation.

In *Funk* v. *Waynesboro, School Dist.* 4 Cent. Rep. 298, this case is referred to, and it is said: "It would follow, of course, that if they were never opened or the locations were abandoned there could be no damages, neither could the owner have any standing to assert what was but a possible claim."

In *Forbes Street*, 70 Pa. 137, we think the proper rule is laid down. There were here two classes of streets. "First, such streets as the commissioners thought proper to survey, locate, and make in the general plan of said city districts; second, such streets which, previous to the making of the said plan, had been laid out and appropriated by private persons or otherwise for public use, or for the use of the owners of lots fronting thereon, which are directed to be adopted, inserted in, and made part of the said general plan." The court says: "The question of dedication, in all the authorities in this State, really applies only to streets of the second class, and has no application to streets of the first class."

"The intention to dedicate, however, ought to be clearly manifest in order to deprive a land owner of his property."

Griffin's App. 42 Legal Int. 437.

As to the rule of estimating damages we refer to the opinions of the lower courts which were affirmed in the supreme court in *Patten* v. *Northern Cent. R. Co.* 33 Pa. 426, and *East Pa. R. R. Co.* v. *Hottenstine*, 47 Pa. 30.

In the latter case Thompson, *J.*, says: "Courts allow the amount of the preponderating advantages to stand against the value of the property taken or other specific injury done."

"What would the property unaffected by the obstruction have sold for at the time the injury was committed? What would it have sold for as affected by the injury? The difference is the true measure of compensation."

Schuylkill Nav. Co. v. *Thoburn*, 7 Serg. & R. 411; *Pittsburg etc. R. R. Co.* v. *McCloskey*, 16 W. N. C. 561.

The effect of the words in the charge of the court was the same as if the rule had been stated in the very words themselves. The charge must be taken as a whole. Parts cannot be cut out and assigned as error.

Little Schuylkill Nav. R. R. Co. v. *French*, 2 W. N. C. 718; *Carothers* v. *Dunning*, 3 Serg.

& R. 378; *Reeves* v. *Delaware etc. R. R. Co.* 30 Pa. 460.

Per Curiam:

No question arises here between the vendor and vendee of land fronting on a street. The sole claim is by the owners of the land against the municipality, for damages which they sustained by its taking of their land for a street. No damages were sustained until the street was opened.

Judgment affirmed.

City of ALLENTOWN, *Plff. in Err.*,
v.
Susie ADAMS *et al.*

SAME *v.* SAME.

1. Where **land** in front of which **water pipes are laid is rural** or suburban it cannot be assessed according to the "foot front rule."
2. In **scire facias upon a municipal lien,** filed against rural or suburban land for **water** pipes according to the "foot front rule," **testimony** that the land is enhanced in value by the pipes is **irrelevant** and inadmissible.
3. It is for the **jury to determine whether** the **land is urban,** suburban or rural.*

(Argued Feb. 14, Decided Feb. 28, 1887.)

JANUARY Term, 1886, No. 201, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Lehigh County, to review judgments on verdicts for the defendants in actions of *scire facias sur* municipal liens. *Affirmed.*

These cases between the same plaintiff and defendants were tried together.

Allentown, being a City of the fourth class, under the Acts of 1874-76, the following ordinance was adopted by councils on January 16, 1883, to wit:

"An ordinance authorizing and directing the board of water commissioners to lay a twelve inch water main on Hamilton Street, west of Tenth Street, to Seventeenth Street."

"Be it ordained, by select and common councils of the City of Allentown, and it is hereby ordained, by the authority of the same, that the board of water commissioners be and is hereby authorized and directed to lay a twelve inch water main on Hamilton Street, west of Tenth Street, to Seventeenth Street."

Acting under this ordinance pipes were laid and liens filed against adjoining property owners.

The other essential facts as they appeared at the trial before HAGENMAN, *P. J.*, of the 23d Judicial District, specially presiding, are stated in his charge to the jury.

The plaintiff offered, *inter alia*, to prove, as bearing upon the character of this land, that as soon as the water mains were laid and the street macadamized, a large number of buildings were erected along this street, between Twelfth and Fifteenth. But the court rejected the offer.

The charge was as follows:

This action is brought by the City of Allentown against Susie Adams and Samuel Adams, her husband, to recover an assessment which was laid against the property of the defendants on Hamilton Street, for the laying of water pipes.

The evidence discloses that Mrs. Adams owned a tract of land through which Hamilton Street runs. The tract contains some forty odd acres. The City of Allentown laid water pipes out Hamilton Street along the front of the property of Mrs. Adams; and the City assessed this property at near or about $1 a foot frontage tax towards bearing the expense of the laying of these pipes.

The jury have nothing to do with the cost of laying these pipes. The simple question for the jury to pass upon is whether the defendants are liable under the evidence for the payment of this tax, as assessed by the plaintiff.

Some years ago, and before Allentown was extended, the tract now owned by Mrs. Adams was a farm, outside of the city limits, extending from what is now known as Linden Street down across Hamilton and Walnut Streets to the Little Lehigh. At that time it was undoubtedly country property; it was a country farm. By the extension of the line of the City of Allentown this property was brought within the limits of the City. Where the previous line of Allentown was, before it was extended westward, does not appear in the evidence, but probably it was near what is now known as Twelfth Street.

That property was brought within the city limits, and thereupon Linden, Hamilton and Walnut Streets were laid out and opened. There are no other streets opened through this extent from Twelfth Street out to Seventeenth Street, except, I believe, Fulton Street, which is spoken of, to my recollection. There are streets not opened, but ordained by ordinance, running out from Twelfth Street to Seventeenth, which, when opened, will cut up this property in a large number of divisions.

This property was used as a farm before it was brought into the City. The evidence that was produced upon the part of the defendants and also upon the part of the plaintiff is that it was used as a farm. You have the testimony of one person, who was a tenant of that property. He testified that he had leased that property about 1880, and continued in possession under that lease until April, 1884, after these pipes were laid; and the whole property, except that which was cut off from it by the opening of Hamilton and Walnut Streets, was used as a farm, the same as it had been before the City was extended. These pipes were laid on Hamilton Street, and fronting on this property of Mrs. Adams; and in the subdivision of this property some forty feet lies to the east of one of these cross streets, which, when opened, will leave but forty feet.

To make myself understood: the street is not now opened, but when opened it will leave forty feet of this property of Mrs. Adams to one side of that street. Her land lies in the other direction, on the opposite side. That is the reason why this frontage tax of forty feet is charged.

The contest here is, and it was argued before you, that this is rural property, or suburban property, as it is called, and therefore is not chargeable with a frontage tax. The plaintiff contends that it is not rural property; that it is not suburban, but that it is strictly, as we understand it, city property, and therefore liable for this frontage tax.

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*Cf. Philadelphia v. Keith, 1 Cent. Rep. 896; Stewart v. Philadelphia, 4 Cent. Rep. 674.

There is no dispute upon the law of this case on either side.

If it is rural or suburban property, then it is not chargeable. If it is what we call strictly city property, it is chargeable with a frontage tax. The evidence on both sides of this case was directed to the establishment of this fact. As you find it, so your verdict will be.

We were asked by the plaintiff in two points to define what rural and what suburban property is. The first point submitted by the plaintiff is: "By suburban land, is meant land and territory on the confines of a city, which, though within the geographical limits of the city, is country and rural, rather than city property." This point is affirmed. It is a definition of what is called suburban property. Suburban property is what we call property in the suburbs of the city, lying within the city limits, or within its suburbs.

The second point submitted is: "By rural land is meant country, rustic, farm land as distinguished from city or town land, or plots of land." This point is also affirmed.

The eighth point is also a definition of what rural land is. "By rural land is meant 'pertaining or belonging to the country as distinguished from a city or town; suiting the country or resembling it.'" This point is also affirmed. These are definitions of rural and suburban property, and are explanations of what we understand by rural or suburban property.

[There was one other question to which the evidence had reference, and that was as to the laying of these water pipes along Hamilton Street. It was said that these water pipes were laid at this time so as to prevent the street, after it had been macadamized, from being dug up again for the purpose of laying these pipes; and it was contended upon the part of the defendants that if that was the cause for the laying of these pipes, then they cannot be held liable for that frontage tax.]

At this point, before I turn to the evidence that was submitted by the defendants to show the character of this property, I may say to you that the laying of these water pipes along Hamilton Street, and in front of this property, may have enhanced the value of this property, and if it be rural or suburban property, that will not give the City a right to charge the property with a frontage tax.

The laying of a water pipe along a street in front of property where there is no water, necessarily and of itself adds an increased value to the property; but that does not justify or authorize the city, which lays a pipe in front of a property, to charge that property to the extent of what may be the increased value of the property.

[The supreme court has said, in a case which I have before me, that that cannot be inquired into. The case to which I refer was a case in the City of Philadelphia. There the property was what we call rural property. The city laid the water pipes in front of it, and then charged the lot or property with a certain frontage tax by the foot. It being rural property it was held that that could not be done. The city then offered to prove that the property was enhanced in value by the laying of these water pipes, and the court below said, it was not evidence, and the party could not prove it. The case went before the supreme court, which said: "This is an attempt to charge the farm land of the defendant at the rate of $1 per foot for water pipes laid by the City. The property being rural there is an absence of power to charge it in that manner." Whether or not the property on each side of the street, including the defendants', is enhanced in value by the laying of the water pipes is therefore irrelevant].

What kind of property is this? Is it rural or suburban property, or is it what we strictly call city property? If it be rural or suburban, then the court says to you that the defendants cannot be charged with this frontage tax. If it be city property, they can be charged.

I referred to the fact of how this property came within the city limits. It was by the extension of the boundaries of Allentown to the westward that the property was brought within the city limits. The simple extending of the line of the City of Allentown, bringing property within it, of itself does not make it city property. While strictly speaking we would call it city property, because it is within the limits of the City, the jury will understand, from what I have already said, what is meant by rural, suburban or city property.

[The defendants offered a considerable amount of testimony to show that this land was used, after it was brought within the limits of the City, as it had been previously. There was a large number of witnesses examined; and they all, without exception, to my recollection, said that this property was farm land; that it had been used before it was within the city limits as a farm, and was used as such up to the time when these pipes were laid, in the summer of 1883; that it was tilled as a farm usually is, and that wheat, corn, potatoes, etc., were raised on it.

I will refer to the testimony of several witnesses, who testified in this case, and those parts I will read to you. The jury will recollect that this is from the evidence as to how this property was used, before and after the time it was brought within the city limits, up to 1883; and they will have to determine from that evidence, and from the property both near to Allentown and beyond it, as to whether it may be styled rural or suburban property, or whether it should be called city property.

Mr. Thos. B. Metzger was called upon the part of the defendants and he said that he had known this property some thirty-six years. Then the question was put: "From that time on down to the time these water pipes were laid it has been used for farming purposes continuously?

A. Yes, sir.

Q. All of the land adjoining is used for farming purposes?

A. Yes, sir.

Q. It is all country land?

A. Yes, sir.

Q. There are no houses on either Hamilton

Street or Walnut from Reinhart's house out to the house that you own beyond Seventeenth Street?

A. Yes, sir.

Q. There are no houses west of Jefferson Street, on Hamilton or Walnut?

A. None on the south side of Hamilton except Reinhart's; it is used as farm land out to my house.

Q. Your farm is opposite the Griesemer farm?

A. Partly."

The jury will remember that all the witnesses examined on the part of the defendants testified that from Twelfth Street, out to Seventeenth, on Hamilton Street, there was at the time this property was brought within the city limits but one house (the Reinhart house), and that from that time down to 1883 there were only two other houses built on Hamilton Street on the south side, and none on the north side. All the witnesses examined on the part of the defendants give the same statement of facts—that all this part of the City of Allentown lying to the west of Twelfth Street, was in 1883 almost, if not entirely, in the same condition it was when, in the year 1869 or 1870, the boundaries of Allentown were extended westward.

There was one witness examined on the part of the plaintiff, Dr. E. G. Martin, who probably was mayor at the time when this improvement was made on Hamilton Street. In his cross examination the question was asked.

"There was at the time these mains were laid no other property along Hamilton Street, from Twelfth to Seventeenth Streets in 1883, that was benefited by it as a public improvement?

A. Yes, sir.

Q. The street was macadamized at that time?

A. Yes, sir.

Q. And to save the trouble and expense of digging up the street after it was macadamized it was thought best to do it before the street was macadamized?

A. Yes, sir. I think that was the gist of it."

This has reference to the other point which I will presently refer to, as to the question whether these pipes were laid as a convenience to the City, and to save expense to the City in laying the pipes.

"Q. This property in 1883 from Twelfth Street, out to Seventeenth Street, on both sides of Hamilton, was what is known as country property?

A. Yes, sir.

Q. It was used for farming purposes?

A. Yes, sir."

Later on there was some inquiry made about lots, and the question was put: "Q. So far as you know no portion of the Adams tract was ever sold off in lots?

A. Not as far as I know.

Q. And that the whole of it was used from Linden Street to the Little Lehigh as a farm?

A. Yes, sir."

Further on in his testimony he was asked: "Q. Water was of no use to the owners of these properties along Hamilton Street?

A. No, sir."

This is the character of the evidence that came in from all the witnesses that were examined, pretty much on both sides, while there was some difference in the testimony of the witnesses who were examined on the part of the plaintiff.

The plaintiff alleges that by the opening of Hamilton Street through this property, probably also in consequence of the laying of these water pipes, this property of the Adams tract became more valuable, because of its character for building lots, than it was before. That testimony was offered on the part of the plaintiff to show that it is city property, and not what we call rural or suburban property.]

(The court then proceeded to answer the point, submitted by the parties, concluding with the defendant's fifth point which was as follows):

"If the jury believe that the laying of the mains in front of the property of the defendants was not called for by reason of there being any houses where water could be used near, in front of or beyond the property of the defendants, and that they were laid because the City proposed to macadamize Hamilton Street from Twelfth to Seventeenth, and thereby save the City the expense of digging up the street after it had been macadamized, then the laying of them must be regarded as a public improvement, and the cost cannot be assessed on the abutting land owners." [This, gentlemen, is the law, and the point is affirmed.]

The question for you to consider is, under all the evidence, whether this is what we call farm, rural or suburban property. Is it rural or suburban property? If it is, then this assessment, as it has been laid, cannot be recovered by the City. If it is city property the City can recover. This is entirely to be passed upon by you under all the evidence. You will examine the whole case from beginning to end, and say whether it is rural or suburban property. If you find that it is, then this assessment by the foot rule cannot be sustained. If it is city property it can be sustained.

[In regard to this other point. If the pipes were simply laid before macadamizing, for the purpose of saving expense to the City, and it was not regarded as a public improvement at the time it was made, there can be no recovery on that point. If there was no necessity for this improvement, or the laying of this pipe at the time it was done, and the City laid these pipes in advance of the time of macadamizing the street simply to save costs and expenses to the City there can be no recovery.]

The question as to whether this property would be liable for this public improvement by some other assessment than the assessment by the foot rule is not raised in this case; and therefore it is not necessary for the court to express any opinion about it.

Verdict and judgment were for the defendants in both cases.

The assignments of error specified the rejection of the plaintiff's offer, the portions of the charge inclosed in brackets, and that the charge was partial and misleading.

Messrs. **R. E. Wright's Sons,** for plaintiff in error:

The City of Allentown accepted the provisions of the Act of 1874 dividing cities into classes, soon after its passage, so that that Act with its supplements constitute the city charter.

By it the water department, being authorized thereunto by councils, may lay water pipes and charge the cost thereof to the owners of abutting lands.

Purd. p. 1239, pl. 166, 167, p. 1240, pl. 174.

The claim filed therefor is *prima facie* evidence of the amount due.

Purd. p. 1227, pl. 106.

The jury cannot review the discretion and motives of the municipal legislature and annul its ordinances.

Easton Borough v. *Neff*, 102 Pa. 477; *Commonwealth* v. *Woods*, 44 Pa. 117; *Borough of Freeport* v. *Marks*, 59 Pa. 257; *Fisher* v. *Harrisburg*, 2 Grant, 296; *O'Maley* v. *Freeport Borough*, 96 Pa. 30.

If the court in its charge to the jury refers to the evidence and comments upon it, it is but right that it should bring every part of it which bears upon the point to their notice so that they may not be misled, and if the court instructs the jury that it can see no evidence which leads to a certain conclusion, when there is such evidence, it is error.

Nieman v. *Ward*, 1 Watts & S. 68.

It is cause for complaint if the court in its charge omits facts material to one party and grounds its instruction only on that which makes in favor of the other.

Heilbruner v. *Wayte*, 51 Pa. 259.

A tendency to mislead, in the general tenor of the charge, although no particular portion of it is clearly erroneous, is sufficient ground for reversal.

Washington Mut. F. Ins. Co. v. *Losenberger*, 8 W. N. C. 17.

If the court proceeds to state the testimony of witnesses, it ought all to be stated, in substance at least.

Parker v. *Donaldson*, 6 Watts & S. 137.

Where the language of the charge as to the true character of the testimony tends to mislead the jury, it is error and a ground for reversal.

Fawcett v. *Fawcett*, 95 Pa. 376.

In *Gehman* v. *Erdman*, 15 W. N. C. 280, *Judge* Clark said: "The testimony was voluminous; and as the plaintiff in error complains, the jury would doubtless rely upon and be largely influenced by the impressions received from the rehearsal of it by the court. It was important, therefore, that the *résumé* should be as full on the one side as on the other, that the jury might not be misled."

The main question here at issue before the jury was whether these lands were rural or city lands; and the whole body of the voluminous testimony was directed to the solution of that question.

Local taxation can be sustained only for local benefits. Where the benefits conferred by a public improvement are not local, there can be no local assessment to pay the expense of erecting them.

Hammett v. *Philadelphia*, 65 Pa. 146; *Washington Avenue*, 69 Pa. 352.

While the paving or curbing of a street, or the laying of water pipes in a city, in front of lands that are adapted and available for city and building purposes, either at the time or in the immediate future, benefits abutting properties beyond the benefits conferred upon the public generally, it is clear that in country or rural districts where the lands are not available for such purposes as made these improvements beneficial, where their principal value consists in their use for farming purposes or in their devotion to uses that were not aided by the improvement,—in such cases as there are no local benefits there can be no local assessments.

Seely v. *Pittsburgh*, 82 Pa. 360; *Bidwell* v. *Pittsburgh*, 85 Pa. 412; *Craig* v. *Philadelphia*, 89 Pa. 265; *City* v. *Rule*, 8 W. N. C. 244; *Philadelphia* v. *Wetherill*, 13 W. N. C. 10; *Scranton* v. *Pa. Coal Co.* 15 W. N. C. 131.

The court in charging the jury ignored the testimony for the plaintiff that the principal use and value and characteristic of these lands consisted in their adaptability for and use and value as city building lots.

This evidence went to the main contention in the cause.

Mr. **Edward Harvey,** for defendants in error:

The authority and discretion vested by the Act in the board and in councils to lay water pipes is not questioned in these cases. Ample power to lay the pipes may exist, and councils may be powerless to assess on the basis of the "per foot front rule."

The right to improve by municipal regulation is statutory; the power to assess a tax for such improvements, while it, too, may be statutory, yet is always subject to constitutional limitation.

Hammett v. *Philadelphia*, 65 Pa. 146; *Washington Avenue*, 69 Pa. 352.

In *Craig* v. *Philadelphia*, 89 Pa. 265, it was held that on a *sci. fa.* on a municipal claim to recover the amount of an assessment of a tax for a street improvement, the defendant could show that the widening of the street was not called for by any reason save as a public improvement.

In *Re Canal Street*, 11 Wend. 155, the defendant was allowed to show that the assessment laid would have ruined the property owners, if required to pay; that it was exorbitant and beyond the benefits conferred.

In *Creighton* v. *Manson*, 27 Cal. 613, the lot in question, before the grading of the street, was appraised for revenue purposes at $1,400; it was rendered worthless by the grading; and the assessment for the grading was $1,989.54. This was proved to defeat a recovery, and it was held to be a good defense.

In *Scranton* v. *Pa. Coal Co.* 105 Pa. 445, a recovery was defeated by proof on the trial of a *sci. fa.* that the property was rural.

In *Philadelphia* v. *Johnson*, 93 Pa. 15, the defendants gave evidence to show that the materials used in paving were not good.

Rural land is not subject to the "per foot front rule assessment."

Scranton v. *Pa. Coal Co.* 105 Pa. 445; *Ferson's App.* 96 Pa. 140; *Philadelphia* v. *Johnson*, 93 Pa. 15; *Seely* v. *Pittsburgh*, 82 Pa. 360; *Philadelphia* v. *Wetherill*, 13 W. N. C. 10.

The judge submitted all of the evidence bearing on this point to the jury. All that is required is that the court leaves the questions of fact fairly to the jury in the charge taken as a whole.

Reese v. *Reese*, 90 Pa. 89.

A strong expression of opinion upon the

facts, which, if taken in connection with the whole charge, does not amount to a binding instruction, is not ground for reversal.

Johnson v. *Commonwealth*, 85 Pa. 54; *Bonner* v. *Herrick*, 39 Legal Int. 364; *Gehman* v. *Erdman*, 15 W. N. C. 280.

A case will not be reversed on account of an expression of opinion by the court as to which of certain witnesses are most entitled to credit, or upon evidence in the case, which, however, is submitted to the jury for its decision.

Porter v. *Seiler*, 23 Pa. 424.

All other questions are immaterial in this case, except that the land assessed was rural. That question was resolved according to the preponderance of proof, and according to the case of *Philadelphia* v. *Wetherill*, 13 W. N. C. 10.

The blending of town and country, of city lots and farm lands, of the residences of the living and the graves of the dead, constitute a group so motley and discordant, a series so wanting in similitude and uniformity, that the frontage or per foot front rule cannot be applied to it. It is so plainly, palpably, rankly and ruinously unjust, it must be pronounced no proper or lawful mode of special taxation.

Seely v. *Pittsburgh*, 82 Pa. 367.

The per foot front rule can apply only to cities and large towns, where the density of population along the street, and the small size of lots, make it a reasonably certain mode of arriving at a true result.

Washington Avenue, 69 Pa. 361.

Per Curiam:

It is well settled, when the land, in front of which the water pipes are laid, is farm land and suburban property, that it cannot be assessed according to the "foot front rule." In such case, there is an absence of power to tax it in that manner.

We discover no error in the answers to the points nor in the charge of the court. The law was correctly declared.

Judgment affirmed in each case.

Emma E. BAUDER, *Appt.*,
v.
John J. BAUDER.

1. A **wife** who, after obtaining in the court of quarter sessions an order against her husband for support on the ground of his desertion, persistently refuses, for the period of two years, his request to leave her parents' house and live with him, is **guilty of desertion**, and the husband is entitled to a divorce.
2. The **record of** the **proceeding in** the **court of quarter sessions**, although admissible upon the question of desertion as a fact, is **not a bar to the divorce.**
3. The **evidence** in this case held sufficient to justify a submission to the jury and a decree **in divorce for desertion.**

(Argued Feb. 17, Decided March 14, 1887.)

JULY Term, 1886, No. 110, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Appeal from a decree of divorce *a. v. m.*, entered by the Common Pleas of Lehigh County. *Affirmed.*

The facts as they appeared at the trial of the issue before ALBRIGHT, *P. J.*, are stated in the opinion.

The libelant proposed to prove that he was married to the respondent; that she deserted him maliciously and refused to live with him for the last two years preceding the filing of the libel.

Objected to by the defendant as incompetent and irrelevant, because the witness, libelant, was prosecuted in this court for desertion, and the case was heard on the 13th of November, 1882, and the libelant was sentenced to pay $1.50 a week for the support of his wife and child, and entered into recognizance in the sum of $100 with John Bauder as bail, and has complied with that sentence from that day up to this; and therefore that proceeding is a bar to this one.

Objection overruled. *First assignment of error.*

The court charged the jury, *inter alia*, as follows:

"In the opinion of the court, if the court were to say that that was conclusive (referring to the husband's desertion and conviction in the criminal court), then the Acts of Assembly which provide that if desertion is proved for two years the party is to have a divorce would be negatived and of no effect. So you will take that action of the criminal court as one of the facts in the case and give it such effect as it may be entitled to, bearing in mind what the court has said upon the subject." *Second assignment of error.*

The respondent presented the following points:

1. "If the jury find that the sentence of the Court of Quarter Sessions of Lehigh County, in compliance of which the libelant in this suit entered bail for the payment of a weekly sum of money to Emma E. Bauder, the respondent, is still in full force and that the libelant has still continued up to the present time to pay to said respondent in compliance of said sentence, the verdict of the jury must be in favor of the respondent."

Ans. Negatived. *Third assignment of error.*

2. "If the jury find that there was no agreement entered into between libelant and respondent to again live together as husband and wife since order of the Court of Quarter Sessions of Lehigh County sentencing to pay a weekly sum to respondent, the verdict of the jury must be in favor of the respondent."

Ans. Negatived. *Fourth assignment of error.*

3. "The former sentence of the Court of Quarter Sessions of Lehigh County and the entering of the recognizance of libelant to pay respondent a weekly sum so long as they shall live separate and apart, and if it is proven that said sentence and recognizance is still in force,

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NOTE.—Where husband and wife have separated by agreement and afterwards the husband asks the wife to permit him to live with her at the place she is living apart from him, it has been held by the Court of Common Pleas No. 3 of Philadelphia Co. that her refusal is not desertion. Eisenberg v. Eisenberg, 1 Pa. C. C. R. 590.

it is a complete bar to the present action and the verdict must be for the respondent."

Ans. Negatived. *Fifth assignment of error.*

4. "Under all the evidence, the verdict must be for the respondent."

Ans. Negatived. *Sixth assignment of error.*

The *seventh assignment of error* alleged the action of the court in decreeing a divorce.

Messrs. **Harry G. Stiles** and **John D. Stiles,** for appellant:

The conviction and sentence in a criminal court is a bar to a suit for divorce on the ground of desertion during the existence of the bond given in that court.

Vanleer v. *Vanleer*, 13 Pa. 211.

The decree of the court between the same parties and on the same subject matter is an absolute bar until reversed or set aside.

Marsh v. *Pier*, 4 Rawle, 273.

And this is so, even if the former judgment was erroneous but not void.

Hinds v. *Willis*, 13 Serg. & R. 213.

A respondent cannot be guilty of desertion who merely declines the invitation of her husband (who had theretofore, according to the language of the bond, "separated himself from her without reasonable cause"), to return to his home after he had been adjudged guilty and was held in a bond for her separate support.

Nathans v. *Nathans*, 2 Phila. 393; *Breinig* v. *Breinig*, 26 Pa. 165; *McClurg's App.* 66 Pa. 373; Act of February 26, 1817, Purd. 512.

There can be no desertion pending a suit by the husband.

1 Bish. Mar. & Div. §§ 801, 802; *Schoote* v. *Schoote*, 8 W. N. C. 286.

Under color of maintaining a suit for a divorce, the husband will not be permitted to avoid the consequence of an abandonment and neglect to provide for his wife.

Doyle v. *Doyle*, 26 Mo. 545, 550; *Simons* v. *Simons*, 13 Tex. 468.

A husband cannot obtain a divorce from his wife on the ground of desertion, although she has separated herself from him for over two years, where it appears that during that period he remitted an allowance to her.

Ralston's App. 93 Pa. 133.

Mr. **C. J. Erdman,** for appellee:

An appeal lies from a decree in pursuance of a verdict; but the supreme court will not retry the matters of fact decided by the jury.

Andrews v. *Andrews*, 5 Serg. & R. 374.

It is established by the verdict, and may now not be disputed, that for two years the appellee in good faith provided a habitation and support for his wife and honestly and properly asked her to live with him from time to time, and that she continually and deliberately refused to live with him.

It does not appear from the report of the case of *Vanleer* v. *Vanleer*, 13 Pa. 211, when the two years' alleged desertion were computed from, but probably a date subsequent to the giving of the bond, and there appears to have been no testimony of an offer to live with the wife afterward.

The decree of the court below was just and proper.

Commonwealth v. *Demott*, 64 Pa. 305; *City* v. *Thiele*, 10 Phila. 205; *Keller* v. *Commonwealth*, 71 Pa. 413; *Breinig* v. *Breinig*, 26 Pa. 161.

A divorce is a matter of right if the grounds prescribed by the Legislature are proven. The proof is by the verdict of a jury.

The order of a judge in the quarter sessions has no conclusive effect upon subsequent proceedings for divorce. It establishes the fact that the husband deserted the wife at and prior to the order, and nothing more. It does not follow that he must always remain such deserter. The wife may subsequently desert the husband by her refusal to live with him without cause. This is what the jury has found she did in this case, and this finding no prior proceeding or decree has barred.

Mr. Chief Justice **Mercur** delivered the opinion of the court:

The libelant applied for a divorce from his wife, on the ground of alleged desertion. The desertion being denied an issue was formed and tried. On that issue the jury returned a verdict in May, 1885, finding that the respondent, the appellant, willfully and maliciously deserted and absented herself from the habitation of the libelant without any just or reasonable cause, and that such desertion had been persisted in for two years and upwards. This finding of facts, if correct, sustains the decree.

The counsel for the appellant contends that the verdict is wrong, by reason of a decree in the quarter sessions of the county in November, 1882. It appears that by reason of the desertion of his wife by the appellee, after hearing the parties, the court of quarter sessions on November 13, 1882, sentenced the appellee to pay $1.50 per week towards the support of his wife and his child so long as they should live separate and apart, etc.

This sentence of the quarter sessions was admitted in evidence on the trial of the present issue; but the learned judge held it was no legal bar to the divorce prayed for by the libelant. In this there was no error. Two and a half years had elapsed between this sentence and the decree of divorce.

The evidence is that after the sentence was pronounced the libelant visited his wife "nearly every week and every two weeks, and later every month," and proposed to her to keep house with him. He leased a house and repeatedly asked her to come and live with him. She answered him evasively, never expressed a willingness to do so and did not return to him nor to his house. The evidence is ample to justify the jury in finding that he offered to receive and provide for her, and that she refused all his offers and without any just or reasonable cause that she persisted in that desertion for two years and more previous to the trial of the issue.

There is no error in the charge of the court nor in the answers to the points. We discover no merit in the sixth and seventh specifications of error.

Decree affirmed and appeal dismissed, at the costs of the appellant.

Damon Y. KILGORE, *Appt.*,
v.
Michael HOFFMAN, Trustee of David Hethery, Deceased.

Where the auditor appointed to audit the account of a trustee refuses, for lack of vouchers, to allow certain credits claimed, finds numerous evidences of mismanagement through lack of business qualifications on the part of the trustee, but not through dishonesty, and accordingly reduces the trustee's commissions to the amount due him upon the business properly done, some of the exceptions to the account being dismissed and some sustained, it is not error to decree as to **costs** that they be **divided between** the **estate and** the **accountant.**

(Argued Feb. 25, Decided March 7, 1887.)

JANUARY Term, 1887, No. 84, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Clark, *JJ.*

Appeal from a final decree of the Common Pleas of Chester County, confirming the report of an auditor appointed to examine and report his opinion upon exceptions filed to the account of a trustee. *Affirmed.*

The facts as found by the auditor William T. Barber, Esq., were as follows:

' David Hethery, in his lifetime, was the owner of a farm situate in East Nantmeal Township, Chester County, containing between seventy-seven and seventy-eight acres of land.

On the 10th day of September, 1868, he executed and delivered to Michael Hoffman a deed of trust for certain purposes, to wit: that said Hoffman should raise money and pay off Hethery's debts existing at that time; that he should manage, use and let the said real estate, and receive the rents and profits of the same, and appropriate the said proceeds to payment of taxes and repairs, and for the support and maintenance of him, the said David Hethery, etc.

Michel Hoffman accepted the trust, and afterwards applied to the Court of Common Pleas of Chester County, by petition, asking to mortgage the said real estate in order to raise money to pay off the indebtedness of David Hethery. The court made a decree, allowing the trustee to borrow the sum of $1,500, and on the second of January, 1878, the trustee borrowed said sum on bond and mortgage, which were made a lien on the said real estate. The $1,500, together with the rents, issues and profits of the farm, were expended; and the trustee now alleges that he had contracted a large amount of debts, besides the above, in order to carry on the business under the trust.

David Hethery died on the 23d of March, 1885. The trustee, Mr. Hoffman, filed an account of his trust on the 4th of August, 1885, showing a balance due to himself of $1,411.61.

To this account Damon Y. Kilgore filed several exceptions. The matters in controversy, among others, were that a large number of items of credits in the trustee's account, amounting to nearly $800, were believed to be incorrect, and should be stricken from the same; that the compensation to accountant—$200—should not be allowed; that the account was erroneous in other respects, and especially that the trustee had not charged himself with all the moneys which came or should have come into his hands, and that the account required a general examination and correction.

The auditor was appointed to examine into the facts and circumstances and report his opinion, etc., to the court. There were fifteen meetings of the audit; and the auditor says in his report "the large majority of which was made necessary in order to afford accountant full opportunity to vouch his disbursements, for which he had neglected to take receipts."

The trustee kept his accounts in a careless, confused, and unskillful manner, which rendered them difficult for him to explain, or for any person to understand. Many of the items in his account were so uncertain that he asked for delay in order to enable him to vouch the same; a large number were imperfectly vouched and many others he could not vouch at all, and they were stricken from the account by the auditor.

The auditor found that the trustee had claimed a credit in his account for $90 interest paid to Eber Anderson, which Mr. Anderson testified was paid by David Hethery himself, personally, and that he gave Hethery a receipt for the same, which was exhibited to the auditor.

The auditor further found that the trustee had taken credit in his account for $200 of interest due himself, when in fact there was only $100 due to him; that he had taken credit in his account for four several items of $50 each, which were not allowed by the auditor; and that he had taken credit in his account for forty-nine items aggregating the sum of $781.99, which were improper, and which he disallowed and struck from the account.

And the auditor, from these facts, restated the account of the trustee, allowed him commissions and placed the whole of the expenses of the audit, amounting to $170.70, on the estate of David Hethery.

To the finding of the auditor exceptions were filed by both parties. Those filed by the executor of David Hethery, had reference, *inter alia*, to the allowance of commissions to accountant, and the placing of any part of the expenses of the audit on the estate.

The auditor thereupon filed a supplemental report substantially as follows:

The accountant, so far as appears in evidence, has in no way misbehaved himself, or abused the trust confided in him. His sins were those of omission, for which he has been fully punished in the loss of money, much of which the evidence shows to have been paid by him to and for the decedent, but for the payment of particular amounts of which no sufficient vouchers were produced. There is no good reason, therefore, for depriving the accountant of commissions. The auditor had in mind, as suitable compensation, the sum of $160, being an average of $20 per year, to which sum the auditor thinks the accountant was entitled, so long as the deed of trust remained unrevoked. From the year 1869 to the year 1877, the former auditor allowed him $25 per year for an administration of the trust conducted in precisely the same manner, to which allowance the decedent then made no objection.

With reference to expenses of audit, the auditor took into consideration that a large portion of the evidence related to exceptions filed by the executor as to rents, pasturage, depreciation of property, etc., which exceptions were not sustained, the exceptant, however, contending that upon a fair settlement there should be a small balance due the estate of the decedent. The auditor, therefore, comes to the conclusion that it would be proper to divide the costs equally between the estate and the accountant, making $85 to be paid by each party. The same result has been obtained by placing all the costs upon the estate, and reducing the commissions to $75.

The court, FUTHEY, *P. J.*, dismissed the exceptions and confirmed the report.

The assignments of error specified, *inter alia*, the action of the court in dismissing the above exceptions.

Messrs. **R. E. Monaghan** and **A. P. Reid**, for appellant:

The report of a master or an auditor is neither a decision nor an infallible guide, but an instrumentality, to aid the court in performing its own functions.

Phillips' App. 68 Pa. 188; *Moyer's App.* 77 Pa. 486; *Glendon Iron Co.* v. *Uhler*, 75 Pa. 471; *Hindman's App.* 85 Pa. 470; *Milligan's App.* 97 Pa. 531.

Compensation is allowed to a trustee for the preformance of duty, as a reward for a faithful execution of the trust confided to him. Integrity, industry, intelligence, and enlightened activity in the trustee, are the qualities which command reward. But if a trustee does wrong, he is entitled to no compensation. Wrongs resulting from neglect of duty, slothfulness, ignorance and confusion of accounts, are means by which compensation is forfeited. Wrongs of omission are as great as wrongs of commission; and neither are entitled to be rewarded.

If the trustee makes false charges against the estate, or seeks to profit out of the funds of his principal, or takes credit against the estate for moneys not due to him, are such misconduct as always is followed by loss of commissions. An unfaithful trustee will not be allowed commissions. They are disallowed to trustees to deter men from committing breaches of trust—as a penalty for a known violation of duty.

Swartswalter's Account, 4 Watts, 77; *Dyott's App.* 2 Watts & S. 557; *Stehman's App.* 5 Pa. 413; *McCahan's App.* 7 Pa. 56; *Holman's App.* 24 Pa. 174; *Mrs. Greenfield's Est.* 24 Pa. 232; *Berryhill's App.* 35 Pa. 245; *Robinett's App.* 36 Pa. 174; *Snyder's App.* 54 Pa. 67; *Lamb's App.* 58 Pa. 142; *Hermstead's App.* 60 Pa. 429; *Norris' App.* 71 Pa. 115; *Welch's App.* 1 Pennyp. 9; *Reeves' App.* 38 Legal Int. 441.

A trustee who makes an unfounded claim against the estate, will not be allowed commissions.

Robinett's App. and *Welch's App. supra.*

Commissions are disallowed where the trustee fails to keep proper accounts with the estate, or failing to satisfactorily vouch his account.

Sauter's Est. 6 W. N. C. 95; *Norris' App.* 71 Pa. 115; *Bradley's Est.* 32 Legal Int. 257.

Where a trustee presents such an account as makes it necessary to refer the same to an auditor, and he should find against the trustee, he, and not those entitled to the estate, should be charged with the expenses of such reference.

Sterett's App. 2 Penr. & W. 419; *Martin's App.* 23 Pa. 433; *Gable's App.* 36 Pa. 395; *Norris' App.* 71 Pa. 106; *Speakman's App.* 71 Pa. 30; *McClintock's App.* 71 Pa. 365; *Lamb's App.* 58 Pa. 142; *Huy's App.* 84 Pa. 51; *Reeves' App.* 38 Legal Int. 441.

Messrs. **Charles H. Pennypacker** and **James H. Bull**, for appellee:

There is no such evidence here as could justify the action sought by this exceptor in regard to the compensation of the trustee. The auditor fully disposes of all reflections upon the conduct of the trustee, and the trustee is entitled to all the commissions allowed him.

Williamson's Est. 7 W. N. C. 82; *Dunlap's Est.* 9 W. N. C. 349; *Bean's Est.* 1 Ches. Co. Rep. 350; *Sourin's Est.* 11 Phila. 14; *Wister's App.* 86 Pa. 160.

Per Curiam:

The auditor found that the accountant had managed the estate conscientiously and to the best of his ability; that while he lacked business qualifications, yet his integrity and his intention to act for the best interests of his *cestui que trust* were unimpeached. In view, however, of the fact that the estate had not been well managed he reduced the commissions of the accountant and imposed one half of the costs of the audit upon him. The court confirmed the decision of the auditor.

We discover nothing inequitable in their conclusion, in considering the whole evidence in the case.

Decree affirmed and appeal dismissed, at the costs of the appellant.

Peter J. COVER, *et al.*, Admrs., *Plffs. in Err.*,
v.
Samuel MISHLER.

Where an action is upon a note under seal and, after the introduction of evidence tending to prove its execution and loss, a paper alleged by the plaintiff to be a copy of it is, without exception, admitted in evidence as proof, not of its execution, but simply of its contents, **an exception to binding instructions** to the jury to find for the defendant **does not raise** the **question whether** the **court should have admitted** the **paper as a copy of a note** the execution of which had been sufficiently proved to entitle it to go to the jury.

(Argued Feb. 8, Decided March 14, 1887.)

JULY Term, 1885, No. 186, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Somerset County, to review a judgment on a verdict for the defendant in an action of *scire facias* to review a judgment. *Affirmed.*

Judgment was confessed on behalf of defendant by the attorneys for plaintiffs on the following note:

$64.63. Davidsville, Pa., Dec. 1, 1873.

Four mounths after date I promise to pay to the order of S. J. Cover sixty-four 63-100 dollars, without defalcation, for value received.

And further, I do hereby empower any attorney of any court of record within the United

States, or elsewhere, to appear for me and, after one or more declarations filed, confess judgment against me as of any term for the above sum, with costs of suit, and attorney's commission of —— per cent for collection, and release of all errors, and without stay of execution, and inquisition and extension upon any levy on real estate is hereby waived, and condemnation agreed to; and the exemption of personal property from levy and sale on any execution hereon is hereby expressly waived, and no benefit of exemption to be claimed under and by virtue of any exemption law now in force or which may be hereafter passed.

Witness my hand and seal,

his
Sophia Cover. Samuel X Mishler, [Seal.]
mark.

Scire facias was issued to review this judgment, when the defendant filed an affidavit of defense setting forth that he never signed the note on which the original judgment is entered, and never authorized anyone to do so for him, by mark or otherwise.

These papers constituted the pleadings in the case, it being agreed that it should be tried on the *scire facias*, as effectually as if the original judgment had been opened.

At the trial before BAER, *P. J.*, the note was not produced and its loss was testified to by the counsel who copied it in the *narr.*

The widow of the payee, who was, under exception, admitted as a witness, says she was called into a room to witness a note; that defendant and her husband were alone in the room; that she signed her name to a note as a witness, that it was for something like $60 or $64 (she was very indefinite as to the time; thought it was in 1874); that Mishler said nothing to her or in her presence, and she said nothing to him. She also said "I don't say that I saw him sign it;" nor did she say that it was signed at all, or whether by name or mark. She did not say she read the note, nor did she say that the copy of the note inserted in the *narr.* was a copy of the note she signed as a witness.

The plaintiffs then offered the copy of a note dated December 1, 1873, payable four months after date to S. J. Cover, calling for $64.63 purporting to be signed by Samuel Mishler, by X mark, and with the name of Sophia Cover at the lower left hand corner.

This was admitted by the court, merely as proof of the contents of a lost paper, but was not admitted as an executed note; the court holding that the execution of the note was not sufficiently proven. To this ruling of the court no exception was taken by the plaintiffs, and they rested their case at that point.

The defendant offered no evidence and the court instructed the jury:

"The defendant offers no evidence; but from the evidence in the case, we say to you that your verdict must be for the defendant."

Judgment and verdict were accordingly for the defendant.

The assignment of error specified the charge of the court.

Messrs. **Coffroth & Ruppel**, for plaintiffs in error:

It is not generally necessary that an attesting witness should be able to recollect the circumstances attending his signature, or the fact that he saw the maker of the instrument attach to it his name.

1 Whart. Ev. § 739.

The evidence should have gone to the jury for them to say whether the execution of the note was sufficiently proven. It was not the province of the court to decide.

Hamsher v. *Kline*, 57 Pa. 402.

If there is any evidence, however slight, tending to prove the formal execution of a deed, it is sufficient to entitle it to go to the jury.

2 Greenl. Ev. § 295.

Few men can swear positively to the sealing and delivery of an instrument after any considerable time.

Pigott v. *Holloway*, 1 Binn. 442.

Identity of name is sufficient in the first instance as presumptive evidence of identity of person.

3 Phillips, Ev. 1301; *Atchison* v. *M'Culloch*, 5 Watts, 13.

In the absence of countervailing proof, the law presumes against fraud and in favor of innocence.

Miller's Est. 3 Rawle, 317.

If a subscribing witness is dead, or out of the State, or has become interested since the execution, evidence of his handwriting is sufficient.

Prince v. *Blackburn*, 2 East, 250; *Hamilton* v. *Marsden*, 6 Binn. 45; *Kelly* v. *Dunlap*, 3 Penr. & W. 136.

Equal reason exists for the application of the same rule where he has lost all memory of the transaction. *Prima facie* the presumption is that what he has attested has taken place in his presence.

Sigfried v. *Levan*, 6 Serg. & R. 311.

Where the defendant moves for a nonsuit, the plaintiff's evidence must be taken to be true, and every reasonable inference of fact which a jury might draw from it in favor of the plaintiff must be drawn by the judges.

Miller v. *Bealler*, 100 Pa. 583.

The binding instruction, given by the court to the jury, to find for the defendant brings the whole record before this court for review.

"A writ of error which goes to the whole record, brings it necessarily into the court of error. Counsel may come here and assign errors upon any part of that record and it is our duty to notice them."

Wheeler v. *Winn*, 53 Pa. 129.

Messrs. **W. H. Koontz** and **H. S. Endsley**, for defendant in error:

Exception was not taken by the plaintiffs in error at the proper time and place.

To authorize *memoriter* proof of a lost document, the witness must have read it, or heard its contents from its author, and be able to speak at least to the substance of such contents. Such evidence, also, should be supported strongly by circumstances in cases where the probabilities are that a writing of the character of that in dispute would be carefully preserved. But before such evidence will be admitted it must be shown that the original instrument was duly executed, and was otherwise genuine.

1 Whart. Ev. §§ 140, 142.

To make a copy of a lost instrument of writing admissible, the evidence of the genuineness of the original from which it was taken must be of the most positive and unequivocal kind.

Krise v. *Neason*, 66 Pa. 253.

Attestation means the witnessing of an instrument of writing at the request of the party signing the same by subscribing the same as a witness.

The attesting witness need not see the party sign the instrument, if he signs it in the presence of the maker and at his request.

It is enough, *prima facie*, if he swears that the signature is his own, and adds that it would not have been affixed but for the purposes of attestation. If he can merely swear to his own signature, other evidence of the genuineness of the instrument may be then received.

Huston v. *Ticknor*, 99 Pa. 231; Greenl. Ev. § 569; 1 Whart. Ev. § 739; 1 Bouv. Law. Dic. 166.

If there is attestation, and the witness confesses himself to be the attesting witness, *prima facie*, the presumption is that what he has attested has taken place in his presence; but if the subscribing witness denies attestation, or is unable to prove execution, then collateral circumstances are admissible in evidence, as where there is no attestation.

When the subscribing witness is dead, absent or becomes interested, proof of the witness's handwriting is *prima facie* evidence of execution and delivery.

1 Whart. Ev. § 723 *et seq.*

In *Pigott* v. *Holloway*, 1 Binn. 442, the subscribing witness proved his own handwriting and his own seal, and deposed, having the instrument before him, that he was convinced he was present and attested the execution of the instrument.

There is no such testimony in this case to prove execution; but on the contrary the fact of execution is negatived by the testimony of the subscribing witness.

The case of *Miller's Estate*, 3 Rawle, 311, arose on the execution and delivery of a specialty. The subscribing witnesses recognized their signatures, and remembered the transaction but did not remember any formal delivery. Their failure of memory was held to be sufficient ground for introducing the testimony of another witness present at the time, who swore that he affixed the seal with the assent of the obligor, and that the instrument was afterwards acknowledged in the presence of the subscribing witnesses.

In *Hamsher* v. *Kline*, 57 Pa. 402, the subscribing witness proved his signature, but he had lost all memory of the transaction; and the same rule was held to apply as if he were dead, out of the State, or had become interested; and the presumption *prima facie* was that what he had attested had taken place.

In the case at hand the subscribing witness proves that she signed a note as witness, but she goes further and details such facts and circumstances as negative the idea that it was executed by the defendant.

It is for the court to judge whether there has been sufficient evidence of execution of a deed to go to the jury.

Hays v. *Hays*, 6 Pa. 368.

Mr. Justice **Paxson** delivered the opinion of the court:

The single assignment of error in this case is not sustained. It was not error to give the jury a binding instruction to find for the defendant, for the reason that there was no evidence which would have justified a verdict for plaintiff. The note in controversy had been lost and some evidence was offered tending to prove its execution, and a paper was produced which the plaintiff contended was a copy thereof. At the close of his case the copy was offered in evidence. The court said:

"It is admitted simply as a proof of the contents of the lost paper; it is not admitted as an executed note at this stage of the case, the execution of the note not being sufficiently proven."

The plaintiffs rested their case at this point and the defendant not having offered any testimony, the court gave a binding instruction to find for the defendant, to which exception was taken and a bill sealed.

It appears that the paper referred to was admitted merely as a copy of a paper which the plaintiffs had sued upon, and which they claimed to have been signed by the defendant, but the execution of which had not been proved. We need not discuss the question whether the court should have admitted the paper as a copy of a note, the execution of which had been sufficiently proved to entitle it to go to the jury, for the reason that no exception was taken to the exclusion of the note, and the exception to the charge does not cover it.

Judgment affirmed.

KEYSTONE MUTUAL BENEFIT ASSOCIATION, *Piff. in Err.*,
v.
Charles NORRIS, To the Use of Jacob R. Spangler.

1. An **insurable interest in** the **life of another** arises from the relation of the party taking the insurance to the insured, either as surety or creditor or from ties of blood or marriage, so that from the relation thus established there may be some expectation of benefit or advantage in the continuance of the assured life.
2. A **policy issued** by a prearranged plan **to one who assigns it to a third person having no insurable interest** in the insured, the latter paying all the premiums, **is void,** notwithstanding the one to whom the policy was issued had such an interest.
3. An **action** instituted **in a court having no jurisdiction** of the defendant will **not suspend** the running of a condition of **limitation in a policy** of insurance.

(Argued Feb. 16, Decided March 14, 1887.)

JANUARY Term, 1887, No. 271, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Lehigh County, to review a judgment on a verdict for the plaintiff in an action of debt on a policy of life insurance. *Reversed.*

This was an action by Charles Norris to the use of Jacob R. Spangler, against the Keystone Mutual Benefit Association, on a policy of insurance for $1,000 on the life of Louisa Rousch.

At the trial before ALBRIGHT, *P. J.*, the following facts appeared:

The policy was issued August 29, 1878, in pursuance of an application dated August 6, 1878, and purporting to be made by the assured. It was payable to Norris, a son-in-law of the assured, and on September 16, 1878, was assigned by him to Jacob R. Spangler, who paid all the premiums but had no interest in the life of the assured.

It was understood among the parties to this transaction, before the application was made, that the policy was to be assigned in this manner.

There was a condition in the policy as follows:

"No suit or action at law under this contract shall lie against this Association, unless the same be brought within one year from and after the death of the insured; and this policy is issued and accepted upon the express condition that said period of time be the limit of the right of action at law under this contract."

The insured died October 28, 1882, in Baltimore. On March 10, 1883, Spangler brought a suit in his own name upon the policy in York County; but the court set aside the service, on the ground that as the assured did not die in the county, and the principal office of the Association was in Lehigh County that action could not, under the Acts of April 24, 1857, and April 8, 1868, be maintained, and the judgment was affirmed by the supreme court June 2, 1884. The present action was begun March 14, 1885.

The court refused the following points presented by the defendant:

"4. This suit not having been brought within one year after the death of the insured cannot be sustained, as that is the limit of the right of action at law under the contract."

"5. According to the admission of Spangler the policy was taken out by him; all the premiums and assessments were paid by him; and that was done upon the strength of an understanding between Spangler and Mrs Rousch; this made Spangler in law the real beneficiary, and as he had no insurable interest in the life of the insured the verdict must be for the defendant."

"6. According to the admissions of Spangler and Norris, made at the trial, the contract of insurance was, in its inception, a wagering policy and therefore void; and the verdict must be for the defendant."

"7. If the jury believe that Spangler effected this insurance for himself; that he paid all the premiums and assessments; that the policy was taken out with the understanding that it was to be for the benefit of Spangler and to be assigned to him; then he, having shown no insurable interest in the life of the insured, would not be entitled to recover, and the verdict must be for the defendant."

Verdict and judgment were for the plaintiff.

The assignments of error specified, *inter alia*, the refusal of the above points.

Mr. **Edward Harvey,** for plaintiff in error:

The conditions of a policy of insurance are part of the contract between the parties.

Desilver v. *State Mut. Ins. Co.* 38 Pa. 130; *Kensington Nat. Bank* v. *Yerkes*, 86 Pa. 227; *Fire Asso. etc.* v. *Williamson*, 26 Pa. 196; *Trask* v. *State Fire etc. Ins. Co.* 29 Pa. 198; *Inland Ins. etc. Co.* v. *Stauffer*, 33 Pa. 397.

A limitation of the time within which an action may be brought on the policy may be valid as a condition.

N. W. Ins. Co. v. *Phœnix Oil etc. Co.* 31 Pa. 448; *Universal Mut. Ins. Co.* v. *Weiss*, 106 Pa. 20; *Waite* v. *Spring Garden Ins. Co.* 1 W. N. C. 155; *Shroeder* v. *Keystone Ins. Co.* 2 Pa. 286; *Warner* v. *Ins. Co.* 37 Legal Int. 475; *Farmers Mut. Ins. Co.* v. *Barr*, 94 Pa. 345; Wood, Fire Ins. § 434; Wood, Limitations, § 42.

The Common Pleas of York County had no jurisdiction of the defendant; and therefore the record worked no estoppel.

Riddlesbarger v. *Hartford Ins. Co.* 7 Wall. 386 (74 U. S. bk. 19, L. ed. 257); Herman, Estop. 192; *Campbell* v. *McCahan*, 41 Ill. 45; *Walden* v. *Craig*, 14 Pet. 154 (39 U. S. bk. 10, L. ed. 397); *Baxley* v. *Linah*, 16 Pa. 241; *Ripley* v. *Ætna Ins. Co.* 30 N. Y. 137; *Roach* v. *N. Y. etc. Ins. Co.* 30 N. Y. 546; *Williams* v. *Vermont Mut. Ins. Co.* 20 Vt. 222; *Wilson* v. *Ætna Ins. Co.* 27 Vt. 99; *Brown* v. *Roger Williams Ins. Co.* 7 R. I. 301; *Portage Co. Mut. Ins. Co.* v. *Stukey*, 18 Ohio, 455; *O'Laughlin* v. *Union Cent. Life Ins. Co.* 3 McCrary, 543; *Wilkinson* v. *First Nat. Ins. Co.* 72 N. Y. 500; *Harris* v. *Dennis*, 1 Serg. & R. 236; *Todd's App.* 24 Pa. 429.

A policy not founded upon an insurable interest is a mere wagering policy, and therefore void.

Shilling v. *Ins. Co.* 2 Hurlst. & N. 42; *Pritchet* v. *Ins. Co. of N. A.* 3 Yeates, 458; *Gilbert* v. *Moose*, 104 Pa. 74; *Warnock* v. *Davis*, 104 U. S. 775 (Bk. 26, L. ed. 924); *Cammack* v. *Lewis*, 15 Wall. 643 (84 U. S. bk. 21, L. ed. 244); *Carson's App.* 4 Cent. Rep. 307; *Ruth* v. *Katterman*, 2 Cent. Rep. 776; *Scott* v. *Dickson*, 108 Pa. 6; *Connecticut Mut. L. Ins. Co.* v. *Schaeffer*, 94 U. S. 457 (Bk. 24, L. ed. 251); *N. Y. Mut. Ins. Co.* v. *Armstrong*, 117 U. S. 591 (Bk. 29, L. ed. 997).

Messrs. **R. E. Wright's Sons,** for defendant in error:

When a legal plaintiff is on the record and proves a case in his own favor against the defendant, it is not necessary for the use plaintiff to prove his title from the legal plaintiff.

If the defendant is indebted to the legal plaintiff, it is of no concern that the sum recovered is to go to the use plaintiff. The judgment protects him and the parties entitled to the fund can intervene to protect their interests in it.

Armstrong v. *City of Lancaster*, 5 Watts, 68; *Montgomery* v. *Cook*, 6 Watts, 238; *Irish* v. *Johnston*, 11 Pa. 483; *Commonwealth* v. *Lightner*, 9 Watts & S. 117; *Hamilton* v. *Brown*, 18 Pa. 87; *Crawford* v. *Stewart*, 38 Pa. 34; *Memphis etc. R. R. Co.* v. *Wilcox*, 48 Pa. 162; *Berks Co.* v. *Levan*, 86 Pa. 360.

The insured was the debtor of the beneficiary; he supported her, and she owed him for this; he had therefore an insurable interest.

Keystone Mut. Benefit Asso. v. *Beaverson*, 16

W. N. C. 188; May, Ins. p. 107; *Am. Life etc. Ins. Co.* v. *Shaw*, 26 Pa. 189; *Reserve Mut. Ins. Co.* v. *Kane*, 81 Pa. 154.

Where one has an insurable interest at the time an insurance is effected upon the life of another for his benefit, the fact that his interest ceases to exist at or prior to the death of the insured will not deprive him of the right to receive the insurance money as against the personal representatives of the insured.

Scott v. *Dickson*, 108 Pa. 6; *Corson* v. *Garnier*, 15 W. N. C. 451; *Corson's App.* 4 Cent. Rep. 307.

One has a right to have his life insured with the money of another, and assign the policy to him absolutely.

Cunningham v. *Smith*, 70 Pa. 450; *Howard Exp. Co.* v. *Wile*, 64 Pa. 201; *Scott* v. *Dickson*, 108 Pa. 6.

One having no interest, as relative or creditor, in the preservation of the life of an insured person, can acquire no title, by assignment or otherwise, to the sum payable on the death of the insured. If, in such case, the insurance company pays him the amount of the policy, the administrators of the insured person may recover it in an action against him.

Gilbert v. *Moose*, 104 Pa. 74.

So far, however, as the policy itself is concerned, it is valid. The sole inquiry is, to whom do the proceeds belong.

Gilbert v. *Moose*, 104 Pa. 74; *Downey* v. *Hoffer*, 16 W. N. C. 184; *Wegman* v. *Smith*, 16 W. N. C. 136; *Mealy* v. *Hershberger*, 16 W. N. C. 186; *Ruth* v. *Katterman*, 2 Cent. Rep. 776, 112 Pa. 251.

It was a substantial compliance with the policy, that the first suit was brought within the year. The defendant having, instead of meeting the issue tendered, moved in abatement of the writ, or to set aside its service, cannot take advantage of the time thus intervening; in analogy to statutes of limitation, and the decisions under them, the present suit was in time because brought within one year after writ quashed.

In Pennsylvania the Statute of Limitations as to personal action provides that if a judgment for plaintiff is reversed on error, or the judgment arrested and judgment given against the plaintiff, that he take nothing by his plaint, a new action may be brought within a year thereafter.

By analogy the equity of the proviso must be extended far beyond its terms.

Downing v. *Lindsay*, 2 Pa. 382; *Given* v. *Albert*, 5 Watts & S. 339; *McClurg* v. *Fryer*, 15 Pa. 293; *Logan* v. *Green*, 1 Pitts. 43; 12 Ins. L. J. p. 561; Wood, Limitation of Actions, pp. 81, 82, 84, 85, 86; Wood, Fire Ins. p. 761.

Mr. Justice **Gordon** delivered the opinion of the court:

Jacob R. Spangler, the use plaintiff, had no insurable interest in the life of Mrs. Rousch; hence this policy, now in suit, which was taken for his use, in the name of Charles Norris was but a wager on Mrs. Rousch's life, and as such void and of no effect.

A single question and answer, selected from his own testimony, proves the nature of the transaction beyond cavil.

Question: And it was understood between you and Mrs. Rousch, before the insurance was taken, that it was to be taken in the name of Norris, and by Norris assigned to you?

Answer. Yes, sir.

If, now, we admit that Norris had such an interest in the assured as would have warranted him in taking a policy on her life, yet that fact cannot help out the plaintiff's case, since the policy was not founded on that interest; neither was it for the benefit of Norris, but for the benefit of one who had no interest whatever in the insured life. Norris' name was used as a mere blind, and could deceive no one conversant with the facts; Spangler was the real beneficiary and the policy would have been quite as efficient had it been issued directly to him. The doctrine here advanced is supported by all our own authorities, one of the most recent being *Corson's App.* 4 Cent. Rep. 307, 113 Pa. 438.

As a case in point we may also cite *Warnock* v. *Davis*, 104 U. S. 775 [Bk. 26, L. ed. 924], in which it was held by *Mr. Justice* Field that an insurable interest, such as will take the contract out of the wager class, must arise from the relation of the party taking the insurance to the insured, either as surety or debtor or from the ties of blood or marriage; so that from the relation thus established, there may be some expectation of benefit or advantage in the continuance of the assured life; otherwise, the risk is to be regarded as a pure wager in which the interest of the policy holder is to be found rather in the cessation than the continuance of the life. On all authority, therefore, the court should have affirmed the defendant's fifth, sixth and seventh points.

Nor can we agree with the learned judge of the court below, that the running of the one year limitation prescribed by the policy was suspended by the York County suit. Passing by the fact that that suit was brought in the name of the equitable instead of the legal plaintiff, yet as it was instituted in a court not having jurisdiction of the defendant, it was wholly without effect. As a consequence, the analogy sought to be established between the plaintiff's case and the Act of the 27th of March, 1713, and the decisions under it, wholly failed, and so the court should have ruled.

The judgment is reversed.

LEHIGH VALLEY R. R. CO., *Plff. in Err.*,
v.
James WOODRING.

1. The **mere possibility** of a subsequent acquisition of property **cannot be transferred** by assignment. *Jermyn* v. *Moffitt*, 75 Pa. 402.
2. An **assignment of wages to be earned** in the future, executed when the assignor was not in the employment of the party from whom the wages is demanded by virtue of the assignment, is **void**, and will not be enforced by the courts.

(Argued March 10, Decided March 21, 1887.)

JANUARY Term, 1887, No. 210, E. D., before Mercur *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Clark, *JJ.*

Error to the Common Pleas of Northampton County, to review a judgment for plaintiff on a special verdict in an action of debt for wages. *Affirmed.*

This was an appeal by the defendant from a judgment of a justice of the peace.

The plea of *nil debit* was entered, and a statement of claim filed. The jury found a special verdict as follows:

"And now, December 8, 1886, the jury find a special verdict as follows: that, during September and October, A. D. 1886, James Woodring worked, at manual labor, for the Lehigh Valley Railroad Company, twenty-six days and earned $32.62 wages, which was due and payable October 8, 1886: that prior to October 8, 1886, either October 6 or 7, Eliza McDermott served upon the Lehigh Valley Railroad Company the following notice, and copy of power of attorney:

" 'To the Lehigh Valley Railroad Co.: You are hereby notified that I have an assignment from James Woodring of the wages due him from you, a copy of which assignment is hereto annexed, and you are notified not to pay the same to said James Woodring or to any other person for him, as I shall look to you for the same.' Dated 'Phillipsburg, New Jersey,——— day of,———,' and signed 'Eliza McDermott.'

"The following is a copy of the power of attorney:

" 'Know all men, by these presents, that I, James Woodring, of the Town of Phillipsburg, County of Warren, and State of New Jersey, in consideration of groceries and provisions furnished me and my family by Eliza McDermott, of Phillipsburg, aforesaid, do hereby constitute and appoint Eliza McDermott my true and lawful attorney, for me and in my name, and for the use and benefit of said Eliza McDermott, and at her expense, to receive, collect, sue for, and receipt for all wages or moneys, due, or that may hereafter become due me from————————and I do hereby authorize and empower the said Eliza McDermott to fill up this power of attorney with the names of any person, firm or corporation for whom I may be working at any time during the time I am receiving groceries and provisions as aforesaid from the said store of the said Eliza McDermott, or, if I should quit dealing with the said Eliza McDermott, leaving any balance due or owing by me to her, hereby declaring this power of attorney shall be operative and have good effect to whom presented, who owes me for wages for labor at any time during the period I may be dealing with or owing the said Eliza McDermott; and I hereby declaring that this power of attorney is, for the consideration above mentioned, by me irrevocable.

" 'In witness whereof I have hereunto set my hand and seal, this 7th day of September, A. D. 1885.

James Woodring. [seal.]'

" 'Signed and delivered in presence of,
'John M. Voorhies.'

"That on October 8, 1886, the pay day of the defendant, he applied to the paymaster for his money and was informed that the above power of attorney had been handed in against him and the paymaster said that he could not pay him.

"That on October 8, after the above information from the paymaster, Woodring served a notice upon the said paymaster as follows:

" '*To the Lehigh Valley Railroad Co:*

" 'Please take notice that I claim all moneys due me from your Company and demand that they be paid to me only. No one has any legal right to receive them except myself.

'Respectfully,
'James Woodring.'

" 'Easton, October 8, 1886.'

"That after October 8, 1886, and after the service of the last named notice, the defendant paid the amount in controversy to Eliza McDermott.

"That on the day of the execution of the said power of attorney, viz.: September 7, 1885, the plaintiff opened an account with Eliza McDermott for groceries, which was continued until December 28, 1885, when the balance due for groceries was $78.04; that Woodring then removed from New Jersey to South Easton Pa., and has not since dealt with Eliza McDermott, and made no payments on account: the only credit since then being the $32.62 received from the defendant.

"And the jury further find that on September 7, 1885, James Woodring was not employed by the Lehigh Valley Railroad Company, nor under any contract of employment with them, and that he did not enter their service until September, 1886.

"And the jury further say that they are ignorant whether the plaintiff, upon foregoing facts, is in law entitled to recover. If the court shall be of the opinion that the law is with the plaintiff, then we find in favor of the plaintiff the sum of $32.62, with interest from October 8, 1886, and judgment to be entered in his favor against the defendant for that amount; but if the court should be of the opinion that the law is with the defendant, then judgment to be entered in their favor."

The opinion of the court was delivered by Schuyler, *P. J.*, as follows:

The only controverted question raised by the special verdict is this: Can a person not engaged in any employment for another, and not under contract for such employment, for a valuable consideration, make a valid assignment of all wages which he may earn in the future, without limit as to time or amount? The learned counsel for the defendant contends that such an assignment will be enforced in equity. The two authorities relied on as sustaining this position are *East Lewisburg Lumber etc. Co.* v. *Marsh*, and *Ruple* v. *Bindley*, 91 Pa. 96, 296.

In the first of these cases, Marsh, who was at that time engaged in manufacturing agricultural implements, assigned as collateral security, to the East Lewisburg Lumber Co., the proceeds of future sales of said implements during the then current year, and it was held that, although the proceeds of sale assigned had no actual existence and rested in expectance only, the assignment was valid. It will be noticed, however, that the thing assigned was individuated, and was the fruit of an employment existing at the time of the assignment.

"In *Ruple* v. *Bindley*, Ruple was under contract to put up the stairs in a building in process of erection by Bindley, and not having the means to fulfill his contract, one Lewis agreed to advance the same. To secure Lewis, Ruple gave him an order on Bindley for $104, the amount advanced by Lewis, to be paid out of his wages when the stairs were finished. This was held to be a valid assignment of the $104. But here again the thing assigned was individuated, and was besides the fruit of an employment, under contract at the time the order was given. No argument is needed to show that these cases fall very far short of sustaining the broad position the defendant is compelled to assume in the case at bar.

Of greater force and more directly in point is *Mulhall* v. *Quinn*, 1 Gray, 105, cited and recognized in *East Lewisburg Lumber etc. Co.* v. *Marsh*, *supra*. In that case there was an assignment of all claims and demands which the assignor had or might have against the City of Boston for money due or to become due for services rendered to the city; and the assignment was accompanied by an irrevocable power of attorney authorizing the assignee to draw the money assigned. Notice of the assignment was given to the city; but the city did not accept or undertake to pay the assignee. At the time of the assignment the assignor was not employed by the city or under any contract for such employment; but he had been employed prior thereto and became so subsequently. The contest was between the assignee and the plaintiff in a trustee attachment for the benefit of all creditors.

"Under these circumstances," says Shaw, *C. J.*, "the court is of opinion that beyond the earnings due at the time of the assignment there was no valid assignment which can be set up to defeat the trustee attachment, and that the earnings of the assignor between the assignment and the attachment did not vest in the assignee. The future earnings constitute a mere possibility, coupled with no interest. There was no subsisting engagement under which wages were to be earned; and it depended altogether upon a future engagement whether anything would ever become due. None of the cases go so far as to hold that the mere possibilty of being again employed by the city, and of earning wages under that employment at a future time, is capable of being assigned. A power of attorney, although irrevocable in terms, does not amount to an assignment, when no assignable interest exists at the time."

Still more to the point is the language used in *Jermyn* v. *Moffitt*, 75 Pa. 402, where Mercur, *J.*, says: "We, however, are clearly of the opinion that an assignment, like the present, which professes to transfer a debt to arise for wages not yet earned, against any person by whom the assignor may thereafter be employed, although followed by a subsequent notice of the assignment to such an employer, is insufficient without acceptance to make a valid transfer of the debt against the employer."

In *Ruple* v. *Bindley*, *supra*, Trunkey, *J.*, says, after quoting this same language, that "the soundness of this principle is unquestioned."

In this connection it is only necessary to call attention to the fact that the jury in the case at bar do not find that the defendant accepted the order given by the plaintiff in favor of Mrs. McDermott, and in the absence of such finding the legal inference is that the order was not accepted.

But aside from these authorities, and aside from the question of acceptance, we think all assignments such as the one in controversy here should be declared void, as being against the principles of public policy. The present assignment is by a day laborer, in consideration of groceries and provisions furnished him and his family; and it covers all wages, past and future, due and to become due, to the assignor from any person, firm or corporation, whatever, so long as the assignee's claim remains unpaid.

True, in the present case, the assignee's claim amounts to but $32.62; but the principle would be the same if the claim were ten or a hundred times that sum. Nor does the fact that the assignment was in consideration of groceries and provisions furnished the family of the assignor give the transaction special character. A money consideration would, in contemplation of law, be just as effectual. Nor, if the transaction be fair, need the price paid be a full equivalent for the wages assigned.

Should the law be declared to be that such an assignment is valid, it is not difficult to see that it would open the door to improvidence and profusion on the part of the assignor, and in the end to utter and hopeless poverty. Take the case of any wage earner, or salary earner, or anyone who is compelled to work for a living, for in either case the principle is the same. He conceives himself to be in want of money, whether for necessaries or luxuries makes no difference. He finds that he can raise the coveted money by assigning his future earnings to become due from any and every source. No purchaser offers for his wages, in any existing employment, for he may quit that employment at any time thus rendering worthless his assignee's security. He, therefore, under the pressure of his supposed wants, pledges his whole money earning power for a price.

Presently the money or provisions, or what not, thus acquired, are all gone. They may have been recklessly squandered; they may have been doled out only for the very necessaries of life, during a period of sickness or other misfortune. It is all the same. He is not only penniless, but he has incurred a debt which it may require months and even years to work off. Turn where he will, go where he will, his creditors may follow him and sweep away every dollar of his earnings until his debt is paid. In the meantime his children are clamoring for bread.

Or there may be a whole community of wage earners thus situated. They may be entirely honest. They may have stout hearts and willing hands. The harvest may be plenty and the laborers few. But how can men labor for that which satisfieth not, and their families starving before their eyes. In addition to all this, the danger to society from such a condition of things would be both grave and alarming. It is true generally, as argued by the learned counsel for defendant, that persons *sui juris* may make their own contract, but the rule has its exceptions. A man may not sell himself into slavery.

Nor is the doctrine for which I have been contending obnoxious to the justly severe criticism of *Mr. Justice* Gordon in *Godcharles* v. *Wigeman*, 4 Cent. Rep. 887, 18 W. N. C. 214, directed against certain legislation in the supposed interest of the laboring classes, to the effect that "It is an insulting attempt to put the laborer under legislative tutelage which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States."

When the court says to the laborer that he shall not beggar himself and family by making merchandise of what is virtually his entire wage earning power, it merely extends to the laborer the same rule which is applicable to the judges themselves, and to the officers of our army and navy; for neither the salaries of the judges nor the pay of these officers may be assigned, either by the party or by operation of law; and for the same reason, to wit: that it is against public policy that they should be. 2 Story, Eq. Jur. § 1040.

And now, December 13, 1886, judgment is entered on the verdict in favor of the plaintiff.

The assignments of error specified: 1, the action of the court in entering judgment for the plaintiff; 2, in holding the power of attorney and assignment void, notwithstanding the wages had been paid to the assignee before suit brought; and 3, in not entering judgment for the defendant.

Messrs. **R. E. Wright, H. S. Drinker** and **B. F. Fackenthall,** for plaintiff in error:

The power of attorney was irrevocable, for two reasons: first, because it was for a valuable consideration, the furnishing of the groceries on credit; and second, its terms and being *inter partes* and during their life makes it so.

Hunt v. *Rousmanier*, 8 Wheat. 174, 202, 206 (21 U. S. bk. 5, L. ed. 589, 596, 597); *Blackstone* v. *Buttermore*, 53 Pa. 266; *Hartley's App.* 53 Pa. 212; *Bancroft* v. *Ashhurst*, 2 Grant, 513.

But the instrument is really an assignment of the wages for a valuable consideration, and not a mere authority to collect them. In that aspect it is binding on both parties, from the time of its execution and the delivering of the goods.

An assignment for a valuable consideration of demands having at the time no actual existence, but which rests in expectancy only, is rated in equity as an agreement and takes effect as an assignment, when the demands intended to be assigned are subsequently brought into existence.

East Lewisburg Lumber etc. Co. v. *Marsh*, and *Ruple* v. *Bindley*, 91 Pa. 96, 296.

In our case the debt was contracted after the assignment was made, so that our agreement is not obnoxious to the rule that a pre-existing debt is in many cases not a valuable consideration.

Bayler v. *Commonwealth*, 40 Pa. 37; 2 Lead. Cas. Eq. part 2, p. 1606, 4th Am. ed. quoting *Wilson's Estate*, 2 Pa. 325.

In *Strausser* v. *Taylor*, 2 Luzerne Legal Rep. 314, Pershing, *P. J.*, holds that "An order by a workman to his employer to pay part or all of his wages earned, or to be earned, to a third party, who in consideration thereof supplied goods to the workman cannot be revoked after acceptance of the order by the employer."

In *Trumbower* v. *Ivey*, 2 Pa. C. C. R. 470, Yerkes, *P. J.*, holds: "An order to collect and appropriate wages to become due from any future employment may become an irrevocable assignment by an appropriation of the wages to a particular use; but it may be revoked as a power of attorney at any time before execution. As an assignment of wages to be earned in a future employment it will not be enforced by the courts."

In Pennsylvania it is settled beyond dispute that a mere expectancy, or estate to arise in the future, may be assigned. It is true it has been said that such a transfer cannot operate as an assignment at law; but it will be recognized as a transfer in equity and will be enforced in a proceeding at law.

In *Bittenbender* v. *Sunbury & Erie R. R. Co.* 40 Pa. 270, it was held that the future earnings of a railroad company are assignable; and in a number of recent cases the very question now in controversy was considered and passed upon by this court.

In the other States the decisions are in full accord with the Pennsylvania doctrine on this subject.

An assignment, for a valuable consideration, of demands having at the time no actual existence, but which rest in expectancy merely, is valid in equity, as an agreement; and it takes effect as an assignment when the demands intended to be assigned are subsequently brought into existence.

Where a person having a demand due him assigns parts of it to different persons, to secure the payment to them of specific sums, in succession, a court of equity has jurisdiction of a suit by one of the assignees to collect his part of the demand.

Where a demand against the Corporation of the City of New York is assigned, notice of the assignment given to the city comptroller is notice to the Corporation.

Payment by a debtor, of his debt, to the original creditor, after notice that the debt has been assigned, constitutes no defense to a suit brought by the assignee.

Field v. *Mayor of N. Y.* 6 N. Y. 179.

A written order, given for a valuable consideration, and addressed by a workman to his employer, requesting him to pay his wages for the ensuing three months, as they become due, to a third person, is, upon its acceptance by the employer, a good assignment of the wages, as against a subsequent attachment by the trustee process; although the workman is paid by the day and is not hired for any specified time.

Lannan v. *Smith*, 7 Gray, 50.

Evidence that an order addressed to a manufacturing corporation by a workman in their employ was received by their paymaster, and treated by him as he treated all such orders drawn on the corporation by their workmen, is competent evidence of the acceptance of this order by the corporation. *Id.*

An assignment of wages to be earned during a specified time, under an existing engagement, made in consideration of necessaries to be furnished to the assignor, if without fraud, will hold the full amount of wages specified, even if supplies to that amount have not been furnished before the service of a trustee process on the employer.

A city officer, who is chosen for a year, subject to be removed from office at any time, at the will of the mayor and aldermen, and whose salary is payable quarterly, may legally make an assignment of a quarter's salary before the quarter expires.

Brackett v. *Blake*, 7 Met. 335.

A debtor who is employed in the service of a third person may lawfully assign to one of his creditors his future earnings in such service; and if the employer thereupon agrees to pay the same to the assignee, he cannot, after the services are rendered, be charged as the trustee of the assignor in a trustee process sued out by another of his creditors.

Weed v. *Jewett*, 2 Met. 608.

Where a workman, in the employment of a manufacturing company, made an assignment of the wages then due, and which thereafter become due, to him, to a certain date, in consideration of being indebted to the assignee, and an undertaking on the part of the latter to supply the former with groceries, from time to time, as his family might need them, it was held that the assignment, in the absence of fraud, was valid and transferred to the assignee all the assignor's interest in his wages for the time specified.

Emery v. *Lawrence*, 8 Cush. 151.

"The lay or share in the profits of the voyage, which a seaman in a whaling ship receives, according to a custom, in lieu of wages, is assignable before the commencement of such voyage."

Gardner v. *Hoeg*, 18 Pick. 168.

☞An assignment of future wages, without limitation of time, will include wages earned by a laborer for nine months thereafter, under a contract then existing, by which he was to labor for his employer for an indefinite time, although his rate of wages was afterwards increased, especially if the parties have treated the assignment as applicable to such wages, and payments thereof have been made to the assignee since the rate was increased.

Boylen v. *Leonard*, 2 Allen, 407.

The court below, in commenting on *Jermyn* v. *Moffitt*, makes the mistake of applying language to that case which *Chief Justice* Mercur used in speaking of an attempt to the assignee to hold an employer who had refused to recognize the assignment.

The doctrine of *Mulhall* v. *Quinn*, 1 Gray, 105, and *Farnsworth* v. *Jackson*, 32 Maine, 419, has not been recognized in Pennsylvania. The ruling in *Jermyn* v. *Moffitt*, is quite to the contrary.

The facts found by the special verdict amount to an acceptance of the assignment by the Railroad Company.

"Where the drawees have expressly or impliedly promised the drawer to pay the check, the holder may sue if payment be refused.

When the depositor settles his accounts with the bank, and leaves the exact amount of an outstanding check expressly for its payment, and the bank tacitly retains the money, and settles on that basis, it is liable to the holder, on the implied acceptance.

Saylor v. *Bushong*, 100 Pa. 23.

"A bank is under no legal obligations to the holder of a check drawn upon it, to pay or accept the check, whether the funds of its depositor are sufficient to meet the check or not. But if the bank does not pay or accept the check on presentation, it is bound to refuse within the proper time; it has no right to receive and keep the check for an indefinite time (longer, it seems, than the next day at farthest), and then to refuse payment."

First Nat. Bank of Northumberland v. *McMichael*, 106 Pa. 460.

"A check was drawn to Cook. Barnes indorsed Cook's name withouth is authority and received the money; the bank deducted the check from the drawer's account and settled with him on that basis. Held, that Cook could recover the amount of the check from the bank. The conduct of the bank was an acceptance and bound it as a certified check would."

Seventh Nat. Bank v. *Cook*, 73 Pa. 483.

Our attention is called to the Act of May 10, 1881, P. L. 17, which reads as follows:

"That no person within this State shall be charged as an acceptor on a bill of exchange, draft or order drawn for the payment of money, exceeding $20, unless his acceptance shall be in writing, signed by himself or his lawful agent."

It is to be assumed that this Act is made for the protection of "alleged acceptors" from liability depending upon parol evidence.

An acceptor may waive the protection of the statute and make a parol acceptance; and if in pursuance of it he pays the amount of the draft or order to the payee, the drawer cannot complain and set up the statute as a reason why the acceptor should pay a second time.

We submit also that it is a grave question whether the statute applies to an assignment or letter of attorney coupled with an interest, and whether it is not to be confined to the language "bill of exchange, draft or order."

Mr. **Russell C. Stewart,** for defendant in error:

An assignment which professes to transfer a debt to arise for wages not yet earned against any person for whom the assignor may thereafter be employed, although followed by a subsequent notice to such employer, is insufficient, without acceptance, to make a valid transfer of the debt against the employer, the cases go further than this, but all agree this far.

Mulhall v. *Quinn*, 1 Gray, 105; *Herbert* v. *Bronson*, 125 Mass. 475; *Hartley* v. *Tapley*, 2 Gray, 566; *East Lewisburg Lumber etc. Co.* v. *Marsh*, 91 Pa. 96; *Field* v. *Mayor*, 6 N. Y. 169; *Ruple* v. *Bindley*, 91 Pa. 296; *Jermyn* v. *Moffitt*, 75 Pa. 400.

See also *Collins' App.* 107 Pa. 590.

The jury in this case do not find that the order was accepted by the Company. In a special verdict nothing is to be taken by implication or intendment; whatever is not found in it is supposed not to exist.

Pittsburgh etc. R. R. Co. v. *Evans*, 53 Pa. 250; *Loew* v. *Stocker*, 61 Pa. 347.

Where there is a possibility of future earnings, coupled with an interest in a contract of employment, in such case, when the earnings accrue, the courts will enforce assignments of them for the reason that the natural and legitimate fruit of the contract and work under it will be future earnings. They are the outcome of something which has tangibility, namely: the contract of employment. To a certain extent the earnings can be specified and individualized. For a long time the courts refused to uphold assignments of property to be acquired in the future; the reason being twofold:

"First, to allow such transfers would be to violate the rules against maintenance and champerty; and secondly, because there could be no valid sale unless the thing to be sold was in *rerum natura* and under the immediate control of the vendor."

The first case wherein the principle of enforcing assignments of property to be acquired in the future was thoroughly discussed seems to be that of *Holroyd* v. *Marshall*, 10 H. L. Cas. 209, which decided that as soon as the property comes into existence the assignee is entitled to have immediate specific performance of the contract to assign, and the assignor will hold it in trust for the assignee. Under this principle the cargo of a ship to be acquired on a voyage was held assignable, and the fleece of a particular flock of sheep, and even the inheritance to descend from a particular person.

However, the property must be specifically pointed out as the product of a particular ship or flock or person.

Belding v. *Read*, 3 Hurlst & C. 961.

Equity considers that as done which a chancellor would decree to be done. This presumes that a chancellor would make a decree if all the proper facts were before him; therefore in equity the element of time is eliminated from the question, but certain facts must be present before that decree can be made. The chancellor cannot supply the facts. The parties must show them to him. In this case the only facts that could have been shown to a chancellor would have been that at the time the contract was signed Woodring was working for someone else. As far as the fruits of that engagement went the chancellor would have sufficient facts before him to make a decree that McDermott was to receive the amount coming from that engagement; but when he makes a decree that McDermott is to receive money from the Lehigh Valley Railroad Company, the chancellor supplies the fact that the Lehigh Valley Railroad has come into this case.

The cogent reasons resulting from public policy, as they appear in the opinion of the lower courts in this case and in the opinion of the court in *Fairgrieves* v. *Lehigh Nav. Co.* 2 Phila. 182, to which we think it unnecessary to add anything, should influence this court in refusing to extend the operation of equity powers beyond what has been decided in the cases of *Mulhall* v. *Quinn* and *Jermyn* v. *Moffitt*, *supra*.

Per Curiam:

The learned judge committed no error in entering judgment in favor of the plaintiff below, on the special verdict. The attempt was to assign that which had no existence, either substantial or incipient. There was no foundation or contract on which an indebtedness might arise. It was the mere possibility of a subsequent acquisition of property. This is too vague and uncertain. It cannot be sustained as a valid assignment and transfer of property. *Jermyn* v. *Moffitt*, 75 Pa. 403.

Judgment affirmed.

Jacob FOLKENSON, *Plff. in Err.*,
v.
EASTON BOROUGH.

The **Act of May 24, 1878,** providing for the assessment of **damages** to property owners, occasioned **by the change of grade** of streets in boroughs, is **not retroactive** so as to give damages for injuries sustained **prior to** the **Constitution** of 1874.

(Argued March —, Decided March 21, 1887.)

JANUARY Term, 1887, No. 236, E. D. *Certiorari* to the Common Pleas of Northampton County, to review the action of the court in sustaining a demurrer to a petition for a jury to assess damages caused by a change of grade of a street in a borough and dismissing the petition. *Affirmed.*

Reported below, 2 Pa. C. C. R. 511, as *Beck* v. *Borough*.

The plaintiff presented his petition November 15, 1886, asking for a jury to assess damages caused by a change of grade of a street in 1871.

The defendant demurred and assigned for cause of demurrer to petition that it is not sufficient in law, inasmuch as it is shown by the petition that the injury complained of by reason of the change of grade was inflicted in the year 1871; and the proceedings are therefore barred by the Statute of Limitations.

The court, REEDER, *J.*, dismissed the petition and sustained the demurrer for the reasons given in the case of *Beck* v. *Borough of Bethlehem*, the opinion in which was delivered by SCHUYLER, *P. J.*, as follows:

George Beck, the plaintiff, is, and has been since the year 1868, the owner of a house and lot at the corner of Church and Linden Streets, within the corporate limits of the defendant borough. On April 12, 1886, the plaintiff presented a petition to this court, in which he complains that the proper authorities of said borough did "during the year 1872" change the grade of said Church Street, thereby causing great damage to his said house and lot, and praying for viewers to assess the damages thus sustained by him. Viewers were appointed as prayed for, and it is to their report that the present exceptions were filed by the defendant.

It will be noticed that the injury complained of was, according to the petition, committed in 1872; and there is no pretense that at that time the plaintiff had any claim for compensation that could be enforced against the defendant. But the plaintiff rests his present claim for compensation on the Act of May 24, 1878, P. L. 129, Purdon, Dig. 213, which provides that "In all cases where the proper authorities of any borough * * * have or may hereafter change the grade or lines of any street * * * thereby causing damage to the owner or owners of property abutting thereon * * * the court of common pleas * * * shall appoint viewers to estimate and determine the amount of said damages, who shall make report of the same to the next term of said court; and if no exceptions be filed within ten days thereafter, the court shall confirm the same and enter judgment thereon with costs."

Notwithstanding the ingenious argument of the learned counsel for the defendant, we are clear that this Act is retroactive. There can be but little doubt that the Act as originally framed was intended to apply to future changes of grade only, and it is more than probable that while the Act was on its passage some member of the Legislature, perhaps more concerned for his own private interests than for the rules of grammar or the rights of municipalities, caused the word "have" to be inserted before the words "or may hereafter change." But it matters not how the word found its way into the Act. It is enough that it is there, and being there the courts are bound to give it effect if possible.

Now the word "have" according to Webster, "as an auxiliary verb is used with the past participle to form preterit tenses;" and as used in the Act of 1878, it must refer to past changes of grade.

Nor do we think, as contended by the learned counsel for the defendant, that the Act as thus read is an *ex post facto* law, within the prohibition of the Constitution. "*Ex post facto* laws relate to penal and criminal proceedings." *Grim* v. *Weissenberg School Dist.* 57 Pa. 433.

A proceeding against a borough to recover damages for the change of grade of a street is neither penal nor criminal. Nor is the mere fact that an Act is retrospective any objection to it, for there is no clause, either in the Constitution of the United States or in that of this Commonwealth, which prohibits retrospective laws. *Lane* v. *Nelson*, 79 Pa. 410.

As has already been intimated, prior to the Act of 1878 the plaintiff had no remedy. It had been decided in *O'Connor* v. *Pittsburgh*, 18 Pa. 187, and was then the law, that a municipal corporation was not liable for damages occasioned by the change of grade of its streets. The law was held to be that way for purely technical reasons, to wit: that in changing the grade of its streets a municipal corporation acted as the agent of the Commonwealth; that the act was the act of the Commonwealth, and that the Commonwealth was exempt from coercion by action. The great judge who delivered the opinion of the court in this case deplored the necessity for the decision, and pronounced it "inequitable to injure the property of an individual for the benefit of the many." And in *Re Ridge Street*, 29 Pa. 395, the law as laid down in *O'Connor* v. *Pittsburgh*, was declared to be "very harsh law."

Finding the law in this unsatisfactory condition, the Legislature passed the Act of 1878, which provides not only for compensation in damages for future changes of grade, but also for past changes. It must be admitted that the retrospective feature of the Act is a bungling and reckless piece of legislation; but in principle, persons who had sustained damages before the passage of the Act were as much entitled to compensation as those who at a future day might be injured in their property. By this Act the Commonwealth submits itself and its agents to the jurisdiction of the court; and this is the full import of the Act, except that it provides a more effectual form of proceeding than a common-law action.

It is a mistake to say that the Act makes that a wrong which was right before. The exact converse is true, for the Act makes that right which was wrong before, by converting a claim which, although just and equitable, was (for technical reasons merely) utterly worthless into a claim of recognized legal obligation. That this is a legitimate exercise of legislative power will appear from the following citation: "The fact that a claim against a municipal or public corporation is not such an one as the law recognizes as of legal obligation has often been decided by courts of the highest respectability and learning to form no constitutional objection to the validity of a law imposing a tax and directing its payment * * * The cases on this subject when carefully examined seem * * * to assert the doctrine that it is competent for the Legislature to compel municipal corporations to recognize and pay debts not binding in strict law, and which for technical reasons, could not be enforced in equity, but which, nevertheless, are just and equitable in their character and involve a moral obligation. To this extent and with this limitation, the doctrine is unobjectionable in principle, and must be regarded as settled. 2 Dill. Mun. Corp. § 75.

It remains to inquire whether the plaintiff's claim is barred by the Act of 1713, known as the Limitation Act. In the discussion of this question the learned counsel on both sides seemed to take it for granted that the decision of the question would be influenced by article XVI, § 8, of the New Constitution, which provided that "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction."

As this section provides compensation solely for injuries inflicted in the future, that is after the adoption of the Constitution, it is not easy to see what bearing it can have on a claim for compensation for injuries inflicted two years before the adoption of that instrument; nor can we see that the Act of 1878 is dependent in the slightest degree for its validity on the new Constitution. If it were, the plaintiff's claim would have to fall for the reason just given. But the power of the Legislature to make laws is absolute, in the absence of constitutional restriction; and we have been referred to no restriction that limits the power of the Legislature to pass such an Act as that of 1878.

It has already been shown that the retroactive feature of that Act is not unconstitutional. As to the prospective feature of the Act it will be sufficient to refer again to *O'Connor* v. *Pittsburgh*, where *Chief Justice* Gibson, after lamenting the want of such an Act under the Constitution of 1838, uses the following language: "The constitutional provision for the case of private property taken for public use extends not to the case of proprty injured or destroyed; but it follows not that the omission may not be supplied by ordinary legislation."

After this slight digression we return to the inquiry whether the plaintiff's claim is barred by the Statute of Limitations. While this Act, strictly speaking, applies only to common-law forms of action, yet it is the cause of action rather than the form of action which determines the applicability of the statute. *Wickersham* v. *Lee*, 83 Pa. 425. "Accordingly it has been uniformly held," says Sharswood, *J.*, in *Hannum* v. *Borough of West Chester*, 63 Pa. 478, "to apply to proceedings in other courts, and before other tribunals than those of the common law, though the words of the statute are evidently confined to the latter; and this is merely by analogy, as has been sometimes inaccurately stated, but because the true spirit and interest of the statute requires that the rule should be uniform."

Further on in the same opinion the law is declared to be that "The bar of the statute is applicable, though the Legislature may provide new and special proceedings in cases, which before were remedied in the common-law forms; for it cannot be supposed that a virtual repeal of the statute was intended. The inquiry must then be, What would have been the form of action at common law, if the special tribunal and proceeding had not been adopted? If in such a proceeding there would have been a bar, it will still continue."

It is true that in *Hannum* v. *Borough of West Chester* the point decided was that the statute did not apply to the proceedings in that case, which were similar in form to the present proceedings, and like them were for the assessment of consequential damages. It has also been held that the statute does not apply to proceedings to assess railroad damages. *Delaware etc. R. R. Co.* v. *Burson*, 61 Pa. 369.

It by no means follows that the bar of the statute may not be interposed in proceedings under a retrospective Act of Assembly. Indeed, the principal vice in the plaintiff's argument is in the assumption that the Act of 1878 puts parties theretofore and thereafter injured by a change of grade on the same footing. This would be impossible. Finding nothing, therefore, in the form of the proceedings to prevent the application of the bar of the statute, let us next inquire whether there is anything in the cause of action which, as has been seen, is the true criterion that leads to such a result. To ascertain just what this cause of action is we must again recur to the Act of 1878 in connection with the undisputed facts:

In 1872 the defendant changed the grade of Church Street, thereby causing damage to the plaintiff, whose property abutted on said street. The plaintiff is thus within the purview of the retrospective features of the Act, which provides under such circumstances for a petition for viewers to "estimate and determine whether any, and if any, how much damage such property owner may have sustained, or seems likely to sustain" by such change of grade.

In *McClinton* v. *Pittsburg etc. R. Co.* 66 Pa. 409, Agnew, *J.*, speaking of such a petition as that mentioned in the Act of 1878, says: "The petition, properly used, is not for the recovery of past damages under an unlawful entry, but for compensation for a right to be invested in the company. Though the latter is often denominated damages, its subject is essentially different from the former. It is called damages only in the sense of an unliquidated demand, but in its nature it is the price of a purchased privilege."

We find the same thought in *Hannum* v. *Borough of West Chester*, applied to the proceedings for the recovery of consequential damages.

Bearing in mind the distinction here indicated, the question of the application of the Statute of Limitations in a case like the present becomes easy of solution. We now know what it is that the Act of 1878 does for the plaintiff. It does not give him an infinitude of actions by converting the defendant into a continuing *tort feasor*, but it gives him a single remedy for a single cause of action, to wit: the price of the privilege exercised by the borough in changing the grade of Church Street. If this is the limitation placed on retrospective statutes concerning the same subject matter, *a fortiori* should a retrospective statute be so construed.

Such being the nature of the plaintiff's cause of action, it falls easily within the equity of the Limitation Act of 1713. That Act begins to run when the right of action accrues. *Barton* v. *Dickens*, 48 Pa. 523; in the present case it began to run May 24, 1878, the date of the approval of the Act under which the proceedings were begun. The plaintiff, having failed to file his petition within six years from that date, is we think forever barred. As the benefit conferred by the Act was a mere gratuity, we do the plaintiff no injustice to hold that he must be considered as having waived it after so long a delay. There is nothing in this conclusion that is in conflict with *Fegley* v. *Borough*, 2 Pa. C. C. R. 505, decided in this court by my predecessor, *Judge* Meyers, the petition in that case having been filed within six years from the passage of the Act of 1878, although not until after sixteen years from the time the change of grade was made. It was in view of the decision in *Fegley* v. *Borough* that I took occasion above to speak of the Act of 1878 in its restrospective aspect as a reckless piece of legislation.

I am aware that in *Craft* v. *Borough*, 2 Pa. C. C. R. 508, the decision in *Fegley* v. *Borough*, is critised as involving a "startling proposition." But it is easier to criticise the effect of that decision than to answer the argument upon which it is made to rest. As strengthening that argument I take the liberty of referring to *Leasure* v. *Mahoning Township*, 8 Watts, 552.

Nor is the decision reached in the present case in conflict with *Knauss* v. *Borough*, decided by myself and not reported, the change of grade in that case having been made since the Act of 1878, which assimilates the case to *Hannum* v. *Borough*.

The defendant's fourth exception is that "The Statute of Limitations is a bar to this action." Some attempt was made to show that the change of grade was made later than 1872, the time mentioned in the petition; but there is no pretense that it was made after the passage of the Act of 1878. We think, therefore, that the exception is well taken; but exactly what disposition to make of it is not so clear. The Act provides that "If no exceptions be filed" to the report of viewers "within ten days" after the same is made, "the court shall confirm the same and enter judgment thereon with costs, * * * from which judgment either party shall be entitled to an appeal as in other cases."

What is to be done in case exceptions are filed and sustained, and whether the appeal provided is to the supreme court or to this court, in analogy to a writ of error *coram nobis*, are left to conjecture.

In *Rodgers* v. *Borough*, 2 Pa. C. C. R. 523, the latter view, so far as the appeal is concerned, seems to have been taken by common consent. We have no precedent, bad or otherwise, to guide us where exceptions are filed. The difficulty would be increased if the exceptions involved questions of fact. Perhaps the easiest way out of the present difficulty will be to treat the defendant's fourth exception as a plea to the jurisdiction, the want of jurisdiction appearing on the face of the proceedings.

The defendant's fourth exception is sustained and the proceedings are set aside.

The assignment of error specified the action of the court in sustaining defendant's demurrer, that the Statute of Limitations, was a bar to the proceeding and in dismissing plaintiff's petition.

Messrs. **H. S. Cavanaugh** and **H. J. Steele,** for plaintiff in error:

The Act has been given a retrospective effect by all the lower courts that have so far passed upon it.

Fegley v. *Borough*, *Craft* v. *Borough*, and *Beck* v. *Borough*, 2 Pa. C. C. R. 505, 508, 511.

There can be no doubt of the right of the Legislature to pass statutes which reach back to and change or modify the effect of prior transactions, provided that no objection to them exists, other than their retrospective character.

Grim v. *Weissenberg School Dist.* 57 Pa. 435; *Lane* v. *Nelson*, 79 Pa. 407; *Hepburn* v. *Curts*, 7 Watts, 300; *Leasure* v. *Mahoning Township*, 8 Watts, 551.

The Legislature in granting the municipal charter did not make a contract such as was contemplated by the Constitution, which could not be modified by subsequent legislation.

Cooley, Const. Lim. 334.

Granting, however, that this Act did impair the obligation of contracts, it is clearly competent for the Commonwealth to pass a retrospective law impairing her own right.

Davis v. *Dawes*, 4 Watts & S. 401.

When on the part of the government or its subordinate agents a moral obligation to relieve its citizens exists sufficient to support a promise if the same state of things existed between individuals, the Legislature has the right to recognize the obligation and to direct its discharge.

Lycoming v. *Union*, 15 Pa. 166; *Town of Guilford* v. *Cornell*, 18 Barb. 615; *New Orleans* v. *Clark*, 95 U. 644 (Bk. 24, L. ed. 521).

The Statute of Limitations can have no application to proceedings under the Act of 1878, because the injury complained of is in the nature of a nuisance, every continuance of which is a new nuisance for which a fresh action will lie; and it can only be barred by adverse possession or user for twenty-one years.

Broomall v. *City of Chester*, 1 W. N. C. 228; 3 Bl. Com. 220; *Smith* v. *Elliott*, 9 Pa. 345; *Fell* v. *Bennett*, 1 Cent. Rep. 409; *Delaware etc. Canal Co.* v. *Torrey*, 33 Pa. 149; *Whitehouse* v. *Fellows*, 10 C. B. N. S. 765; *Holmes* v. *Wilson*, 10 Ad. & Ell. 503; *Hannum* v. *West Chester*, 63 Pa. 475.

The evident object of the Act was to provide a remedy and at the same time avoid a multiplicity of suits.

Humphrey v. *Irvin*, 4 Cent. Rep. 685; *O'Connor* v. *Pittsburgh*, 18 Pa. 187.

The Statute of Limitations does not apply because a special statutory remedy, which precludes all others, has been provided for a cause of action unknown to the common law.

Wood, Limitations, §§ 29, 36, 39; *Penrose* v. *King*, 1 Yeates, 344; *Richards* v. *Bickley*, 13 Serg. & R. 395; *Summerville* v. *Holliday*, 1 Watts, 507; *Cork & Bandon R. Co.* v. *Goode*, 13 C. B. 824; *Bullard* v. *Bell*, 1 Mason, 243; *Delaware etc. R. R. Co.* v. *Burson*, 61 Pa. 369; *McClinton* v. *Pittsburgh etc. R. Co.* 66 Pa. 404; *Hannum* v. *West Chester*, 63 Pa. 475; *Council* v. *Moyamensing*, 2 Pa. 224; *Magee* v. *Commonwealth*, 46 Pa. 358.

The statute does not apply because the injury complained of was an exercise of the right of eminent domain.

A municipal corporation, invested with the right of eminent domain, being the agent of the State, was liable to damages for injuries to private property, no further than it was declared to be so in its Act of incorporation.

M'Clenachan v. *Curwin*, 3 Yeates, 362; *East Union* v. *Comrey*, 100 Pa. 362.

Prior to the Constitution of 1874 municipal corporations were held to be not liable for damages by reason of the change of grade of their streets or indeed for any consequential injury.

Philadelphia & Trenton R. R. Co. 6 Whart. 25; *Green* v. *Reading*, 9 Watts, 382; *O'Connor* v. *Pittsburgh*, 18 Pa. 187.

How, then, could the statute apply to a future remedy, the granting of which would depend entirely upon the grace of the Legislature.

Hannum v. *West Chester*, 63 Pa. 475; *McClinton* v. *Pittsburgh etc. R. Co.* 66 Pa. 410.

Mr. **Wm. Beidelman,** for defendant in error:

The reasonable and proper application of the Act of May 24, 1878, seems to be that it was intended simply to provide a remedy for the infringement of the new right created by article XVI, § 8, of the Constitution of Pennsylvania, because prior to the adoption of that instrument there existed no right of action, either at common law or by statute, for the recovery of damages inflicted by a change of grade.

New Brighton v. *United Presby. Ch.* 96 Pa. 331.

Unless the Constitution by its very terms is made retrospective, it, as well as the Act of 1878, should be given prospective effect.

Cooley, Const. Lim. 5th ed. pp. 76, 456.

What the Legislature evidently intended by the words "have changed" was any change made after the adoption of the Constitution, and before the passage of the Act of 1878. Such a construction would make the Act consistent, not only with existing laws but with common sense also.

Per Curiam:

The court committed no error in sustaining the demurrer of the defendant. It certainly was not the intention of the Act of 1878 to give damages for injuries sustained prior to the Constitution of 1874. Before this time no remedy existed whereby a recovery could be had for such injuries; and we cannot assume, from the rather careless language of the Act that its retroactive power should go back of the Constitution, upon which it is based.

Judgment affirmed.

NEW YORK.

COURT OF APPEALS.

PEOPLE of the State of New York, *Respts.*,
v.
Peter SMITH, *Appt.*

1. On a **trial for murder**, where **dying declarations** are sought to be given in evidence, the court may receive, in the presence of the jury, **preliminary proof** of the expectation of death, before deciding to admit the dying declarations.
2. **Where** the **trial court heard** the whole **statement of** the **dying declarations upon** the **preliminary issue** before it of their admissibility, and permitted a cross examination on the subject, and then decided upon their admissibility **and directed a portion** of them **to be read to** the **jury** as evidence in the case **and** ordered the **balance** to be **struck out** and instructed the jury to disregard it, *held*, that that was not first admitting erroneous proof to go to the jury and then striking it out, and that **no error was** committed.
3. *Held, further*, that the **admissibilty** of the proposed evidence was **determined** as soon as was consistent with the right of cross examination reserved to the defense.
4. Although as a general rule the trial court should confine the **preliminary examination** to the facts relating to the declarant's condition of body and mind at the time, yet the inquiry will remain in each case, under its own peculiar circumstances, how far the examination should extend in order to ascertain the mental condition and belief of the deceased.
5. **The exercise of** that **discretion by** the **trial court**, in acquiring the needed information, is **reviewable by** the **general term**, but **not by this court**, **unless** it can see that such discretion was **abused** and the action of that court arbitrary and without reason.
6. *Held, further*, that it is apparent that the **determination of** the **trial court to hear all** that the **deceased said before deciding whether any of it was admissible was not**, under the circumstances, arbitrary nor **an abuse of discretion**; and as the general term had held that the rights of the prisoner were not prejudiced, its conclusions must prevail.

(*Andrews and Peckham JJ., dissented.*)

(Decided March 1, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Court of General Sessions on conviction of defendant under indictment for murder in the first degree. *Affirmed.*

The facts appear from the dissenting opinion of Andrews, *J.*

Mr. **John O'Byrne**, with *Mr.* **Arthur C. Palmer**, for appellant:

To render a statement admissible as a dying declaration it is not enough that it appears that the person making it was under the impression that death must ultimately ensue; but it is necessary that it should appear that the person was conscious at the time that death was actually imminent.

Reg. v. *Forester*, 4 Fost. & F. 857; *S. C.* 10 Cox, C. C. 368; *Reg.* v. *Osman*, 15 Cox, C. C. 1; *Maine* v. *People*, 9 Hun, 118, 115; 1 Greenl. Ev. § 158; Roscoe, Crim. Ev. 31; *Brotherton* v. *People*, 75 N. Y. 161; *People* v. *Robinson*, 2 Park. Crim. Rep. 246; *Rex* v. *Van Butchell*, 3 Carr. & P. 629, 631; *Reg.* v. *Jenkins*, 11 Cox, C. C. 250; *Rex* v. *Fagent*, 7 Carr. & P. 238; *Rex* v. *Spilsbury*, 7 Carr. & P. 187; *Reg.* v. *Megson*, 9 Carr. & P. 418; *Welbourn's Case*, 1 East, C. L. 358; *Wilson's Case*, 1 Lewin, 78; *Re Errington*, 2 Lewin, 148; *State* v. *Medlicott*, 9 Kan. 257; *Starkey* v. *People*, 17 Ill. 20; *King* v. *Commonwealth*, 2 Va. Cas. 78, 80; *Smith* v. *State*, 9 Humph. 924; *Lewis* v. *State*, 9 Smedes & M. (Miss.) 120; *Robbins* v. *State*, 8 Ohio St. 163; *Brakefield* v. *State*, 1 Sneed, 218; *People* v. *Evans*, 4 N. Y. Crim. Rep.

But, assuming for the purpose of argument that the necessary foundation had been laid, the declaration was inadmissible in view of all that the deceased said.

The same principles of law are applicable to the contradictory statement of persons *in extremis* as to those of a witness under oath.

M'Pherson v. *State*, 9 Yerg. 279.

The evidence would not have been admissible in an action for damages.

Lambeth v. *State*, 23 Miss. 323; 1 Greenl. Ev. § 156, note 1; *People* v. *Davis*, 56 N. Y. 96; approved, 95 N. Y. 275; *Waldele* v. *N. Y. Cent. etc. R. R. Co.* 95 N. Y. 275; 19 Hun, 69; 14 Crim. Law Review, 817; 15 Crim. Law Review, 1, 70, 104; *Chapin* v. *Marlborough*, 9 Gray, 244; *Rockwell* v. *Taylor*, 41 Conn. 59; *Lubey* v. *Hudson Riv. R. R. Co.* 17 N. Y. 131; *State* v. *Davidson*, 30 Vt. 377.

When the declarations offered are merely narrative of past occurrences or relate to past transactions, they are incompetent.

1 Greenl. Ev. § 110; *People* v. *Davis*, 56 N. Y. 95; *Travelers' Ins. Co* v. *Mosley*, 8 Wall. 397 (75 U. S. bk. 19, L. ed. 437).

A dying declaration that the prisoner had two or three times attempted to kill deceased is not admissible.

Wharton, Homicide, 307; *Nelson* v. *State*, 7 Humph. 542; 1 Taylor, Ev. 542, § 530.

The courts have held that if evidence which is inadmissible is introduced, an error is committed which is not cured by striking the same out, provided the same was prejudicial to the prisoner.

People v. *Zimmerman*, Daily Reg. Sept. 14, 1886.

The evidence which found its way upon the record and was subsequently stricken out was, beyond question, prejudicial to the defendant.

It was the duty of the court to determine whether, upon the facts proved, the statement of the deceased was competent. Its decision upon that question is a matter of law and may be reviewed

1 Whart. Crim. Law, § 681; 1 Greenl. Ev. § 160; *Donnelly* v. *State*, 2 Dutch. 463, 601.

Declarations must state facts, not opinions. Stark. Ev. § 38, and note.

Messrs. **Randolph B. Martine**, *Dist. Atty.*, and **McKenzie Semple**, *Asst. Atty-Gen.*, for respondent:

The record shows that the declarations admitted in evidence as the dying declarations of John Hannon were made under a sense of impending and immediate dissolution, and without hope of recovery.

As to the question of the sufficiency of the preliminary proof, see *People* v. *Sweeney*, 4 N. Y. Crim. Rep. 275.

Finch, *J.*, delivered the opinion of the court:

We all agree in this case that no error was committed upon the trial, unless as to the single point which in the opinion of Andrews, *J.*, is deemed sufficient ground for ordering a new trial. That opinion stated fully and accurately the facts disclosed by the proofs, and shows that the killing was admitted; and the only issue that remained was whether the fatal shot was accidental or intentional. It further holds that when the admissibility of the dying declaration of Hannon was brought in question, it became the duty of the court to determine as a preliminary issue whether the alleged declarations were made by the deceased under a conviction of approaching and imminent death, and that such necessary preliminary examination might, in the discretion of the court, be conducted in the presence of the jury.

When the dying declarations of Hannon were offered by the prosecution, the defense objected, upon the ground that they were not such. The trial judge answered in substance that he could not determine that question until he knew whether or not they were made in anticipation of approaching death. The defense then claimed a right to cross examine "upon that point." The judge answered "Not just yet" and finally said, before the preliminary examination began: "When the district attorney gets the statements of the witness, you may cross examine, and I will then determine whether it comes within the rule."

At this stage of the case there seems to have been no room for a misunderstanding as to what was at the moment before the court. It was an issue of law, to be determined by the court, upon facts addressed to it, and with which the jury had nothing whatever to do.

The defense so understood it for they sought to enter at once upon a cross examination of the witness on that point. Everybody understood that the admission of any declarations of Hannon was stayed and barred until upon the examination by the prosecution and the cross examination by the defense the issue of admissibility should be tried and determined by the court. During the trial of that preliminary issue the jury stood merely [in the attitude of spectators. They had no concern with it and knew from the statement of the court that they had not. They understood that out of its result something might come before them as evidence, or nothing, and that until the judge ruled, the facts developed were for his consideration and not for theirs. The fact that their presence was not error shows that in the judgment of the law a jury must be deemed capable of that amount of discrimination at least.

And thus the trial of the preliminary issue before the court was entered upon, with the complete knowledge and understanding of all parties. The district attorney proceeded at once to the precise point and proved the statement of Hannon to his mother, that he was "going to die."

At the close of about one half of a printed page directed to the issue before the court the prosecution said: "Now we think we have laid the foundation for declarations." The judge seems not to have been entirely satisfied. The mother had given to her son the doctor's assurance that he would get well. It had produced no apparent effect at the moment, but who could tell that if the rest of the conversation occurring thereafter should be disclosed, there might not appear a hope of recovery, born of that assurance, or a spirit of hatred and revenge inconsistent with the solemn truths of statements in the presence of death?

The prosecution had obtained enough for its purpose, but the court had a duty to its own conscience, a duty not to be hasty or to be misled, and to make sure that it fully and correctly understood the frame of mind of the deceased. The learned judge, therefore, continued the examination; and at some point the district attorney apparently aided in its progress, until the witness had disclosed not a selected part but the whole of what deceased said to her during the last two days of his life. Near its close Hannon spoke of the influence of Sweeney with the police.

The prisoner's counsel asked the court: "Will you admit this," to which the judge replied: "I have not admitted anything yet; I want to hear the whole statement made by the deceased, before I determine whether I will or will not allow the alleged dying declarations in evidence."

Nothing could be plainer or more direct than this. All that had been said by the witness was thus again declared to be purely tentative and preliminary, not yet evidence in the case, and wholly directed to the enlightenment of the court in the performance of its duty. The statement, thus interrupted, was thereupon finished in a single sentence more, of about half a dozen lines.

So far, no evidence of Hannon's declarations had been admitted at all. They had been repeated for the information of the court, to enable it to perform the duty of ruling whether any (and if so what portion) of them were competent evidence to be submitted to the jury. Until some such ruling was made there could be nothing to which the prisoner could except, as constituting legal error. What followed was in some respects out of regular order. The district attorney, dropping the entire subject of the conversations with the deceased, proceeded to examine Hannon's mother, not upon the preliminary issue but upon matters relating to the main issue, and belonging to the consideration of the jury.

It would have been more regular to first finish the preliminary issue. The prisoner's counsel, however, seems to have acquiesced. He had been told that he could cross examine upon the preliminary issue, when the prosecutor had finished. That time had come and he was at liberty if he cared for the order of the proceeding to interpose and assert the right which the court had promised to give him, and ask a decision of the preliminary issue before the trial proper was resumed. He did not do so. He chose to sit silent while the added proof competent upon the main issue was being submitted to the jury.

When the district attorney closed his examination of the witness the prisoner's counsel asked three not very important questions, and then turning to the court said: "I move now to strike out all the evidence given by the witness in regard to the interview with the deceased, on the ground that it is inadmissible, for the reason that the necessary foundation has not been laid for such declarations."

This motion was singularly inapt, except for one purpose. As no declarations had yet been received in evidence there were none to strike out, and the objection was to the whole of them when some were beyond doubt admissible. If the purpose was to draw from the court the admission that they had been received, or an assent to such a claim, that purpose failed; for the court said in answer to the motion:

"As I understand the position of the matter now it is this: Mr. O'Byrne claims the right to cross examine the witness in reference to *what will be claimed by the district attorney*, as evidence of dying declarations, for the purpose of ascertaining whether it is admissible. Are you cross examining on that point?"

The prisoner's counsel replied: "I am not; I am in a general cross examination."

The answer suggested to the judge the possibility of some confusion, for he at once said: "You may enter on the record that the court will now permit the defendant's counsel to cross examine the witness, before passing upon the question of admissibility of the alleged dying declarations made by the deceased to the witness, as testified to by her."

To this the prisoner's counsel said: "We cannot be estopped by any such record as that; it is a monstrous proposition."

Why that should have been said, after what had occurred, it is difficult to say. We do not mean to criticise the counsel who bore the heavy responsibility of his client's life or misinterpret his zeal; but at least we differ from him entirely. We see in the action of the trial court a steady purpose to keep the evidence of declarations out of the case, until at a proper and suitable time it should be determined what, if any, were admissible.

The counter effort seemed to be to insist that the court stood in the position of having admitted in evidence what it is clear was never admitted at all. The cross examination then proceeded. Before it closed it reverted to the declarations of the deceased, which had been repeated to the court. The witness was asked if she recollected the interview clearly; if she thought her son was dying; why she did not send for a priest on Wednesday; what was the subject matter of deceased's conversation on Thursday, and what was the whole conversation between them.

As the witness began to repeat it the counsel suddenly closed his cross examination. The court then asked if it was finished, and receiving an affirmative answer, proceeded to determine the preliminary issue, and decide what portion of the statement of the witness to the court should be admitted, and directed the stenographer to read to the jury and he did read to them "so much and such parts thereof as are embraced within black lines;" and marked on the margin: "Allowed to stand as evidence of dying declarations," and ordered the balance to be "stricken from the evidence;" and in view of what had occurred took the added pains to caution the jury to disregard what they had heard repeated but what the court decided it would not admit.

Upon this state of facts I cannot resist the conviction that the declarations of Hannon now objected to were never admitted in evidence but wholly excluded; and that the case is not at all one in which erroneous proof was first admitted and then sought to be stricken out, but one in which no error of admission existed which required correction. It seems sufficiently evident also that any doubt on the subject and any confusion or mistake as to what was being done was steadily and persistently guarded against by the court and the admissibility of the proposed evidence determined as soon as it could be done consistently with the right of cross examination reserved to the defense.

Since there could be no valid exception to the admission of evidence which was never admitted, the only possible inquiry becomes whether the action of the court in acquiring the needed information on which to rule is itself the subject of our review. We do not see how it can be. It rests in the judicial discretion. It never goes to the jury, except so far as admitted. Some means of information the court must have. The suggestion made is that "It should have confined the preliminary examination to the facts relating to the declarant's condition of body and mind at the time."

That proposition stated as a general rule for the guidance of trial judges, in exercising their discretion, need not be doubted; but the inquiry will remain in each case, under its own peculiar circumstances, how far the examination should extend, in order to ascertain with accuracy and reasonable certainty the mental condition and belief of the declarant. The exercise of that discretion was reviewable by the general term, but is beyond our jurisdiction, unless we can see that such discretion was abused, and the action of the court arbitrary and without reason.

We cannot say that. There was a motive that might fairly have operated upon the judicial mind to push the inquiry beyond the point at which the district attorney paused, and that motive was, as we have already suggested, to ascertain whether the assurance of survival which the deceased had been told the doctors had given, became at any time so operative upon him as to awaken a hope of life. With that circumstance before it, the court might reasonably conclude that a part of what was said would scarcely furnish as safe a basis of judgment as the whole. We can readily see that the determination of the court to hear all that the deceased said before deciding whether any of it was admissible should not be deemed arbitrary or an abuse of discretion, under the existing facts.

Suppose that it had turned out, as from what appears seemed quite possible, that the very last thing said by Hannon, relating not at all to the facts of the shooting, had shown the presence of a lurking but confident hope of recovery. Singularly enough the prisoner's counsel illustrates the force of what we are saying by claiming in his able brief precisely such a result. He plants himself on the very last words of Hannon which closed the conversation with his mother, and which were about Sweeney and the police, and argues that they show a hope of recovery.

Hannon said: "I am afraid, Mother, you will get no satisfaction for your son." She replied: "Johnny, that can't be so." He answered: "I hope so, Mother, because I would like to go agin them fellows."

The counsel claims that the expression does bear somewhat upon Hannon's frame of mind, and yet, without what preceded it, its occasion and even its accurate meaning might be lost to us. It does appear to have been deemed sufficiently material by the learned trial judge to have affected his judgment; but he could not have known that in advance; and it is easy to see that it might have assumed a form which would have been very material. The hope of survival, the lingering belief that death is not inevitable, may disclose itself to an observant mind where even the witness does not see it, and may come to the surface when the talk is far away from the facts of the killing and from the *res gestæ.*

The suggestions show that the action of the court was, at least, not arbitrary and without some apparent reason; and so its discretion was not abused. The general term, which had the power to review it, has held that the rights of the prisoner were not prejudiced; and its conclusions must, therefore, prevail.

The judgment should be affirmed.

Ruger, *Ch. J.*, **Earl** and **Danforth,** *JJ.*, concur; **Andrews,** *J.*, reads dissenting opinion for reversal, in which **Peckham,** *J.*, concurs. **Rapallo,** *J.*, absent.

Andrews, *J.*, dissenting:

The defendant was jointly indicted with one Alexander Sweeney in the Court of General Sessions in the City of New York, for the murder of John Hannon, by shooting with a pistol, April of 1885. He was separately tried, and was convicted of murder in the first degree. The transaction took place at about 6 o'clock in the evening, at a shanty at the foot of Thirty-Eighth Street in the City of New York, where the deceased was employed as a watchman in the street cleaning department.

The deceased was at the time sitting or lying on a bench in the shanty, and a man named Tracy was in the room sitting by and leaning upon a table. Tracy saw Smith and Sweeney enter the door, and he pretended to be asleep. He testified that they had some conversation in a whisper, which was followed almost immediately by the report of a pistol, and they then turned and left the place. Tracy, seeing that Hannon was shot, followed the two men and pointed them out to officers who arrested them. The shooting was done on Tuesday evening. Hannon was taken the same evening to Bellevue Hospital, and died there the Saturday following. It was found that a ball had penetrated the skull over the right eye, entering the brain.

There was no controversy, on the trial, that the shot proceeded from a pistol in the hands of the defendant. The defense was that the shooting was unintentional and accidental. The testimony of the defendant, who was sworn as a witness in his own behalf, tended to support this explanation.

The theory of the prosecution was that it was a deliberate and premeditated murder, committed by Smith and Sweeney, acting in concert, from enmity, each having a grudge against the deceased. The prosecution in support of this theory, proved that Smith and Sweeney had known each other from boyhood, and were intimate friends, and were also acquaintances of the deceased. For the purpose of showing the hostility of Sweeney to the deceased, the prosecution was permitted, against the objection of the defendant's counsel, to show that a fight had occurred between them on the day before the homicide.

It was also shown by the evidence of the mother and sister of the deceased that about two years prior to the homicide an altercation took place between the defendant and the deceased, during which the former drew a pistol, and that on that occasion the defendant threatened to kill Hannon "if it is twenty years to come."

The People, further to support the indictment, offered evidence of declarations made by the deceased to his mother at the hospital on Wednesday morning, the day after the shooting, and also to his sister on Thursday morning. The principal and serious allegations of error relate to this evidence: *first*, as to whether the declarant made the declarations under a sense of impending death, within the rules governing the admission of dying declarations; and *second*, whether the court committed a legal error in permitting declarations of the deceased to be proved in the first instance not relating to the immediate circumstances of the death, and which the court subsequently ordered to be stricken out.

In respect to the first question, viz.: whether the deceased at the time of making the declarations, was in such condition of body and mind, and had such a sense of impending dissolution as to make his dying declarations admissible as such, we entertain no doubt. As the sequel proved, he had received a mortal wound. His conversation with his mother indicated that he considered his condition hopeless. He said: "Yes, Mother, I am shot. Mother will you take me home? The Bellevue people are good; they are good enough, but they can do nothing for me." The mother said "Johnny, the doctor don't say so; the doctor says you will get well."

He said: "Mother, lift me up; kiss me; kiss me, because I am going to die; the bullet that Pete Smith put in my head, it is in it, and it will fetch me, and leave you without your only son."

There was other conversation not necessary to repeat. Suffice it to say that all his statements as to his condition indicate that both on Wednesday and Thursday mornings he had a settled conviction that he was fatally wounded and that death was imminent.

It would not be profitable to go over the cases as to the preliminary proof necessary to entitle dying declarations to be given in evidence. Each case differs in its circumstances, and the cases are not all reconcilable. The rule admitting dying declarations is anomalous, and courts are strict in requiring that, before admitting them, it shall be made clearly to appear that the declarant was in fact resting under the shadow of death from the fatal stroke, and so believed, entertaining no hope of recovery.

The circumstances proved in this case bring it within the rule, according to the best considered authorities. *Reg.* v. *Reauy*, 26 L. J. M. C. 43; *Reg.* v. *Jenkins*, 11 Cox, C. C. 250; *Reg.* v. *Peel*, 2 Fost & Fin. 21; 3 Russ. Cr. 4th Eng. ed. 250 *et seq.;* 1 Greenl. Ev. chap. 9.

The more serious question arises in respect to the alleged error of the court in admitting declarations made by the deceased in relation to matters not the proper subject of proof by dying declarations.

The course of the trial upon this point, as disclosed by the record was this: the mother of the deceased, on being called and sworn as a witness for the People, was asked by the prosecuting attorney to state the conversation she had with the deceased at the hospital on Wednesday morning.

The defendant's counsel interposed an objection that it was not "in the nature of an *ante mortem*, and was inadmissible." The court replied: "I cannot determine whether it is or not, till I hear it." On the defendant's counsel repeating the objection, the court stated: "Mr. Palmer, rather than that you should interrupt at every question put to the witness, you may consider an objection and exception to every question put to to the witness."

The witness was again asked to state the conversation, when the defendant's counsel asked the court if it had decided to admit declarations of Hannon, when not in fear of imminent death, and the court replied that it had not, adding: "How do I know as yet but that they were made in anticipation of immediate death?" The defendant's counsel then asked to be permitted to cross examine the witness on that point, but the court denied his request, saying that when the district attorney got the statement of the witness the defendant's counsel could then cross examine, and the court would decide whether it came within the rule; and to this ruling an exception was taken.

The district attorney then proved by the mother the declarations of the son heretofore stated, and said: "Now I think we have laid the foundation for declarations."

The court then took up the examination of the witness, and she proceeded, in answer to the questions of the court and the district attorney, to give testimony occupying four printed pages of the case, narrating the whole conversation with her son. Much of the evidence was elicited by answers to the specific questions as to declarations having no relation to the *res gestæ* of the homicide.

After an examination of the witness, covering twenty printed pages, embracing many subjects other than the interview at the hospital, the court directed the stenographer to read to the jury from his stenographic notes a part of the evidence of the witness, pointed out by the court, of the conversation with her son, which embraced the evidence which has been detailed, showing Hannon's expectation of death, and also his declarations as to the circumstances of the murder, and directed that the further evidence of the witness, of what transpired at the interview, should be stricken out and disregarded by the jury.

The portion of the evidence directed to be read to the jury is inclosed in black lines in the error book, and occupies about a printed page of the testimony of the witness.

Following the testimony admitted is the testimony stricken out, which occupies three printed pages.

In the testimony stricken out is the following to a question by the mother: "Johnny, what did they shoot you for?" The deceased replied: "Very little cause, Mother; but Pete Smith has promised me this for a long time."

To another remark by the mother, "Johnny, how early they went down to shoot you," he replied: "That was their best chance, Mother, because the carts never came in with their first loads before 7 or half past 7 in the evening; Smith and Sweeney knew the time the loads came in, just as well as I did; they thought they would catch me alone."

The mother asked "How came Tracy to be with you, Johnny?" He answered, "Because I asked him to remain with me all night; I was afraid; I asked Tracy to stay with me; he said he would stay; I asked William Curry to remain with me the night before; he also did stay. Mother, I think I would got shot Tuesday morning only for having William Curry with me."

The mother asked, "Johnny, why do you think that?" He replied: "Because Sweeney and another man came down in the morning, between 5 and 6 I think it was."

The particulars of the interview between Sweeney and deceased on Tuesday morning, as related by the latter, were then called out by specific questions by the district attorney.

It appeared from his statement to his mother that Sweeney called the deceased out of the shanty and Sweeny said: "What talk have you had about what you can do to me and Smith?" The deceased replied, "I have no talk about what I can do to you." Sweeney then called him a liar, and on the deceased saying, "If you want any more satisfaction, I am man enough for you, if I only get fair play," Sweeney said, "We will not mind it now; we will have another time to fix this."

Further declarations of the deceased were proved, to the effect that Sweeney and Smith had relatives in the police force, who would be able to prevent the mother "getting any satisfaction for her son."

We are of opinion that the court committed a legal error under the circumstances, in permitting proof of declarations of deceased in respect to facts not coming within the class of facts which may be proved by dying declarations, and that the error was not cured by striking these declarations from the record and directing the jury to disregard them.

There is no doubt of the proposition stated by the counsel for the People that the question whether circumstances exist which make declarations admissible as dying declarations, is a preliminary fact to be determined by the court, and that it cannot be left to the jury to say whether the deceased thought he was dying or not; for that must be decided by the judge, whose decision is reviewable on error, before he permits the declarations to be given in evidence.

This was decided at a conference of all the judges of England in 1790 and has been generally accepted as the rule in this country. 3 Russ. Crimes, 4th Eng. ed. 266, and cases cited. *Donnelly* v. *State*, 2 Dutch. (N. J.) 463; 1 Whart. § 681.

It is a necessary result of this doctrine that the court must in the first instance hear the evidence bearing upon the condition of the declarant, and his sense of impending death. If on this inquiry the court determines that the circumstances justify the introduction of dying declarations, then on their being offered the question whether they relate to facts which may be proved by dying declarations, arises and is to be determined by the court in the ordinary way.

It is also well settled that dying declarations relating to transactions prior to the homicide, and not a part of the *res gestæ*, are not admissible. The rule is stated by Abbott, *Ch. J.*, in *Rex* v. *Mead*, 2 Barn. & Cres. 605, in language often quoted with approval, that "Evidence of this description is only admissible, where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration." 1 Greenl. Ev. § 156; *People* v. *Davis*, 56 N.Y. 95; *Travelers' Ins. Co.* v. *Mosley*, 8 Wall, 397 [75 U. S. bk. 19, L. ed. 437.]

The declarations of Hannon to which we have referred, which were stricken out by the court, were clearly inadmissible under the rule, and were calculated seriously to prejudice the defendant. They supplemented with great force the evidence tending to show concert, deliberation and premeditation.

We think it was the duty of the court to have confined the preliminary examination to the facts relating to the declarant's condition of mind and body at the time.

The whole examination was taken before the jury in the ordinary manner of taking testimony on the trial of an issue. It was we think the duty of the court in fairness to the prisoner, and that a discreet administration of the criminal law required the court to have called the attention of the witness on the preliminary inquiry, to the particular point to which the inquiry was directed, and not to have permitted her to testify to declarations not only irrelevant to the preliminary fact, but inadmissible on the main issue. The court not only omitted to call the attention of the witness to the point, but refused to permit the defendant's counsel to examine her on the preliminary question until after the examination by the district attorney, covering the whole interview, had been concluded. The testimony stricken out was received after all the testimony admitted bearing upon the preliminary inquiry had been elicited.

The part stricken out was evidence received subsequent to the evidence retained. It might happen that a witness, called to testify to dying declarations, might on the preliminary examination (through ignorance or want of discrimination) intermingle declarations as to the condition of the deceased with declarations relating to the crime. Such prejudice as the defendant might suffer in such a case he would have to bear as an unavoidable incident of the trial.

But that is not this case.

We think the judge erred, and that according to the suggestion of the court, made to counsel on the trial, an exception must be deemed to have been taken to the objectionable evidence; and we think it quite clear that the error was not cured by striking it from the record and instructing the jury to disregard it. *Erben* v. *Lorillard*, 19 N. Y. 299; *Linsday* v. *People*, 63 N. Y. 154; *Furst* v. *Second Ave. R. R. Co.* 72 N.Y. 542.

The judgment and conviction should therefore be reversed, and a new trial granted.

PEOPLE of the State of New York, *Respts.*, *v.* HORN SILVER MINING CO., *Appt.*

1. Chapter 542 of Laws of 1880, as amended by chapter 361 of Laws of 1881 and chapter 151 of Laws of 1882, in regard to **taxes,** are free from constitutional objection and valid.
2. A **foreign corporation,** incorporated under the laws of Utah to conduct the business of mining in that Territory, where it mined the ore and manufactured it into base bullion which it partly refined in Chicago, which does not have or carry on in this State any refining or manufacturing establishment, and only within this State delivers its bullion to the United States Assay Office, to be further refined, for a compensation, is **not engaged in manufacture within this State so as to be entitled to an exemption from taxation** under said Act of 1881.
3. Under section 3 of the Act of 1881 it is not sufficient to **exempt a corporation from taxation** that it is a manufacturing corporation, but it must also carry on manufacture within this State.
4. **The words "doing business in this State"** in such Act, do not mean the whole business of the corporation; but where the principal officers of the corporation have their offices in New York City, its directors' meetings are held and its dividends declared and paid there, and, as in this case, in addition thereto, a substantial part of the regular business of the corporation is continuously carried on there during the whole year, its silver bullion sold and the proceeds of it received there and some of it deposited or loaned and used for the purposes of the Company there, the corporation is brought within the Act as "doing business within this State."
5. In computing the taxes to be paid by the defendant in this case under the above mentioned laws, its **entire capital stock** was properly taken as the **basis of taxation.**

6. By chapter 501 of the Laws of 1885, for the first time the **basis of computing a tax** under section 3 of the Act of 1881, **to be paid by a corporation,** was fixed as the amount of capital stock employed within this State.
7. In this case, as a judgment was entered for the tax before the passage of the Act of 1885, defendant can have no **benefit from** its **provisions authorizing** the **comptroller to adjust** all **accounts against a corporation for** all **taxes** and penalties under the Act of 1881, by taking as the basis for taxation the capital employed within this State by such corporation.
8. The defendant in this case was liable to the **penalties** imposed by section 2 of the Act of 1881, **for neglecting to pay** the **taxes** within the time specified therein.

(Decided March 15, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Third Department, affirming a judgment entered in Albany County on report of a referee in favor of plaintiffs in an action to recover taxes and penalties under the Act of 1880, chapter 542, and supplements thereto. *Affirmed.*

Reported below, 38 Hun, 276.

The facts and questions raised appear from the opinion.

Messrs. **Julien T. Davies** and **Edward Lyman Short,** for appellant:

The defendant was not, during the years ending November 1, 1881, and November 1, 1882, doing business within the State of New York, within the meaning of the statute, and hence is not liable to taxation under the Acts in question.

People v. *Equitable Trust Co.* 96 N. Y. 387; *People* v. *Commissioners*, 59 N. Y. 40; *Parker Mills* v. *Commissioners*, 23 N. Y. 242; *Doty* v. *Mich. Cent. R. R. Co.* 8 Abb. Pr. 427; *Smyth* v. *Internat. Life Asso. Co.* 4 Abb. N. S. 11.

If the defendant was, during the years ending November 1, 1881, and November 1, 1882, "Doing business within this State," then such business constituted a carrying on of manufacture within this State, and the Horn Silver Mining Company was a manufacturing corporation carrying on manufacture within this State within the meaning of Laws of 1880, chap. 542, § 3, as amended by Laws of 1881, chap. 361, § 3, and was not liable to taxation under the provisions of these statutes.

In other statutes of this State and others, and in England, and in the language of various legal instruments, the terms "manufacturing" and "manufacture" have been applied to processes and products similar to those of the defendant.

Briggs v. *Tillotson*, 8 Johns. 304; Laws 1811, chap. 67; Laws 1816, chaps. 58, 67; R. S. pt. 1, chap. 13; *People* v. *Holdridge*, 4 Lans. 511; *Rogers* v. *Danforth*, 9 N. J. Eq. 289; *Schriefer* v. *Wood*, 5 Blatchf. 137, 215; *Furniss* v. *Midland R. Co.* L. R. 6 Eq. Cas. 473; *Queen* v. *London & G. R. Co.* 3 Q. B. 166; *Crane* v. *Price*, 4 Man. & G. 580; Laws 1849, p. 563, § 1; Swan & Sayler's Supp. to R. S. Ohio, p. 758; *Commonwealth* v. *Pa. Coal Co.* 2 Pears. 404; *Internat. Nav. Co.* v. *Commonwealth*, 13 W. N. C. 481; 92 N. Y. 487; *Holden* v. *Clancy*, 58 Barb. 590; *King* v. *Wheeler*, 2 Barn. & Ald. 350; *People* v. *Knickerbocker Ice Co.* 32 Hun, 475; *Dudley* v. *Jamaica Pond Aqueduct Co.* 100 Mass. 183; *State* v. *Chadbourn*, 80 N. C. 479.

The defendant carries on manufacture within the State of New York. The defendant deposited its silver bullion in the assay office for the purpose of completing the process of manufacturing the ore into standard bars. This process is spoken of in the Revised Statutes of the United States as a "manufacture" of bars. See § 3553.

The defendant sells its silver on the street by transferring the receipts of the assay office after the silver bars have been completely manufactured into standard bars.

Gillman v. *State*, 55 Ala. 248; *Ex parte Smith*, 2 Pugsley (N. B.) 147.

If any tax was due from the Horn Silver Mining Company in January, 1883, the basis of such tax was only the capital employed within this State.

A close analysis of section 1, chap. 361, Laws 1881, in connection with section 11, chap. 151, Laws 1882, shows that subsequent to the passage of the second Act, the law was that the capital employed within this State was to be the basis of taxation, and section 11 of chapter 151 provided for a method by which the comptroller could initiate and carry out a revision of the amount of this capital in case of his dissatisfaction with a company's report.

If the State did not intend to take as a basis of taxation the capital employed within the State, there is no object either in a corporation making a return of the capital employed within the State, or in the comptroller's having the power to revise such a return. The Act of 1882 was not before the court in *People* v. *Equitable Trust Co.* 96 N. Y. 387.

The Pennsylvania courts have construed their statutes to fix as the basis of the tax the capital employed in that State; and it may be said to be common learning that under such circumstances the New York Legislature must have adopted within the statute the judicial construction already given to it in the State of its origin.

Skouten v. *Wood*, 57 Mo. 380; *Skrainka* v. *Allen*, 76 Mo. 384; *Commonwealth* v. *Hartnett*, 69 Mass. 451.

To measure the taxation of the business of a foreign corporation or of the franchise of a domestic corporation by the capital employed within the State is consistent with equity and the established policy of this State.

People, Bay State Co. v. *McLean*, 80 N. Y. 259; *Ohio etc. R. R. Co.* v. *Weber*, 96 Ill. 448; *State Treasurer* v. *Auditor-Gen.* 46 Mich. 226; Bishop, Written Laws, § 141; Maxwell, p. 119; *Stetson* v. *City Bank N. O.* 2 Ohio St. 174; *Woodard* v. *Michigan etc. R. R. Co.* 10 Ohio St. 122.

The subsequent Act of 1885, chap. 501, determines clearly that the Acts of 1880 and 1881, as amended by the Statute of 1882, establish as a basis for taxation the amount of capital employed within this State.

Mr. **D. O'Brien,** *Atty-Gen.*, for respondents:

The defendant while doing business within this State is not exempted from taxation as a manufacturing corporation carrying on manufacture within this State.

Laws 1880, chap. 542, § 3, as amended by Laws 1881, chap. 361, § 1; *Byers* v. *Franklin Coal Co.* 106 Mass. 131; *Dudley* v. *Jamaica Pond Aqueduct Corp.* 100 Mass. 183; *Frazee* v. *Moffitt*, 20 Blatchf. 267; *People* v. *Knickerbocker Ice Co.* 32 Hun, 475; affirmed in 99 N. Y. 181.

The method by which the tax was computed by the comptroller was correct.

96 N. Y. 387, 397.

Earl, *J.*, delivered the opinion of the court:

This action was commenced to recover certain taxes claimed to be due from the defendant under chapter 542 of the Laws of 1880, as amended by chapter 361 of the Laws of 1881, and chapter 151 of the Laws of 1882.

The plaintiffs claim in their complaint that there was due January 1, 1882, from the defendant the sum of $7,500, being the tax at the rate of 1½ mills of each dollar of valuation of its capital stock at $5,000,000; and also $1,500, as a penalty for neglect or refusal to pay the tax for two years.

They also claim that there was due January 1, 1883, from the defendants the sum of $30,000, being a tax at the rate of one quarter of a mill for each 1 per centum of dividends declared during the year ending November 1, 1882, upon $10,000,000, the par value of defendant's capital stock, the dividends declared being 12 per centum; and also $3,000 as a penalty for neglect or refusal to pay the tax within fifteen days from January 1, 1883.

The defendant is a foreign corporation, incorporated under the laws of the Territory of Utah. The plaintiffs recovered the amount of taxes and penalties claimed, and the defendant complains of the recovery, upon several grounds which will be separately considered:

The constitutional objections to the Acts under which these taxes were imposed have been sufficiently considered in prior decisions of this court, and the Acts must now be regarded as free from constitutional objection and therefore valid. *People* v. *Home Ins. Co.* 72 N. Y. 328; *People* v. *Equitable Trust Co.* 96 N. Y. 387; *People* v. *Gold etc. Telegraph Co.* 98 N. Y. 67.

We have now, therefore, only to construe the Acts and apply them to the facts of this case.

First. The defendant claims that it was "a manufacturing corporation carrying on manufacture within this State," and therefore not liable to taxation under section 3 of the Act of 1881, which excepts such corporations from taxation under that Act. As appears from its articles of association, the defendant was organized to conduct the business of mining in Utah Territory, of the buying, selling, leasing and operating mines and mining claims in that Territory, and smelting, reducing and refining works there or elsewhere; of conducting a general mining, milling and smelting business, in all its branches, including buying and selling mineral ores and bullion, carrying on a general mercantile business by buying and selling such goods, merchandise, stores and miners' supplies as are usually kept in and required by the wants of a mining camp or settlement; of the building and operating all such roads, tramways and transportation routes as may be convenient in transporting the products of its business or procuring supplies; of purchasing, hiring and holding all such real and personal property wherever situate, as may be required in carrying on any of its business, and, when no longer required for business purposes, leasing, selling or exchanging the same; and generally to do all acts and things incidental to a general mining business, or to any of the specified pursuits, the corporation being primarily formed for the immediate purpose of working and developing the estate, property and premises known as the Horn Silver Mine, and for the treatment and reduction of the ores and metals therein contained.

The business of the defendant in Utah consisted in mining the ore and manufacturing it into base bullion. The bullion was then shipped to Chicago, where it had a refinery in which the lead was smelted from the base bullion and separated from the silver. The bullion thus refined was then shipped to the City of New York where it was delivered to the United States Assay office, where it was still further refined into standard silver bars, for doing which the defendant paid 2 per cent of the silver. It generally sold the receipts issued for the silver by the assay office in the City of New York; and so much of the proceeds as were not sold there were transmitted to Utah and Chicago for use in the business of the Company at those points. It did not have or carry on within this State any refining or manufacturing establishment: and its claim to be a manufacturing corporation carrying on manufacture within this State is based solely upon the fact that it delivered its bullion to the assay office to be further refined, for a compensation to be paid by it.

Upon these facts the referee found that it was not engaged in the manufacture within this State, and we are of the same opinion. As its name implies, it is a mining corporation, and was organized primarily for that purpose; and all its other business was incidental, connected with and related to that. But even if it could, in any proper sense, according to the common understanding of the phrase used in this statute, be deemed a manufacturing corporation in Utah, yet it cannot with any propriety be said that it carried on manufacture within this State. According to common comprehension and the ordinary use of language, the process of refining this bullion at the assay office was not a manufacture, and the assay office was not a manufacturing establishment. But whether it was or not, the defendant, which employed the assay office for a compensation to refine the bullion, was not itself engaged in the manufacture. It was no more a manufacturer than a farmer is who takes his grain to the grist mill to be ground into flour, for a part of the grain or a money compensation, or who takes his wool to a cloth manufacturer to be made into cloth for a compensation, and then to be returned to him. A railroad company may manufacture all its cars and engines, and yet it cannot be properly classified as a manufacturing company.

The definition of the terms "manufacturing corporations" and "manufacture," as derived from some decisions and statutes to which our attention has been called, is of little service in the construction of the language of this Act. These terms must be construed in view of the general purposes of the Acts in which they are used, and the general phraseology found in connection with them. To give effect to the legislative intention, their ordinary meaning may be enlarged or restricted. Under this section it is not sufficient (to exempt a corporation from taxation) that it is a manufacturing corporation, but it must also carry on manufacture within this State.

In exempting such corporations from taxation under the Act, the Legislature may be supposed to have been influenced by two things: a desire to encourage manufacture within the State, and the fact that a corporation carrying on any manufacturing business within the State would necessarily have visible, tangible property, liable under the general laws of the State to taxation. We are, therefore, constrained to hold that the defendant cannot be allowed the exemption claimed.

Second. It is claimed that the defendant was not during the years 1881 and 1882 "doing business in this State," and that therefore it was not liable to taxation under the Act of 1881. It is quite true that by far the larger share of its business was carried on in Utah and at Chicago. But its president, secretary and treasurer had their offices in New York; the directors held their annual meetings there; its dividends were declared and paid there; its silver bullion was all sent there and sold there, and the proceeds of it received there; some of the proceeds were deposited in banks, some loaned in the City of New York, and some of it used for the purposes of the Company in that city, and the balance was transferred to Chicago and Utah for use in the business of the Company.

There was thus a very substantial portion of its business done in the City of New York. The business did not consist of occasional transactions; but an office was kept there and the business continuously transacted there during the whole year. We cannot construe the words "doing business in this State" to mean the whole business of the Corporation within this State; and while we are not prepared to hold that an occasional business transaction—that keeping an office where meetings of the directors are held, transfer books kept, dividends declared and paid and other business merely incidental to the regular business of the corporation is done,—would bring a corporation within this Act; yet when, as in this case, all these things are done and in addition thereto a substantial part of the regular business of the Corporation is carried on here, then we are unable to say that the Corporation is not brought within the Act as one "doing business in this State."

There is no injustice in subjecting to taxation such a corporation enjoying the benefits of our great mart, the advantages of our social order and the protection of our laws.

Third. It is further claimed that in computing the taxes only, only the amount of defendant's capital employed within this State should have been taken as the basis, and not its entire capital. We do not perceive how it is possible to limit the computation of the taxes as thus claimed.

Section 1 of the Act of 1881 provides that hereafter it shall be the duty of the president and treasurer of every corporation liable to be taxed on its corporate franchises or business to make report to the comptroller annually, in writing, stating specifically the amount of "capital" paid in; that in all cases where any such corporation shall fail to make or declare any dividend upon either its "common or preferred stock," or in case the dividend or dividends made or declared upon either its "common or preferred stock" during the year shall amount to less than 6 per centum upon the par value of the "stock," the treasurer and secretary thereof shall in each year in which no dividend has been made or declared, or in which the dividend made or declared upon either its "common or preferred stock" amounted to less than 6 per centum upon the par value of the "stock," estimate and appraise the "capital stock" of the company upon which no dividend has been made or declared, or upon the par value of which the dividend or dividends made or declared amounted to less than 6 per centum, at its actual value in cash, and shall forward a certificate thereof to the comptroller.

Section 3 provides that every corporation incorporated under any law of this State, or under the laws of any other State or country and doing business in this State, except savings institutions and other corporations named, shall be subject to and pay a tax upon its corporate franchise or business, to be computed as follows: if the dividend or dividends made or declared by such corporation, joint stock company or association during any year amount to 6 or more than 6 per centum upon the par value of "its capital stock," then the tax to be at the rate of one quarter mill upon the "capital stock" for each 1 per centum of dividends so made or declared, or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to 6 per centum upon the par value of "the capital stock," then the tax to be at the rate of 1½ mills upon each dollar of a valuation of "the capital stock," made in accordance with the provisions of the first section of the Act. And in case any such corporation, joint stock company or association, shall have more than one kind of "capital stock," as for instance "common and preferred stock," and upon one of said stocks a dividend or dividends amounting to 6 or more than 6 per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared, or the dividends made or declared amounted to less than 6 per centum upon the par value thereof, then the tax shall be at the rate of one quarter mill for each one per centum of dividend made or declared "upon the capital stock," upon the par value of which the dividend or dividends made or declared amount to 6 or more than 6 per centum; and in addition thereto, a tax shall be charged at the rate of 1½ mills upon each dollar of a valuation, made also in accordance with the provisions of the Act, of "the capital stock" upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to 6 per centum.

It is very clear from this review of the two sections that the whole capital stock—the same stock upon which dividends are declared and paid is to be taken as the basis of taxation. And so we held in *People* v. *Equitable Trust Co.* 96 N. Y. 387, where we said that "We find no authority in this case for apportioning a tax upon such a corporation as this upon the amount of dividends earned in this State, or upon the amount of capital stock employed in this State."

But it is claimed that since the Act of 1882 a different construction should be given to the Act of 1881. The Act of 1882 did not amend any of the sections of the Act of 1881, but added thereto three sections, the first of which, section 11, it is important only to notice. That provides that when the comptroller is dissatisfied with the report of any corporation or association or joint stock company liable to pay a tax under any of the provisions of the Act, whose capital is only partially employed in this State, he is authorized to fix and determine the amount of capital stock which in his judgment shall be the basis for the tax under the provisions of the Act, and to settle an account for the taxes, penalties and interest due the State thereon; and any association, corporation or joint stock company dissatisfied with the account so settled, may, within ten days after notice thereof, appeal therefrom to a board, consisting of the secretary of state, attorney-general and state treasurer; which board on such appeal shall affirm or correct the account so settled by the comptroller, and the decision of such board shall be final.

Under the Act of 1881, it was the duty of every corporation liable to taxation under that Act, annually to make a report to the comptroller stating specifically the amount of its entire capital paid in and the amount and rate of per cent of each dividend declared during the year; and in case it had declared no dividend during the year, or a dividend of less than 6 per centum upon the par value of its stock, it was also required to send a verified estimate and appraisal of its capital stock to the comptroller, and it was provided that if the comptroller was not satisfied with the valuation so made and returned, he could make a valuation thereof and settle an account upon a valuation made by him for the taxes, penalties and interest due the State thereon; and it was further provided that if the corporation was dissatisfied with the account so settled it could appeal to a board consisting of the secretary of state, attorney-general, and state treasurer; which board on such appeal could affirm or correct the account as settled by the comptroller, and the decision of such board was final. Under that Act the whole capital stock was to be reported and in the cases provided the whole capital stock was to be estimated and appraised, and all the clear and express provisions in the Act of 1881 are left unrepealed.

Now what was meant by section 11 in the Act of 1882? It does not authorize the corporation, in making the report required by the first section of the Act of 1881, to report only the amount of its capital employed within this State; and it does not require the comptroller to take the amount of capital so employed as the basis of taxation. The utmost effect that can be given to it is to authorize the comptroller when he shall ascertain that only a portion of the capital of a corporation is employed within this State to fix and determine the amount of capital stock which in his judgment shall be the basis of the tax under the provisions of the Act. That was an authority which he did not have under the Act of 1881. Under that Act he had no right to review the report of the corporation as to the amount of its capital stock, but under the Act of 1882 in all cases where a portion only of the capital stock of the corporation is employed within this State; he has a right to review the report and determine the amount of the capital stock which shall be used as a basis for the tax.

There is another qualification to section 11, and that is before the comptroller can be called upon to exercise his judgment and discretion he must be dissatisfied with the report of the corporation. Here there was no dissatisfaction on the part of the comptroller; and hence the emergency which authorized him to exercise his judgment, in fixing and determining the amount of capital stock which is to be taken as the basis for the tax had not arisen. That this is a proper construction of section 11 of the Act of 1882 is made more clear by reference to chapter 501 of the Laws of 1885.

In that Act section 11 is amended so as to provide in distinct terms that the amount of capital stock which shall be the basis for taxation under the provisions of section 3 of the Act of 1881, in the case of every corporation, joint stock company and association liable to taxation thereunder, "shall be the amount of capital stock employed within this State." Then, for the first time the basis for computing the tax was actually fixed by law, at the amount of capital stock employed within this State; and the discretion conferred upon the comptroller by the same section in the Act of 1882 was taken away.

Therefore, while it is extremely hard and unjust that the defendant should be required to pay a tax computed upon the basis of its entire capital stock, we are unable so to construe the statute as to relieve it therefrom.

The injustice of such a basis of taxation has finally been recognized by the Legislature; and it is quite unfortunate for the defendant that it is deprived of the benefit of this change, particularly as by the fourteenth section of the Act of 1885 the comptroller was authorized and directed, upon the application to him of any corporation, to make, settle and adjust all accounts against such corporation, joint stock company or association, for all taxes and penalties arising under the third section of the Act of 1881 since the 12th day of May, 1882, by taking as a basis for taxation the capital employed within the State by such corporation, association or joint stock company.

But there was a further provision in section 14 that such corporation, joint stock company or association should not be entitled to the benefit of a settlement upon such basis unless it shall have secured such adjustment and paid into the treasury the full amount of the taxes so settled before the first day of August, 1885, nor in the case of any tax for which suit had theretofore been brought by the attorney-general and for which judgment had been entered therein.

As judgment was entered in this action before the passage of that Act the defendant can have no benefit from its provisions.

Fourth. We see no reason to doubt that the defendant was liable to the penalties imposed by section 2 of the Act of 1881, for neglecting to pay the taxes within the time specified therein.

We are reluctantly brought to the conclusion that the judgment below cannot be reversed. If it be true that, as against all other corporations but this defendant and two or three others, the taxes have been computed upon the basis of the capital employed in this State, then the defendant has good reason to complain of unjust discrimination; and it may very properly appeal to the Legislature for the relief which it has failed to obtain elsewhere. A great State can afford to be both just and magnanimous; and it is certainly against a sound public policy to treat with injustice foreign corporations who come to our great metropolis to transact their business and thus add to the prosperity, wealth and importance of our State.

Our conclusion is that *the judgment should be affirmed, with costs.*

All concur, except **Peckham,** *J.*, dissenting, and **Rapallo,** *J.*, not voting.

William J. SYMS *et al.*, Exrs., *Appts.*,
v.
MAYOR, Aldermen and Commonalty of the City OF NEW YORK, *Respt.*

1. A **lease** executed by the City of New York in 1810, demising lands for a term of thirty years, containing an agreement that the City, at the expiration of the term, to wit: in 1840, would demise the premises to the lessee, his assigns, etc., for the term of twenty-one years thereafter, **with** a like **covenant for future renewals,** should **not** be so construed as to **create a perpetuity.**
2. Its **language** is satisfied by holding that it **gave** the lessee the right to **two renewals.**
3. A **practical construction given** to such **lease** by two renewals signed **by both parties,** the latter of which provided for the surrender of the premises, is **entitled to great weight** in ascertaining its **meaning** and **effect.**
4. Where there is no proof of any mistake or fraud in the execution of **leases** or in the terms inserted in them, there is no **basis for** their **reformation.**
5. Under section 3246 of the Code, in an **action** brought **by an executor** in his representative capacity, **costs** may be awarded against him as executor.
6. Where, upon **appeals to** the **general term** from an order denying a motion for a new trial, and also from the judgment in a suit, the general term affirms both the order and the judgment and awards costs upon the appeal from the judgment, it has no power to award **costs upon** the **appeal from** the **order;** but such error should be corrected in that court.
7. A **judgment for costs against** an **executor in** his **representative capacity, should not contain a provision that execution issue** for such costs; the judgment could only be enforced by execution when allowed by the surrogate, as provided in sections 1825 and 1826 of the Code.
8. Any such informality in the judgment should have been corrected by motion; and if the party failed upon such motion in a matter affecting a substantial right, not resting in discretion, he could reach this court by an appeal from the order denying the motion. **This court will not correct** such **informalities upon** a mere **appeal from** the **judgment.**

(Decided March 22, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming an order denying a motion for a new trial, and a judgment upon a verdict directed for plaintiff in an action to reform a lease by inserting a covenant for renewal. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **H. Brewster,** for appellants:

A renewal lease is a continuation of the original lease; and even where there is no positive covenant for the renewal, but the renewals are given in like cases, the lessee in possession has a valuable interest which a court of equity will protect.

Phyfe v. *Wardell,* 5 Paige, 279; McAdam, Land. & T. 258; Woodfall, Land. & T. 329.

The right of renewal was a continuing right.

Moss v. *Barton,* 35 Beav. 197.

Where there was a lease for twenty-one years, with a covenant to renew on the request of the lessee from twenty-one to twenty-one years to make up ninety-nine years and at the expiration of the first term, rent being in arrears and no application being made for renewal, ejectment was brought and the lessor put in possession; on a bill in chancery for a renewal, a renewal was decreed on payment of the rent, the lessor not having been prejudiced by the neglect to demand the renewal.

Rawstorne v. *Bentley,* 4 Bro. Ch. 415; *Statham* v. *Trustees Liverpool Docks,* 3 Younge & J. Ch. 565; *Hunter* v. *Hopetoun,* 13 L. T. N. S. 180; *Phyfe* v. *Wardell,* 5 Paige, 279.

The covenant to renew was an independent one; and it was the duty of the lessor to offer the renewal, whether the lessee asked for it or not. Time was in no sense of the essence of the contract. There was no condition precedent for the lessee to perform; and while he remained in possession under renewals he had a right to rely upon the covenant that they should be continued, and had no cause for complaint, and was not bound to bring his action until he learned that the lessor had, by a conveyance, placed it out of his power to further perform the covenant for renewals.

Nicholson v. *Smith,* L. R. 22 Ch. Div. 640; *Johnson* v. *Conger,* 14 Abb. Pr. 195; 1 Platt, Leases, 614, 713, 731, 744; *Bridges* v. *Hitchcock,* 5 Bro. P. C. 6; *Maynie* v. *Scot*, Cro. Eliz. 479; *Richardson* v. *Sydenham*, 2 Vern. 447; *Brook* v. *Bulkeley*, 2 Ves. 498.

Again; it is a rule in equity that the court will consider done those things which should have been done, and therefore will construe the covenants contained in the latter leases as containing the same provisions as those required in the first one.

Story, Eq. Jur. § 64.

The court below erred in awarding costs against the plaintiffs personally, and also in awarding execution against them. The suit was brought by them as executors; and an execution could only issue by order of the surrogate, and against the property of the deceased. There was no claim of mismanagement or bad faith against them.

Code Civ. Proc. § 3246.

The court below erred in awarding costs on the appeal from the judgment, and also separate costs on the appeal from the order denying the motion for a new trial. This is expressly prohibited by subdivision 2 of section 3239 of the Code of Civil Procedure.

Stanton v. *King*, 76 N. Y. 585.

Mr. **D. J. Dean**, with *Mr.* **E. Henry Lacombe**, for respondent:

The court should not reform the leases to conform to plaintiffs' prayer for relief.

Courts lean against such a construction of leases as will lead to perpetuities. They should not be astute to reform them so as to lead to the same result.

Carr v. *Ellison*, 20 Wend. 178; *Banker* v. *Brakes*, 9 Abb. N. C. 412; *Piggot* v. *Mason*, 1 Paige, 412; *Rutgers* v. *Hunter*, 6 Johns. Ch. 215; *Hyde* v. *Skinner*, 2 P. Wms. 196.

There is no evidence before the court which will warrant the reformation of either of the leases in question.

The evidence must show that there was a mutual mistake, and that the instrument does not contain some covenant or condition, which the parties supposed that it did contain; or the evidence must establish fraud by one of the parties, by which the other party was deceived and led into a mistake. Before any reformation of a written instrument can be had upon parol evidence of mistake or fraud, such evidence must be very clear and satisfactory.

Albany Sav. Inst. v. *Burdick*, 87 N. Y. 40. See also *Mead* v. *Westchester Fire Ins. Co.* 64 N. Y. 455; *Nevius* v. *Dunlap*, 33 N. Y. 680; Story, Eq. Jur. 155–177; *Lyman* v. *Utica Ins. Co.** 17 Johns. 373; *Moran* v. *McLarty*, 75 N. Y. 28.

Earl, *J.*, delivered the opinion of the court:

On the 10th day of April, 1810, the City of New York executed to Peter Lorillard a lease demising to him certain premises for a term of thirty years ending on the first day of May, 1840. The lease was executed by both parties, and in it the City agreed that at the expiration of the term, to wit: May 1, 1840, it would demise the premises to him, his assigns, etc., "for and during the term of twenty-one years thereafter, with a like covenant for future renewals of the lease as is contained in this present indenture."

On February 1, 1839, Lorillard assigned the lease to John Syms, who thus became substituted in his place. On the first day of April, 1840, the City executed a lease of the same premises to John Syms for another term of twenty-one years in which it covenanted that at the expiration of that lease, to wit: May 1, 1861, it would again demise the premises "in pursuance of this present lease * * * for and during the term of twenty-one years thereafter upon such rents as shall be agreed upon," or determined by two sworn appraisers and an umpire.

On the 20th of April, 1861, the City executed a third lease to John Syms for twenty-one years from May 1, 1861. That lease contained no covenant for renewal, and in it Syms covenanted that at the end of that term he would peaceably and quietly leave, surrender and yield up to the City or its successors or assigns all of the demised premises. Syms died in 1868, having some years before his death erected a valuable building upon the premises.

In April, 1880, the City sold the premises to John B. Haskin. Thereafter, in October, 1880, the plaintiffs, as executors of Syms, commenced this action, alleging in their complaint, among other things, the facts hereinbefore stated, and praying that the City be adjudged to reform the leases dated April 1, 1840, and April 20, 1861, by inserting therein a covenant for a further renewal of twenty-one years from May 1, 1882, and that the sale and conveyance to Haskin be set aside, and the plaintiffs be given a renewal lease for twenty-one years from May 1, 1882, or if the defendant had put it out of its power to perform the covenant by having sold the premises, that it and Haskin be adjudged to pay the plaintiffs their damages by them sustained for the conversion of the building on the premises to their own use, and for damages by depriving the plaintiffs of a further renewal of the lease of the demised premises to the amount of $18,000.

Upon the trial, at the close of the evidence, the court directed a verdict in favor of the defendant.

We are of opinion that the verdict was properly directed. The lease executed in 1810 should not be so construed as to create a perpetuity. *Rutgers* v. *Hunter*, 6 Johns. Ch. 215; *Carr* v. *Ellison*, 20 Wend. 178; *Piggot* v. *Mason*, 1 Paige, 412; *Banker* v. *Braker*, 9 Abb. N. C. 411.

Its language is satisfied by holding that it gave the lessee the right to two renewals, and those renewals were subsequently given; and it must be assumed that the parties so understood the first lease. The two renewals signed by both parties gave that lease a practical construction which should have great weight with any court called upon to ascertain its meaning and effect.

But the second lease executed in 1840, which then defined the rights of the parties, contained a covenant for but one renewal. In the last lease there was no covenant for renewal; and in that lease the lessee absolutely covenanted at the end of his term to surrender up the premises to the lessor. So long as that lease remained in its present form, neither the lessee nor any person claiming under him could assert any right to the premises after its termination. It defines the precise rights of the parties in the demised premises, and neither could assert anything in contravention of it.

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*See note to this case, Lawyers' edition. [Ed.]

This action was brought mainly for the purpose of reforming the last two leases. But there was no proof of any mistake or fraud in their execution or in the terms inserted in them; and therefore, even if the Statute of Limitations did not furnish a bar to the action to reform the leases, there was no basis or ground for their reformation. The plaintiffs' action, therefore, utterly failed; and a verdict was properly directed for the defendant.

The judgment entered upon the verdict provides that the defendant should recover costs of the plaintiffs and have execution therefor. At the general term it was also adjudged that the City should recover of the plaintiffs, as executors, its costs, and should have execution therefor. The plaintiffs now complain of this provision for costs, and cite section 3246 of the Code. That section expressly authorizes costs against them as executors. The court did not direct them to pay the costs personally; but the judgment for costs is against them in their representative capacity.

After a verdict had been directed for the defendant, the plaintiffs moved for a new trial upon the judge's minutes, which was denied, and after entry of judgment they appealed to the general term, both from the order denying their motion for a new trial and from the judgment; and at the general term both the order and judgment were affirmed, and the court awarded against the plaintiffs, not only costs upon the appeal from the judgment, but also $10 costs upon the appeal from the order. Having awarded costs upon the appeal from the judgment, the court had no power to award costs upon the appeal from the order. Code, § 3239, subd. 2.

It is a small matter and should have been corrected in the court below, and we have no means of knowing that it was not corrected in the judgment finally entered.

The judgments in the court below should not have contained the provisions that the defendant should have executions for its costs. The judgments for costs could be enforced by executions only in case they were allowed by the surrogate, as provided in sections 1825 and 1826 of the Code. But this is an innocuous informality. Any informality in the judgment should have been corrected by motion; and if the plaintiffs failed upon such motion, in a matter affecting a substantial right, not resting in discretion, they could have reached this court by an appeal from the order denying their motion. We do not correct such informalities upon a mere appeal from the judgment.

The judgment should, therefore, be affirmed, with costs against the plaintiffs as executors.

All concur.

PEOPLE of the State of New York, *Respts.*,
v.
Eucebia FITZGERALD, *Appt.*

1. The **statute against body stealing** (Penal Code, § 311) **does not apply to exhumations** made **by** legally constituted **public authorities** for the purpose of **ascertaining** whether a crime had been committed in producing the death of the person whose body is exhumed.
2. Where the **exhumation** is made, not secretly, but publicly, **on open application to** the **officer of justice** charged with the duty of inquiring into the cause of such death, the statute cannot be used to impose punishment upon the persons concerned in the exhumation, in case any **proceedings** of the officer under whose direction it was made are found to be **irregular.**
3. It is debatable whether a **post mortem examination** should be made before the coroner has empaneled a jury; but it should not be made in the presence of the jury. The dissection by order of the coroner is expressly authorized. Penal Code, § 308.
4. Where the affidavits furnished by the defendant to the coroner made a strong case to lead the latter to believe that a murder had been committed and that an examination of the body, which was within his jurisdiction, would disclose the fact, and **defendant sought** such **examination and asked** the **coroner to make it,** although her motive was not the punishment of crime but some **pecuniary advantage** for herself by making defamatory charges, and she committed a wrong, it was **not** the **crime of body stealing.**

(Decided March 22, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Fourth Department, affirming a judgment of the Chemung Oyer and Terminer on conviction of defendant of the crime of body stealing. *Reversed.*

The defendant was jointly indicted with Edmund A. Reilly and J. Thomas Nealson. The indictment alleged "That the said * * * on the 9th day of April, 1885, at the City of Elmira, in the County of Chemung, with force and arms, unlawfully and feloniously, did remove the dead body of a human being, to wit: that of William Irvine, from a grave or place where the same had been buried, without authority of law, for the purpose of dissection, for procuring the reward for the return of the same, and for motives of malice and wantonness, against the form of the statute in such case made and provided."

The defendant was tried separately and convicted, and on appeal to the general term the conviction and judgment entered thereon was affirmed.

HARDIN, *P. J.*, dissenting, stated the facts as follows:

"General Irvine died in the City of San Francisco on the night of November 12, 1882, suddenly, having during the day been out gunning, returning to his home during the evening, after partaking of a light repast, consisting of tea, eggs, cold meat and bread and butter, prepared by his wife, Phœbe, who with their daughter, Mrs. Merkle, were occupying apartments together. Soon after partaking of the refreshments he became distressed and made complaints of internal pains. The daughter left for a physician and upon returning they found that death had taken place. The remains were taken that night to the rooms of an undertaker and they were subsequantly embalmed and on the 4th of December were conveyed by the widow and daughter to the City of Elmira, where they were interred in Woodlawn Cemetery.

"About a year after the death inquiry was instituted as to the cause thereof and the defendant employed a detective named Nealson, who visited the City of Elmira, and returned to San Francisco and made a report to the defendant, who then applied to the undertaker who embalmed the body, and to Dr. Wooster, the decedent's intimate friend and physician, who had viewed the body, and they gave affidavits of certain facts within their knowledge.

"In the affidavit of Dr. Wooster, subscribed March 11, 1885, in connection with the statement of facts he adds, 'In my opinion he was first poisoned in his food or drink, and then when in agony from the effects of the dose, he was struck on the head to stop his contortions and groans.'

"Porter, the undertaker, stated in the affidavit subscribed by him the condition of the remains when he received them, and that sundry persons viewed the remains, 'among others Dr. Wooster, who remarked that to him it looked as having been poisoned.'

"With these papers in her possession the defendant visited the City of Elmira, where she met the detective Nealson. She sought legal counsel as to the method to be pursued, in order to investigate whether General Irvine died a natural or unnatural death. She consulted an attorney, who advised her that the coroner of the County of Chemung, had jurisdiction to hold an inquest over the remains, and that the 'papers upon their face authorized him (the coroner) or were sufficient, upon which he might exercise his discretion in the matter.'

"The defendant and Nealson visited the office of Dr. Reilly, the Coroner of the County of Chemung, and held a conversation in regard to the circumstances attending the death of the deceased. The affidavits of Porter and Dr. Wooster were presented to the coroner, and the defendant asked Dr. Reilly 'to do his duty as a coroner; to examine and see if the proofs were sufficient to authorize him in proceedings' and 'that she wished the body to be taken up and the stomach or some part of it to be analyzed to see if there was any trace of poison there. She made the request that the evidence should be produced if it was there.'

"After that interview Coroner Reilly determined to proceed in the premises. He visited Nathan Baker, Superintendent of Woodlawn Cemetery at his house and said to him, viz.: 'That he had evidence to satisfy him that a wrong had been perpetrated, or sufficient to warrant him in making an examination of the body of General Irvine. * * * That he had sufficient grounds of acting, and he asked Baker, the superintendent, to act,' showing him one of the affidavits and stating that he had others. Thereupon the superintendent determined to act in the premises and facilitate the proceedings in behalf of the coroner. Thereupon directions were given Abbott, the sexton, to open the grave and remove the remains to the vault in the cemetery for the purpose of an examination.

"Reilly, the coroner, also applied to Dr. Wey to become one of two physicians to make the examination; and on the evening of the 8th of April. Reilly visited the office of Wey, with Nealson, avowing that he had full authority in the premises 'to conduct an examination and have an examination made by the physicians.' The hour was fixed for an examination at ten the next morning, and Reilly informed Wey that he would 'notify Dr. Squires * * * and we might expect to meet at the receiving vault in Woodlawn Cemetery' at ten the next morning. Accordingly they met the next morning at the receiving vault in Woodlawn Cemetery, where the physicians found Coroner Reilly, and Nealson, Baker and Abbott. The body was found lying in a coffin or casket on the floor of the receiving vault. The coroner made a minute of the nature of the covering of the coffin and its handles and the plate and the descriptions of every other matter connected therewith. Drs. Wey and Squires raised the head and shoulders of the body and after carefully scrutinizing the face and the coroner making a minute thereof, a careful examination was made of the head, and the stomach and duodenum and certain other parts of the body were removed and delivered to Dr. Reilly, who placed them in a vessel he had prepared for that purpose.

"After the examination the coroner went over to the house of Abbott, the sexton, in the cemetery grounds, where Baker suggested the propriety of having a coroner's jury and Wey replied, 'It is too late for such a proceeding.'

"Baker testified that he was present at the request of the coroner to identify the remains, and that he did so identify them, and that he was sworn upon that point by the coroner; that while at the vault he had a conversation with Dr. Reilly, the coroner, and he adds, viz.: 'Dr. Reilly and myself conversed for a few minutes about having a jury and I said to Dr. Reilly there was enough within the bounds of the cemetery to make up a jury; and he asked if I would have them all come to the house, and I so ordered, and they came. I think there were five men that came off the cemetery. I think there were nine men there then. When I had sent for the men I went back to the house and did not go in the vault again. About that time Dr. Wey came over to the house.'

"He also testifies that he held a conversation with Dr. Wey and stated as follows, viz.: 'Dr. Reilly has seemed to think it advisable to have a jury. There are men enough here to have a jury without delaying, they are already here; and Dr. Wey said it was of no use; that if there was anything found to show that this man died from any causes other than natural causes the whole procedure would have to go to California, and this jury would never be heard of again. I stepped out of doors, and Reilly was coming over from the vault, and he had not yet come in the house; and I said, Dr. Wey thinks it is entirely useless to have a jury, and I don't wish to urge this matter one way or the other, Doctor; and Dr. Wey came out and he repeated to Dr. Reilly what he had said to me in the house, that it was no use to have a jury and he gave his reasons as I have stated.'

"No jury was, in fact, sworn to hold an inquest. The remains were recoffined and returned to the grave, except the parts removed therefrom as already stated."

Mr. **Jacob Schwartz,** for appellant:

Any coroner of Chemung County had jurisdiction to hold an inquest over the body of General Irvine.

Smith, Coroners, 620.

Whenever information comes to a coroner that a person has died suddenly under such circumstances as to afford a reasonable ground that the death was occasioned by criminal means, the law makes it the duty of that coroner to go to the place where the body is and investigate the cause of death.

Code Crim. Proc. § 773.

There are two distinct elements necessary to be established to constitute this crime, viz.: first, the body must be removed from the place where it is buried, without authority of law; second, such removal must be effected with either of the following purposes, viz.: 1, to sell the body; 2, to dissect it; 3, to procure a reward for its return; 4, from wantonness or malice.

3 R. S. 5th ed. 968, 969; Penal Code, § 311.

The coroner is the sole judge as to the propriety and necessity of holding an inquest. There is no exception to his will; there is no appeal from his determination.

Smith, Coroners, 620.

The statute prescribes the manner in which the inquest shall be held, but it does not say how the removal of the body shall be effected. It has no legal bearing on this case, that the inquest was improperly held. It has no legal bearing on this case that no inquest at all has been held. The removal of the body is no part of the inquest; and this court has gone so far as to hold that the *post mortem* itself is no part of the inquest, and that not even the jurors have a right to witness the examination.

Crisfield v. *Perine*, 15 Hun, 200; affirmed, 81 N. Y. 622.

Mr. **John B. Stanchfield,** for respondents:

The death of Irvine having taken place in the State of California, the interment of the body in the County of Chemung in the State of New York, gave no jurisdiction to a coroner of that county to act in the premises.

Reg. v. *Great Western R. Co.* 3 Q. B. 333; Code Crim. Proc. § 773.

The failure of the coroner to proceed in the manner required by the Code of Criminal Procedure was a jurisdictional defect, and made him, and all interested with him, whether present or absent, trespassers and criminally amenable to the law *ab initio.*

Code Crim. Proc. §§ 773–775.

Rapallo, *J.*, delivered the opinion of the court.

The facts of this extraordinary case are fully stated in the dissenting opinion of Hardin, *J.*, at general term. We should content ourselves with concurring in that opinion were it not that it simply orders a new trial for errors in the charge and for refusal to charge, while we think that it should have gone further, and have held that the facts of the case did not establish a crime punishable under the statute against body stealing (Penal Code, § 311) under which the prisoner was indicted and convicted, and which is in the following words:

"Sec. 311. A person who removes the dead body of a human being, or any part thereof, from a grave, vault or other place where the same has been buried, or from a place where the same has been deposited while awaiting burial, without authority of law, with intent to steal the same, or for the purpose of dissection, or for the purpose of procuring a reward for the return of the same, or from malice or wantonness, is punishable by imprisonment for not more than five years, or by a fine not exceeding $1,000, or both."

This statute describes every kind of "body stealing" known to the law. The addition inserted in the Penal Code, "or for the purpose of obtaining a reward for the same," was the only substantial change made since the Revised Statutes in the definition of this heinous crime.

The intent of the statute is manifest. It certainly was not intended to apply to exhumations made by legally constituted public authorities, for the purpose of ascertaining whether crime has been committed in producing the death of the person whose body is exhumed.

When the exhumation is made, not secretly, but publicly, on open application to the officer of justice charged with the duty of inquiring into the cause of death of any person whose body is brought within his jurisdiction, it is a total misapplication of the statute against body stealing to use it for the purpose of imposing its punishment on all persons concerned in the exhumation in case any proceedings of the officer, under whose direction it was made, should be found to be irregular.

The irregularity alleged in this case in the conduct of the coroner is that he did not empanel a jury before he ordered the *post mortem* examination to be made by the physicians whom he summoned for the purpose. A sufficient number of persons to form a jury was assembled by direction of the coroner, but the jury was not sworn and empaneled. I refer to the opinion of *Judge* Hardin as correctly stating the facts which we have verified by an examination of the testimony.

The point of law is debatable whether a *post mortem* should take place before the coroner has empaneled a jury. But it is settled that the *post mortem* should not be in the presence of the jury, and that they are to be instructed by the testimony of the physicians who are designated by the coroner to make it. The dissection by order of the coroner is expressly authorized. Penal Code, § 308; *Crisfield* v. *Perine*, 15 Hun, 202; affirmed, 81 N. Y. 622.

If, as in England at one time, the findings of the coroner's jury were to stand as an indictment by a grand jury, some point might be made on behalf of the accused as to the validity of the inquest in such a case as this. But to resort to those questions for the purpose of supporting an indictment for body stealing, under the circumstances of this case, is quite unreasonable.

In the present case the defendant communicated to the coroner in the form of affidavits, whether legally authenticated or not is immaterial, information which should have induced any magistrate, not neglectful of his duty, to believe that he ought to investigate the matter presented to him. Those affidavits made a strong case to lead the coroner to believe that a murder had been committed, and that an examination of the body, which was within his jurisdiction, would disclose the fact.

The defendant sought an examination of the body. She asked the coroner to do his duty, and to examine the body. Whatever motives may have influenced her, no one can suppose that, however unfounded her belief might have been, there was not sufficient in the papers she presented to the coroner to justify his action, and there is no pretense that the affidavit of Doctor Wooster, which she produced, had been in any manner influenced by her. Her silence during several years after the death of General Irvine is the main argument against the *bona fides* of her charge, and it is said that her desire was not so much for the punishment of crime as to obtain some pecuniary advantage for herself by making defamatory charges.

However this may be, if she committed a wrong it was not the crime of body stealing, and *on this ground the conviction, and the judgment of the General Term affirming it, should be reversed and the prisoner discharged.*

All concur.

Robert TAYLOR, *Respt.*,
v.
City of YONKERS, *Appt.*

1. A **municipal corporation** may lawfully require each of its citizens to **clean** the **snow from** the **walks** adjacent to his own premises; but although the municipality makes the necessary regulation it is not thereby relieved from responsibility; it must see that its ordinance is obeyed, within a reasonable time, and it is not guilty of negligence if, observing that the work is being generally done, it awaits for a reasonable period the action of the citizens.
2. But **when** such **reasonable time** has been **given,** the **corporation must compel** the **adjoining owners** or occupants **to act,** or do the work itself; and if it suffers the obstruction to remain thereafter with notice, actual or constructive, of its existence it may become **responsible for** the **injuries** resulting.
3. **When** a fall of rain or the melting of adjoining snow is suddenly followed by **severe cold** which **covers** the **walks with** a layer of **ice** and makes them slippery and dangerous and which it is practically impossible to remove until a thaw comes, the **municipality is not negligent for awaiting a change of temperature** which will remedy the evil.
4. It may and **should require householders,** when the danger is great, **to sprinkle ashes or sand,** or the like, upon the surface, but it is not responsible for their omission.
5. When for two years the action of rain and frost had thrown upon the sidewalk sand, gravel and stones from an adjoining bank, until the flagging was entirely covered by it and a new and sloping grade susbstituted for the one adopted, which when winter came was covered with snow which was never removed but had been trampled down by travel, and by freezing and thawing converted into ice, *held*, that these **facts tended to establish negligence** on the **part of** the **city.**
6. When the plaintiff stepped on such **new ice surface,** just **formed on** such **slope** which had **a** fall towards the curb, of **six** or seven inches in ten feet, and which the city had negligently suffered to remain, if such slope was one concurring cause of the fall without which the accident to plaintiff would not have happened, the **city is liable.**
7. When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate, the one being a culpable defect in the highway and the other some occurrence for which neither party is responsible, the **municipality** is **liable, provided** the **injury would not have been sustained but for** such **defect.**
8. **Where** there were **no facts beyond** the **existence of** the **slope** that **permitted** the **inference that** the **slope of** the **walk was a concurrent cause** without which the accident would not have happened, and the conclusion of the jury was mere guess and speculation, *held*, that the plaintiff had not made out his case by a preponderance of evidence, and the motion for **nonsuit should have been granted.**

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Westchester Circuit on a verdict for plaintiff of $1,420 damages in an action for injuries occasioned by a fall on an icy sidewalk in defendant city. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **Joseph F. Daly,** for appellant.

Mr. **John F. Brennan,** for respondent.

Finch, *J.*, delivered the opinion of the court:

This case was submitted to the jury under instructions that a municipal corporation is bound to keep its sidewalks safe and convenient for the passage of the public, so far as reasonable diligence and the possession of adequate resources will allow; and the application of this rule to conditions resulting from the rigors and changes of a northern winter, and to two emergencies which frequently occur, was very fairly and justly discussed and limited.

It often happens that in a single day or night every street and sidewalk in a city or village is covered with a heavy fall of snow. It is not expected and cannot be required that the corporation shall itself forthwith employ laborers to clean all the walks and so accomplish the object by a slow and expensive process when the result may be effected more swiftly and easily by imposing that duty upon the citizens. Each can promptly and without unreasonable burden clean the snow from his own premises; and the authorities may justly and lawfully require that to be done, under the jurisdiction conferred by their charters.

But although the municipality makes the necessary regulation it is not thereby relieved from responsibility. The duty remains, and it must therefore see to it that its ordinance is obeyed. It is entitled, however, to a reasonable time within which to perform the duty in the manner permitted, and is not guilty of negligence if, observing that the work is being generally done, it awaits for a reasonable period the action of the citizens. But when such reasonable time has been given, the corporation must compel the adjoining owners or occupants to act, or do the work itself; and if it suffers the obstruction to remain thereafter with notice, actual or constructive, of its existence, it may become responsible for injuries resulting.

Another and different emergency sometimes occurs and was referred to in the charge to the jury. When the streets have been wholly or partially cleaned it often happens that a fall of rain or the melting of adjoining snow is suddenly followed by severe cold which covers everything with a film or layer of ice and makes the walks slippery and dangerous. This frozen surface it is practically impossible to remove until a thaw comes which remedies the evil. The municipality is not negligent for awaiting that result. It may and should require householders, when the danger is great, to sprinkle upon the surface ashes or sand or the like, as a measure of prudence and precaution, but is not responsible for their omission. It is no more bound to put upon the ice (which it cannot reasonably remove) such foreign material than to cover it with boards. The emergency is one which is common to every street in the village or city, and which the corporation is powerless to combat. Usually it lasts but a few days, and the corporate authorities may await without negligence a change of temperature which will remove the danger.

Both of these emergencies are shown to have existed in the present case, and as to both the learned trial judge gave to the defendant the full benefit of the rule as we have stated it. But there were further facts: the sidewalk along Buena Vista Avenue, where it passed an unoccupied lot, was bounded on its inner line by an unprotected bank of earth. For two years the action of rain and frost had thrown upon the walk sand, gravel and stones from the bank, until the flagging was entirely covered by it, and a new and sloping grade substituted for the one adopted. The sand on the inner line was about eight inches in depth, growing less toward the curb, where it was about one inch. Mixed in with this were stones, some of which were as large as apples. When the winter came this walk was covered with snow which was never removed. Before the accident the snow fall had been heavy, but it was evidently not recent, for upon this walk it had been trampled down by travel, and by freezing and thawing converted into ice.

These facts tended to establish negligence on the part of the City. If the slope of the walk was not dangerous in the summer weather, it might become so when coated with ice in the winter; and those having the care of the highway were very blind if they did not foresee the possible danger. No one, however, appears to have been injured by it when simply in this condition, for the reason probably that sand was continually washed upon it from the adjoining bank. But this protection disappeared before the plaintiff was injured. On the night preceding, rain fell which washed the sand from the ice, and then froze, covering everything with a new surface, and making the whole city slippery and dangerous for travelers. That was just as true of walks cleaned as of those not cleaned; and it may even be the fact that the latter, when paved, became by reason of their smoothness, the most dangerous of all. That such was the situation was very strongly shown by the conduct of plaintiff himself. He boarded in a house adjoining the vacant lot of which we have spoken, and standing so far above the grade of the street that ten steps led down to the sidewalk in front. On coming out in the morning with a companion, and observing the situation, he hesitated to come down his own steps to the sidewalk although clear of snow as we may fairly assume; and chose rather as a measure of safety to take another route. He went through the picket fence at the side, and on to the vacant lot which was covered with snow, and thence down to the sidewalk, which he essayed to cross, intending to go to his work through the middle of the street and on the roadway.

His conduct pictures the situation perfectly, He stepped on the new ice surface, just formed, and for the existence of which the City was in no respect responsible. Had that been the whole of the case, a recovery would have been impossible. But this new ice formed on a slope, having a fall toward the curb of six or seven inches in ten feet, which the City had negligently suffered to remain. If that slope was one concurring cause of the fall, without which the accident would not have happened, the City is liable.

We have stated the rule to be that "When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate, the one being a culpable defect in a highway and the other some occurrence for which neither party is responsible, the municipality is liable, provided the injury would not have been sustained but for such defect." *Ring* v. *Cohoes*, 77 N. Y. 88.

Now the jury were plainly charged that the new ice recently formed furnished no ground of negligence on the part of the city; and it necessarily followed that the jury found the slope of the walk to have been a concurrent cause without which the accident would not have happened.

The only remaining inquiry is whether there were any facts which permitted that inference or whether there were none; and the conclusion was mere guess and speculation. The fact proved was that the plaintiff slipped on the ice lying on a slope. The inference, it is claimed, is natural and logical and sustained by common observation and experience—that both of the conditions entered into the accident as proximate causes. But no one can say that if the new ice had spread over a level the plaintiff would not have fallen; and there is nothing in the case pointing to the slope as a concurrent cause, beyond the bare fact that it existed, and so nothing to redeem the inference sought from the domain of mere guess and speculation. The question involved has been quite earnestly debated in other States, where it arose under statutes requiring towns to keep the streets safe and convenient.

In Maine and Massachusetts it is held that if besides the defect in the way there is also another proximate cause of the injury contributing directly to the result, for which neither of the parties is in fault, the town is not liable. *Moore* v. *Abbott*, 32 Maine, 46; *Moulton* v. *Sanford*, 51 Maine, 127; *Marble* v. *Worcester*, 4 Gray, 395; *Billings* v. *Worcester*, 102 Mass. 329.

These rulings are based largely upon two grounds: that the town is liable for the defect alone, and that the proportion of injury due to that cause is impossible to be ascertained. A contrary rule is held in Vermont and New Hampshire. *Hunt* v. *Pownal*, 9 Vt. 411; *Winship* v. *Enfield*, 42 N. H. 197.

We have already stated the rule to be in this State that the defect, even when a concurring cause, must be such that without its operation the accident would not have happened. Where the defect is the sole explanation of the injury there is no difficulty; but where there is also another for which no one is responsible we have held that "The plaintiff must fail if his evidence does not show that the damage was produced by the former cause;" *Searles* v. *Manhattan R. Co.* (N. Y.) 2 Cent. Rep. 442, 101 N. Y. 661; and we added that he must fail also if it is just as probable that the injury came from one cause as the other, because he is bound to make out his case by a preponderance of evidence; and the jury must not be left to a mere conjecture or to act upon a bare possibility.

In this case that rule was violated. The plaintiff slipped upon the ice. That by itself was a sufficient, certain and operating cause of the fall. No other explanation is needed to account for what happened. It is possible that the slope of the walk had something to do with it. It is equally possible that it did not. There is not a particle of proof that it did. To affirm it is a pure guess and an absolute speculation. Are we to send it to a jury for them to imagine what might have been? The great balance of probability is that the ice was the efficient cause; there is no probability not wholly speculative that the slope was also such. Its descent was slight, not quite an inch in a foot, and not more than constantly occurs in the streets of a city. No knowledge or intelligence can determine or ascertain that such a slope had any part or share in the injury, and to send the question to the jury is simply to let them guess at it and then upon that guess to sustain a verdict for damages. I am quite willing to hold cities and villages to a reasonable performance of duties; but I am not willing to make them practically insurers by founding their liability upon mere possibilities.

For these reasons I think the plaintiff should fail and the motion for a nonsuit should have been granted.

Judgment reversed; new trial granted; costs to abide event.

All concur, except **Andrews,** *J.*, not voting.

Re Petition of KINGS COUNTY ELEVATED R. CO. to Acquire Title to Lands of Ernest Nathan.*

Same, *Re* Lands of John O'Brien.

Same, *Re* Lands of Mary Duane.

1. The **application** for the appointment of commissioners to determine the routes of a contemplated railway, **under** the **Rapid Transit Act** (Laws 1875, chap. 606), **need not be verified by all the subscribers** thereto; the requirements of the statute are satisfied if the application is proved by a single witness upon oath to have been signed by the persons whose names are thereto appended.
2. *Held*, upon the facts, that, upon filing the certificate and articles of association required by said Act of 1875, on January 6, 1879, the petitioner, the **Kings County Elevated R. Co.** then became, and that it now is, **a corporation.**
3. *Held*, that **a condition affixed by** the **common council** of Brooklyn **to its consent** to the construction of petitioner's proposed roads, to the effect **that** the **company** should enter into **a** bond **to pay** into the city treasury semi-annually, for the benefit of **the city,** 2 per cent of its gross receipts, was (even if the common council had power to affix any conditions to its consent), a condition which could not be performed until after the road should be constructed, and **did not prevent** the **consent** of the common council (in connection with that of property owners) **being effective to give** the **company power to appropriate** interests in **land** for the construction of its roads.
4. Other **conditions,** affixed to such consent by the common council, requiring the company to consent **that** the **city assessors should arbitrate** all **damages** caused to property owners by the construction of the road, **and that** portions of the **road should be completed at certain dates** specified (being different from the dates fixed by the commissioners)—*held*, to be **beyond** the **power of** the **common council** and in conflict with the statute.
5. The articles of association prepared by the commissioners provided that the time unavoidably consumed by legal proceedings, etc., "or otherwise," should not be deemed a part of the period limited for the completion of the road. *Held*, that the **time** intervening **between** the date of the **resolution of** the **commissioners** limiting the time for the completion of the road **and** the date of the **incorporation of** the **company** should **not** be **counted against** the company; nor should the time unavoidably consumed by the impossibility of obtaining the consent of property owners, or

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*See N. Y. Cable R. Co. v. Mayor of New York, 6 Cent. Rep. 56.

its equivalent, or the consent of the local authorities, be counted.

6. The **forfeiture** to the county supervisors **of the corporate rights** of a company organized under the Act of 1875, prescribed by that Act in case the railway shall not be completed within the time fixed by the articles of association, is **not worked by** the **mere default,** without the intervention of the courts or action on the part of the State or of the county.

7. The **commissioners** having located fifteen different routes, **fixed** (in the articles of association under which the petitioner was organized) the **time within which five** only of such **routes** should be **completed,** and **omitted** to determine any period within which **the remaining** ten should be finished. *Held,* that this **omission** was **not fatal to** the **whole scheme;** that the different routes being distinct and the provisions in respect to them being severable, the right of the petitioner to the routes, the time for the completion of which had been properly limited, was not affected by such omissions in respect to other routes; but such other routes, for which no time was fixed, were for that reason not legally designated for any railway, and the streets included in them are open to occupation by another company.

(Decided March 22, 1887.)

APPEAL by the Kings County Elevated Railway Company from an order of the Supreme Court at General Term in the Second Department, affirming an order of the Kings Special Term denying a petition for the appointment of commissioners of appraisal. *Reversed.*

The facts and questions raised appear from the opinion.

Messrs. **George F. Comstock** and **George Shea,** for appellant:

A clause of forfeiture upon nonperformance of a condition, does not *per se* disturb the right which is the subject of the grant of gift but is, in judgment of law, merely the justification for an entry and taking of possession, or for a judicial proceeding to ascertain and enforce such forfeiture.

N. Y. Elevated R. R. Co. 70 N. Y. 327–337; *Brooklyn Steam Transit Co.* v. *Brooklyn,* 78 N. Y. 529; *Mickles* v. *Rochester City Bank,* 11 Paige, 124; *Sewalls Falls Bridge* v. *Fisk,* 23 Fost. (N. H.) 177; *Willamet Falls Co.* v. *Kittridge,* 5 Sawyer, C. C. 44–47; *Frost* v. *Frostburg Coal Co.* 24 How. 283 (65 U. S. bk. 16, L. ed. 639); *Chesapeake etc. Canal Co.* v. *Baltimore & Ohio R. R. Co.* 4 Gill & J. 1, 127; *Irvine* v. *Lumbermen's Bank,* 2 Watts & S. 190; *Connecticut etc. R. R. Co.* v. *Bailey,* 24 Vt. 465, 475; *Atchafalaya Bank* v. *Dawson,* 13 La. 497; *Regents of the University* v. *Williams,* 9 Gill & J. 365, 426.

This court will not go back six years and find the extinction then of this corporation and all its rights, while both the State and the County of Kings have been dormant and acquiescent during all that period, and while during all of the same period, this Company has been working with all the means and power at its command to remove the legal obstacles placed in its way.

Atlanta v. *Gate City Gas Light Co.* 71 Ga. 106, 125; *White* v. *State,* 69 Ind. 273, 279; Angell & Ames Corp. § 70.

The conditions imposed by the common council, as qualifying their consent of 1879, were conditions subsequent.

Finlay v. *King,* 3 Pet. 346 (28 U. S. bk. 7, L. ed. 701); *Martin* v. *Ballou,* 13 Barb. 119, 133; 2 Bl. Com. old ed. 156; *Nicoll* v. *New York etc. R. R. Co.* 12 N. Y. 121; *Davis* v. *Gray,* 16 Wall. 203 (83 U. S. bk. 21, L. ed. 447).

The charter is a contract.

23 Wend. 540, 576; 12 N. Y. 121; 13 Barb. 83; 20 Barb. 455; 33 Barb. 79, 87; 46 Barb. 109.

Mr. **Leslie W. Russell,** also for appellant:

Equity abhors forfeiture. It exacts no penalties where good conscience justifies delay.

Jackson v. *Topping,* 1 Wend. 388; *Hasbrook* v. *Paddock,* 1 Barb. 635; *Linden* v. *Hepburn,* 3 Sandf. Ch. 668.

Conceding the power of the Legislature to provide that a corporation may lose its life without the intervention of the courts, each case depends upon the construction of the language used. Two cases are found where this court has held that the forfeiture became complete *per se* on the happening of the thing provided against.

Re Brooklyn R. R. Co. 72 N. Y. 245; *Brooklyn Steam Transit Co.* v. *Brooklyn,* 78 N. Y. 524.

In the former case the provision was: "Its corporate existence and powers cease." In the latter case it was: "This Act and all the powers, rights and franchises herein and hereby granted shall be deemed forfeited and terminated." Both these cases recognize the general doctrine that the omission to perform a duty imposed on a corporation does not *ipso facto* destroy the corporate character or existence. It was only by a peculiar and pointed wording of the statute in those cases that the result obtained.

Re N. Y. Elevated R. R. Co. 70 N. Y. 327; *Denike* v. *N. Y. etc. Cement Co.* 80 N. Y. 599; *Bank of Niagara* v. *Johnson,* 8 Wend. 645; *People* v. *Manhattan Co.* 9 Wend. 351; *Mickles* v. *Rochester City Bank,* 11 Paige, 118.

But further; the statute provides that on default the rights acquired by the company shall be transferred to the Supervisors of Kings County. Under that language the corporate character and powers of the company not only are not lost *ipso facto* on default, but the cause of forfeiture, if any, exists only in favor of the supervisors; and until they assert their rights and make an entry the title of the company is not devested, and cannot be questioned by a third person.

Welch v. *Silliman,* 2 Hill, 491; *Fonda* v. *Sage,* 46 Barb. 110; *Thompson* v. *N. Y. & Harlem R. R. Co.* 3 Sandf. Ch. 625; *Nicoll* v. *New York etc. R. R. Co.* 12 N. Y. 121; *Patten* v. *N. Y. Elevated R. R. Co.* 3 Abb. N. C. 306; *Towle* v. *Remsen,* 70 N. Y. 303, 312; *Sewall's Falls Bridge Co.* v. *Fisk,* 23 N. H. 171; *Schulenberg* v. *Harriman,* 21 Wall. 45, 63 (88 U. S. bk. 22, L. ed. 551, 555); *Chesapeake etc. Canal Co.* v. *Baltimore & O. R. R. Co.* 4 Gill & J. 121.

There has been no default amounting to a cause of forfeiture of the charter. The consent of the property holders were conditions precedent to the right to go ahead.

Constitution, art. 3, § 18; Laws 1875, chap. 606, § 4.

Without them the Company could not build. The limitation of time in the Act can only refer to the time elapsing after the Company had power to go ahead. No statute of limitation begins to run until the right of action accrues. Any other construction involves an absurdity.

Angell, Limitations, § 42.

The provision as to the time, in the consent of the municipality of 1879, is from its very nature a condition subsequent within all the authorities. Furthermore, it was a condition which became impossible of performance because contrary to law. It was unlawful to build without the consent of the property owners, which we absolutely were unable to obtain. In such a case the law is well settled that the consent itself attaches to it as a valid execution of a power, and the conditions fall. Such conditions are strictly construed.

Finlay v. *King*, 3 Pet. 364 (28 U. S. bk. 7, L. ed. 708); 2 Washb. Real Prop. pp. 8–12; *Towle* v. *Remsen*, 70 N. Y. 303, 311; *Woodworth* v. *Payne*, 74 N. Y. 196; *Brooklyn Cent. R. R. Co* v. *Brooklyn City R. R. Co.* 32 Barb. 358.

Mr. **George W. Wingate,** for respondents:

A municipality whose consent is necessary to the construction of a railroad in the public streets may impose such conditions as it may think necessary in granting its consent, and such conditions are binding.

N. Y. etc. R. R. Co. v. *Mayor*, 1 Hilt. 562; *Mayor* v. *Troy etc. R. R. Co.* 49 N. Y. 657; *Re N. Y. Cable R. Co.* 40 Hun, 27; *Pacific R. R. Co.* v. *Leavenworth*, 1 Dill. C. C. 393; *St. Louis etc. R. R. Co.* v. *Capps*, 67 Ill. 607.

The imposition of conditions to protect the public is now made obligatory by statute, in all cases of consent to the construction of street railroads.

Surface R. R. Act, Laws 1884, chap. 252, p. 309; Laws 1886, chap. 642, p. 919.

Common councils have been enjoined (in suits by taxpayers) from passing, over the mayor's veto, resolutions granting consent to the use of streets by railroads, on the ground that they had neglected to impose such conditions as were necessary to protect the public interests.

Seeger v. *Mayor*, Daily Reg. March, 1889; *Re N. Y. Cable R. Co.* 40 Hun, 1.

A railway company accepting a right to construct its road from a city council is bound to comply with its terms.

Indianapolis etc. R. R. Co. v. *Lawrenceburg*, 34 Ind. 305; *Phila.* v. *Lombard etc. R. R. Co.* 3 Grant, Cas. 403.

Where a corporation has no right to act, except under the conditions of an ordinance granting permission, its action implies its acceptance of the conditions in full.

Detroit v. *Detroit City R. Co.* 37 Mich. 558.

Even though no time was prescribed the condition must be performed in a reasonable time, or the grant will be considered as lapsed.

Davis v. *Gray*, 16 Wall. 231 (83 U. S. bk. 21, L. ed. 457).

A license to maintain a telegraph, conditioned to exist as long as the company shall exist, expires by its own limitation upon the day when the charter of the company expires.

Western Union Tel. Co. v. *Baltimore etc. R. R. Co.* 20 Fed. Rep. 572.

When a condition on which consent was given to the building of a dam has not been performed, the consent is no longer binding.

Brown v. *Bowen*, 30 N. Y. 520.

The rule in relation to conditions subsequent, relied upon by the appellant, has no application to this resolution. It is an elementary principle that a grant of a right to use the streets to a railroad corporation must be construed most strongly against the corporation; and any ambiguity or doubt must be construed in favor of the public, so that nothing shall pass thereby but what appears to have been clearly intended.

Burns v. *Multnomah R. Co.* 15 Fed. Rep. 177, 185; *Richmond etc. R. R. Co.* v. *Louisa. R. R. Co.* 13 How. 81 (54 U. S. bk. 14, L. ed. 55); *Charles Bridge* v. *Warren Bridge*, 11 Pet. 544 (36 U. S. bk. 9, L. ed. 826); *Rice* v. *R. R. Co.* 1 Black, 360 (66 U. S. bk. 17, L. ed. 147).

Acts in favor of corporations are not to be extended beyond their express words or clear import.

Sprague v. *Birdsall*, 2 Cow. 419; *Bridgewater & Utica Plank Road* v. *Robbins*, 22 Barb. 662.

Exclusive privileges must be construed strictly against the grantee and will not be extended by implication.

Cayuga Bridge Co. v. *Magee*, 2 Paige, 116; affirmed in 6 Wend. 85.

Statutes by which authority is delegated to corporations to acquire title to the real estate of a citizen are to be strictly construed, and the authority is to be clearly shown and strictly pursued.

Sharpe v. *Speir**, 4 Hill, 76; *Corwin* v. *Merritt*, 3 Barb. 341; *Washington Cemetery* v. *Prospect Park etc. R. R. Co.* 68 N. Y. 591.

Upon the expiration of the time limited in the consent without the Company having complied therewith, the resolution executed itself and all rights under it ceased; and that fact could be asserted by anyone where property was sought to be taken, under the form of eminent domain.

Brooklyn Steam Transit Co. v. *Brooklyn*, 78 N. Y. 525; *Re Brooklyn etc. R. R. Co.* 75 N. Y. 335; *Re N. Y. Cable R. Co.* 40 Hun, 1.

The franchises of the corporation have been lost.

Re Brooklyn etc. R. R. Co. 75 N. Y. 338; *Oakland R. R. Co.* v. *Oakland, B. & F. V. R. R. Co.* 45 Cal. 365; *Fontaine* v. *Phœnix Ins. Co.* 11 Johns. 293; *Kennedy* v. *Strong*, 14 Johns. 129; *Bennett* v. *American Art Union*, 5 Sandf. Ch. 614; *N. Y. etc. R. R. Co.* v. *Boston etc. R. R. Co.* 36 Conn. 196; *U. S.* v. *1960 Bags of Coffee*, 8 Cranch, 398 (12 U. S. bk. 3, L. ed. 602); *U. S.* v. *Grundy*, 3 Cranch, 337 (7 U. S. bk. 2, L. ed. 459); *Borland* v. *Lewis*, 43 Cal. 569; *Commonwealth* v. *Erie etc. R. R. Co.* 27 Pa. 339; *Brouwer* v. *Appleby*, 1 Sandf. 158; *Street R. Co.* v. *West Side St. R. Co.* 48 Mich. 433; Washb. Real Prop. 475; *Willard* v. *Henry*, 2 N. H. 120; *Hamilton* v. *Elliott*, 5 Serg. & R. 375; *Andrews* v. *Senter*, 32 Maine, 394.

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*See editorial note to this case, and digested citations at the end, Lawyers' edition. [Ed.]

The rule which prevents the existence of a corporation being questioned collaterally does not apply where a corporation is attempting to condemn land under the power of eminent domain. In such a case the owner can attack its existence.

Re Brooklyn etc. R. R. Co. 72 N. Y. 245; *Brooklyn Steam Transit Co.* v. *Brooklyn,* 78 N. Y. 531.

The property of individuals cannot be condemned for a right of way, after the time limited in the charter for the completion of a railroad, even although its dissolution has not been decreed.

Atlantic etc. R. R. Co. v. *St. Louis,* 66 Mo. 226, 250; *Peavey* v. *Calais R. R. Co.* 30 Maine, 499; *Morris etc. R. R. Co.* v. *Central R. R. Co.* 31 N. J. Law, 207; *Regina* v. *London etc. R. R. Co.* 6 Eng. Law & E. 220.

Danforth, *J.*, delivered the opinion of the court:

The appellant by proceedings instituted April 8, 1886, sought to have an easement or interest appurtenant to certain lands abutting on Fulton Street, in the City of Booklyn, appropriated to its use for railway purposes; and to that end applied by petition to the court at special term for the appointment of commissioners of appraisal. It was there denied, not in the exercise of discretion, but upon the ground as stated in the order, "that the petitioner had never obtained the consent of the local authorities of the City of Brooklyn to the construction of its road in Fulton Street."

Upon appeal to the general term, the order appears to have been affirmed upon the further ground that by reason of certain defaults on its part, or noncompliance with conditions imposed by its articles of association, the petitioner had lost its corporate powers, including the right to take proceedings for the condemnation of private property for public use.

The petitioner was organized as a railway company under chapter 606 of the Laws of 1875, which provides for the construction and operation of a steam railway or railways in the counties of this State, and on the performance of certain conditions imposed by that Act, is permitted to exercise the power of eminent domain over lands, or any interest therein necessary for the construction or operation of its road, in the manner or by the special proceedings prescribed thereby. Sec. 17.

For that purpose there must be a company duly incorporated, and which, having complied with the conditions named in the Act, has the power and the intention in good faith to construct and finish a railroad to and from the places named in its articles of association; § 18; and unless these facts are alleged, and upon hearing found to exist, the petition cannot be maintained.

It is not denied that the petition at the bottom of these proceedings was in the form, and set out all the facts, made essential by statute; but the question raised by the answer to the petition in each case, and now relied upon by the learned counsel for the respondent, includes not only those on which the special and general terms of the court below put their decision, but one going to the very existence of the petitioner.

So we have before us three material propositions: 1, that the company never acquired a corporate existence; 2, that it never performed the conditions imposed by the Act of 1875 (*supra*), and therefore lost its franchises; 3, that it never obtained the consent of the local authorities having control of that portion of Fulton Street upon which it was proposed to construct the railway.

First. The Act relating to the formation of these corporations (Laws of 1875, *supra*) prescribes that whenever it shall be made to appear to the supervisors of the county or the mayor of the city as the case may be, by the application of fifty reputable householders and taxpayers, verified upon oath before a justice of the supreme court, that there is need in their county of a steam railway, commissioners shall be appointed who, if they find such railway necessary, shall fix and determine its route or routes, "*Provided,* That the consent of the owners of one half the property bounded on (or in lieu thereof, the consent of commissioners appointed by the supreme court), and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railway, be first obtained." Secs. 1, 5.

In this case the application on which commissioners were appointed to determine the necessity of the proposed road is conceded to have been signed by the requisite number of qualified persons and to have been sufficient in form. But it was verified by one of the subscribers only; and therefore it is contended by the learned counsel for the respondents that it was insufficient to give jurisdiction to the mayor to entertain and pass upon the application, his claim being that each subscriber should have made oath.

We think the statute was satisfied. It requires only that the application shall be verified upon oath, before a supreme court judge, that is by a witness upon oath before him to have been really signed by the persons whose names are thereto appended. Sixty names appear upon the application. One affiant stated that he knew each of the persons represented by those names, save five, and saw them sign it; another said the same as to four of these five; and a supreme court judge certified that these statements were sworn to before him.

The application was therefore duly verified, and the order appointing the commissioners justified. It was made on the 23d of March, 1878, and it is conceded that the persons thus appointed, duly qualified as required by law (§ 4), and entered upon and executed their duties. They, thereupon, by public notice, invited plans for construction and operation of such railway "upon the route or routes, and in the locations theretofore determined by them" (§ 5), and many other things relating to the running of the road and the amount of capital stock of "the company to be formed for the purpose of constructing, maintaining and operating such railway." Sec. 6.

It is by the Act (*supra*) made the duty of the commissioners to prepare articles of association for a company to be formed, and to set forth therein the particulars, requirements and conditions imposed by the commissioners, pursuant to the sections above referred to, and which the statute says "shall provide for the release and forfeiture to the supervisors of the county, of all rights and franchises acquired by such corporation, in case such railway or railways shall not be completed within the time and upon the conditions therein provided. Sec. 7.

It should be observed that up to this time no company was in existence to profit by the necessity which had been declared to exist for a steam railway, or which could claim the right to construct or maintain it. The next statutory step is in that direction, and the scheme was completed when, after notice, capital stock had been subscribed for and the subscribers met for organization and the election of directors. Secs. 8, 9.

The commissioners were then required to deliver to the directors a certificate, setting forth the articles of association, theretofore prepared by them, and the organization of the Company, which when filed with an affidavit, showing the subscription and payment in of stock, and "that it is intended in good faith to construct, maintain and operate the railway or railways in such articles of association mentioned," constituted the persons who had subscribed them a corporation by the name specified therein, with the powers and privileges, and subject to the duties and restrictions of corporations (§ 9); and a copy of such certificate and affidavit duly certified is made "presumptive evidence of the incorporation of such company, and of the facts therein stated."

All these prescribed duties on the part of the commissioners and acts on the part of the directors were performed and a copy of their report, certificate and articles of association, and affidavit certified by the secretary of state, was in evidence. It showed that the originals were filed January 6, 1869, and thus it appeared that the Company on that day acquired the franchise of being and acting as a corporation.

Its right to build and operate a railway in the streets of Brooklyn was, however, limited, not only by the Constitution of the State, but as we have seen, by the Statute of 1875, *supra*, and also by the very terms of the articles of association. The routes over which it might construct and operate its road were, as fixed by the commissioners, fifteen in number, and among others, one on or through Fulton Street. They directed that certain specified portions of the railway should be constructed and ready for operation at specified times, one within one year from the first of August, 1878, two within three years of the first of August, 1878, one within one year and six months from the first of August, 1878, but at the same time provided, that the time, if any, unavoidably consumed by the pendency of legal proceedings or by the delay or interference of the public authorities in refusing or neglecting to give their consent to the use of the streets and avenues as required in section 4 of chapter 606 of the Laws of 1875, or otherwise, should not be deemed a part of any period of time within which the construction and completion of the railway or railways is required to be made, but be added to each of the periods otherwise limited for such construction and completion. And as they were authorized to do by statute (Laws 1875, § 7, *supra*) the commissioners declared that, in case the several portions of such railway or railways shall not be completed each within the time and upon the conditions hereinbefore; and as to such portions provided for, the rights and franchises acquired by such corporation shall be released and forfeited to the supervisors of the County of Kings.

The work through the route in question was not completed within the time mentioned, and so it is said that a forfeiture is incurred and the Company made incapable of going on. The right to do so under any circumstances was dependent upon the consent of a certain proportion of the abutting owners, or its equivalent, and the consent also of the local authorities. It appears that the necessary consent of property owners had been obtained before the institution of these proceedings, and various action had been taken on the part of the municipal authorities. The sufficiency of that action is a material and difficult question in the case.

On the 30th of June, 1879, the common council of the City of Brooklyn by resolution declared "that this common council do hereby consent to the construction and operation of an elevated railway or railways, over, along and through the following routes, fixed, determined and located by the rapid transit commissioners" (meaning the commissioners whose action has already been referred to), and describing the routes specified in the articles of association, and among others the one in question; following this resolution were two others, not important here. Then come these words: "*Provided*, That the consent of the common council is hereby given upon the following conditions: noncompliance on the part of the Company with all or any one of which shall render this consent void."

So far as the respondent deems them material as bearing upon this controversy, they are: 1, that the Company shall enter into good and sufficient bond to the city in the sum of $200,000, that it will pay into its treasury, semi-annually for the benefit of the city, 2 per cent of its gross receipts; 2, that it shall consent that the city assessors shall arbitrate all damages caused to property owners by the construction of the road; 3, that portions of the railway shall be completed at certain times specified, the latest of which is June 1, 1881.

On the part of the appellant the claim is made that the consent embodied in the first resolution became at once valid and effectual, and fixed the municipal authorities of Brooklyn so effectually that the Company must be deemed to have thereby met and satisfied the requirement of the Constitution and statute, and the exaction of the articles of association, each of which requires the consent of the public authorities to the use of the streets and avenues for railway purposes. In effect its contention is that all of the matter set forth in the resolution of June 30, 1879, save that consent was *ultra vires* the power of the common council; and therefore that the decision of the special term, in which a contrary conclusion was reached, should have been reversed.

On the other side it is insisted that a municipality whose consent is necessary to the construction of a railway in the public streets may impose such conditions as it thinks necessary in granting its consent, and that the company to which it is given cannot enjoy the benefit while it rejects the conditions. This claim treats the transaction as a contract between parties having full power to treat, assumes that the commissioners had no other power than to determine the character of the railway structure, and that it was left to the local authorities not only to decide whether they would consent to its erection in their streets, but if so, upon what terms. This seems to me to be a very imperfect view of the scheme formulated by the Act of 1875.

In pursuance of it, before the organization of any company was possible, it had been determined that a steam railway was necessary; and, acting under an exclusive power given to them, commissioners had fixed its route through the street in question, and determined the manner and time of its construction. All this was done because of the ascertained public necessity for such a railway; and after that it remained to find a company willing to build the road in the manner and at the time prescribed, and for the common council of the city by its consent, to enable them to do so. But neither the company when organized, nor the common council, could add to or take away from the terms or the conditions before provided and imposed by the commissioners. The company by its formation accepted them; the common council need not consent, but if it did, the company, so far as the city was concerned, could proceed with the undertaking according to the charter, which the State through its agents, the commissioners, had prepared for them.

I find nothing in the cases or the statutes cited by the respondents which calls for a different interpretation of the Act of 1875; and to hold otherwise would enable the common council to put itself in the place of the commissioners, and assume a function which had been delegated by the Legislature to the commissioners as independent public officers. It is, I think, a sufficient answer to say that such power of substitution is not within the language nor the intent of the statute; and to interpolate it would greatly weaken, if it did not altogether destroy, the utility and force of its provisions which have relation to the public necessity for means of transportation "for passengers, mails or freight."

The franchises conferred upon the city by the Legislature were public property, and remained subject to its control. It follows that the power contingently conferred by the Legislature to construct the railway became absolute, for the conditions imposed upon its exercise had both been performed. The abutting owners had consented, and so had the municipal authorities. To that extent the object, which the Legislature had declared to be one of public necessity, was accomplished.

Subsequent legislation is not without importance as throwing light upon this question. The Act of 1884, chap. 252, dispenses with the freeholders' petition, requires no determination as to the necessity for rapid transit, but, on the other hand, provides that the local authorities, before acting upon an application for their consent, shall give public notice thereof, and of the time and place where it will be considered; and when granted, it shall be upon the express condition that the conditions of the statute shall be complied with, or the local authorities at their option may provide for the sale of the franchise at public auction, subject to all the provisions of the Act as to construction, operation, etc., of the railway.

It then declares that every corporation formed under the provisions of that Act (1884), in cities having 250,000 inhabitants or more, shall pay annually into the city treasury a percentage, at first 5 per cent, and afterward of 3 per cent of its gross receipts, and that in other cities or villages the local authorities shall have the right to require, as a condition to their consent to the construction and operation of the road under that Act, the payment annually of such percentage of gross receipts, not exceeding 3 per cent, into their treasury, as they may deem proper. A failure on the part of the company to make payment of the sum prescribed involves a penalty of 5 per cent additional each month on such percentage, until it is paid. Sec. 8.

These provisions would have been entirely unnecessary if under an Act, that of 1875, which contains none of them, the local authorities could, at their pleasure, impose payment of such sum as they thought proper as a condition of giving consent. But if it be otherwise, if the common council can qualify their consent by such reasonable conditions as they think necessary for the protection of the interests and well being of the city (and we need not and do not decide that they cannot) and that such condition as the one I have considered is of that character, it is nevertheless a condition which could not be performed until after the road was constructed and in running order; and it is not required that the bond for its payment should be given before the company had acquired the right of way.

But however it may be with this condition, the others are neither reasonable nor lawful, They relate to matters over which the Legislature and the commissioners have entire control. The statute determines how the damages of the land owner shall be ascertained, and confers upon the commissioners sole power and jurisdiction to determine when the various portions of the road shall be completed. Their action is as the action of the Legislature, and can neither be superseded nor in any way affected by that of any other body. But here the resolution of the common council is wholly repugnant to the statute in one case, and to the condition imposed by the commissioners in the other. The statute requires the appointment by the supreme court of commissioners of appraisal, defines the mode of procedure, and gives effect to their decision, both as respects the company and the land owner. The common council requires the company to consent, at the option of the land owner, to have his damages ascertained by the assessors for the city, and to abide by their decision as to damage or injury, including depreciation in value to any property abutting upon and along the line of the road.

These two schemes are inconsistent and cannot stand together. The resolution of the common council, if effectual, nullifies the statute. As to the other condition, the statute (§ 6), requires the commissioners, within ninety days after their organization as a board, to fix and determine the time within which "the railway or railways, or portions of the same, shall be constructed and ready for operation," and this was done, as we have seen, before the plan was submitted to the public as one to be carried out by such company as might be formed.

They prescribed for one portion the first of August, 1879, subject to an enlargement by reason of certain named contingencies hereinafter referred to. The common council for the same portion fixed the arbitrary time of the first of June, 1879. For another portion the commissioners subject to the same contingencies, fixed August 1, 1881. The common council named December 1, 1880, with no allowance in either case for the delays allowed for by the commissioners.

Again; it may be observed of these conditions imposed by the local authorities, or accompanying their consent, as was said of the other and much more obvious terms, that they are in no sense conditions precedent, to be performed before the consent takes effect, and so become a component part of the scheme, but are conditions subsequent, the nonperformance of which in the future shall, in the language of the resolution, "render the consent void." The power to recall a consent is not given by the Act of 1875; neither can it by the operation of any cause set on foot by the local authorities, when once given, be annulled.

It is claimed, however, by the respondents that the time fixed in the articles of association, for the completion of that portion of the railway which includes Fulton Street, expired before the commencement of these proceedings, and that, therefore, the petitioner's corporate existence has been terminated. This raises a very different question. As the Legislature is the final judge as to what the public interest required to be done, so it could declare the consequences of a default. It could itself fix the time for completing the railway, or leave that matter to be determined by the commissioners. Both events were provided for in the articles of association, and it is necessarily conceded by the appellant that the date specifically named for the completion of the work had passed before these proceedings were commenced (it expired August 1, 1881), but the contention is that this period of limitation was extended by the proviso above set out, which suspends the running of time during the pendency of legal proceedings, or delays or interference of the public authorities, "or otherwise."

The charter provision must have a reasonable construction; and it is plain that the time during which, and without fault on its part, the Company had no legal ability to commence or carry on the work should not be deemed to form any part of the allotted period. It appears, by article 7 of the articles of association, that the resolution of the commissioners limiting the time for the completion of the work in question, was adopted on the 30th of June, 1878, and fixed the time as August 1, 1879, or thirteen months from the adoption of the resolution. But the work of the commissioners was not completed until the articles were filed; nor was there until that event any company with corporate existence, to carry out their direction.

It may properly be held, therefore, that the time intervening between the date of the resolution, June 30, 1878, and the incorporation of the company, should not be counted against it. For that delay the Company was not chargeable; and the intention of the resolution in consideration of the object in view, and the language even of the statute (§ 6, *supra*), which gave authority to the commissioners in this respect, must be deemed to give a certain length of time after the Company received its charter, in which that object should be accomplished. It had no power or being even, until January 6, 1879. Immediately after that date it made efforts to obtain consent of the property owners, and failing in that, applied to the supreme court under section 4 of the Act of 1875 (*supra*), for the appointment of commissioners, whose determination, if in favor of the construction of the railway, after confirmation by the supreme court, "should," the statute says "be taken in lieu of the consent of the property owners." The report of the commissioners was made on the 26th of April, 1879.

It was favorable to the road, and on the same day an application was made for its confirmation. It was opposed, and remained undecided until February 10, 1880, when confirmation was refused. In different courts the controversy between the Company and its opposers continued until September, 1880, when it ended in a decision adverse to the Company. Since that time the affidavits show continuous efforts on the part of the Company, among other things, to obtain the necessary consents of property owners, which was accomplished December 2, 1885. It appears, therefore, that without fault on the part of the Company, the intervening time was unavoidably consumed in part by legal proceedings, but also by the impossibility of obtaining the consent of the property owners, or its equivalent; and that time may, therefore, be added to the specified period named in the articles of association for the completion of so much of the road as is now in question. This effect should be given to the word "otherwise," as it stands in the article already quoted (art. 7, § 6).

Whether we look at the general scheme of the Act which has regard to an undertaking promoted by the law-making power of the State because of an ascertained public necessity for its completion, or at the rights of the parties who accepted the proposition of the commissioners appointed to carry out the scheme, as those rights are regulated by the statute, we are required to give effect to this general clause by which the scheme is regulated. In doing this we must take into account the conditions upon which alone the work could proceed. First, the consent of the citizens, property owners; and second, the consent of the local authorities.

Until the consent of each was obtained nothing could be done by way of construction; and the time necessarily and in good faith employed in obtaining either may properly be deemed to have been unavoidably consumed. The commissioners anticipated that some time would be so consumed, and enumerated certain causes calculated to have that effect, as the pendency of legal proceedings, the delay or interference of the public authorities; but to those words they add "or otherwise," apparently having relation to the danger guarded against in the untimely expiration of the period limited. The word might indeed be applied to some act or interference on the part of the public authorities other than those mentioned, but it is not necessarily so limited; and as the manifest intention of the provisions of the sentence was to secure to the Company the full time before specified for the completion of the work, it should be deemed to relate to both of these conditions and include any time "unavoidably consumed" in an effort to obtain either, and so make it legally possible to commence the work which was to be completed at a given period, after the time began to run. This construction would not excuse a delay not involuntary, nor an incapacity to proceed caused by the Company itself, and would satisfy the rule which requires a court to be "guided by the intent of the Legislature * * * taken according to the necessity of the matter and to that which is consonant to reason and good discretion;" *Stradling* v. *Morgan*, Plowden, 204, and which makes it necessary to construe a statute in accordance with the circumstances to which the Act was intended to apply.

That the commissioners did not exceed their authority by providing for these contingencies, and that notwithstanding the qualifications, the time within which the railways should be constructed was fixed and determined by them as required by statute, was in effect held by us in the matter of the Cable Railway, decided December 17, 1886 [*ante*, 56], and requires no further discussion.

The appellant claims also that by various Acts of the Legislature the time for the construction of the railway has been extended; chap. 350, Laws 1879; chap. 405, Laws 1882; but the views already expressed make it unnecessary to consider the argument by which it is enforced. If correct, they answer also the position of the respondents, that the franchises of the Corporation have been lost. That contention has no other basis than the assumption that the time given the Company to construct its road expired before the present proceedings were commenced.

I have endeavored to show that upon the papers before us the fact is otherwise. But if mistaken in this, it would not follow that the appeal should for that reason fail. Section 7 of the Act of 1875 (*supra*) provides that the commissioners shall, in the articles of association, "provide for the release and forfeiture to the supervisors of the county, of all rights and franchises acquired by such corporation, in case such railway or railways shall not be completed within the time and upon the conditions therein provided."

This, as we have seen, was done in the very language of the Act; and, assuming with the respondent that the default existed, we are to inquire whether the property right or franchise then in the Company was by that circumstance and without further act done by anyone, or judgment of any court, transferred to the supervisors of Kings County, or at least diverted from the Company. It is certainly well settled that a nonperformance of the conditions of an Act of incorporation will forfeit the grant, even at common law; and like effect is given to such omission by the statute under which the petitioner came into existence; but I am not aware of any case holding that such default does of itself work a forfeiture, or that it can take effect except upon some proceeding where the question is brought directly before the court, unless the statute otherwise provides.

The principal cases relied upon by the respondent were within this exception. *Re Brooklyn etc. R. Co.* 72 N.Y. 245; 75 N.Y. 335. The Company then before the court was organized under an Act which declared that upon omission to do the thing in question, "its corporate existence and powers shall cease."

And in *Brooklyn Steam Transit Co.* v. *Brooklyn*, 78 N. Y. 524, the charter then before the court provided that upon such omission, "This Act and all the powers, rights and franchises herein and hereby granted shall be deemed forfeited and terminated." In the last case the other two were reviewed; but the same principle was said to apply to each.

The general rule to which I have adverted was recognized; but the court held that the Legislature had the power to provide that a corporation might lose its corporate existence without the intervention of the courts; and whether it had intended so to provide must depend upon the construction of the language used. In those cases the statute defined a single act and used unmistakable language. It was held that it executed itself. In the case before us, whether the omission has occurred depends upon a variety of circumstances, any one or all of which must be determined as matters of fact before a forfeiture could be found. It would be easy to say that the road was not completed at the end of thirteen months, or other fixed period, but whether in the meantime there had been delays from causes unavoidable, leading to loss of time, and to what extent, could be answered only upon an issue and after inquiry. Moreover, if there is a forfeiture, it is to the supervisors.

The Company remains a corporation, and the property right or franchise of building this particular portion of railway, or receiving whatever the Company has lost, goes to the supervisors. They have not claimed it, nor does it appear that they require or will accept it. If there is a cause of forfeiture, then there is no reason apparent why they may not waive it. But this point need not be decided. The Legislature has not annulled or dissolved the incorporation of the petitioner, as they might have done; § 34, Act of 1875; nor has judgment of forfeiture been rendered in any suit. We think nothing has yet passed from the Company, and that it is entitled, so far as any question before us is concerned, to proceed with the work for which it is organized.

Such was our conclusion upon all the points presented upon the argument, or embodied in the brief then submitted; but afterwards the case of *The New York Cable Railroad Company* was decided; and a new point suggested by it has been presented in behalf of the respondent as a conclusive answer to this appeal. It is argued that the organization of the Company is not complete, because the commissioners, having located fifteen different routes, fixed the time within which five only of such routes should be completed, and omitted to determine any period within which the remaining ten should be finished. As a matter of fact the premises are truly stated.

Is then the omission of a prescribed time as to the completion of some routes fatal to the whole scheme? This question did not arise in the *Cable Co. Case.* The articles of organization of that company provided for the completion of the routes named; but the time within which it should be done was to begin to run only when the necessary consents should be obtained; and as no time was limited for obtaining them, it was contended by the opponents of the company that there was no actual limitation of the time within which the roads were to be constructed; but the court held that the commissioners substantially complied in this respect with the statute, and that the objection to the organization of the company, in the respect insisted upon, was not well taken. The effect of prescribing the time for the completion of some routes, and altogether omitting to do so as to others, was not discussed. If it be conceded that as to those latter routes the company had no power or right of construction, then we are to see whether the authority given in legal form as to certain routes is avoided because the same charter includes other routes not so authorized. The general rule is that when the illegal part of a contract cannot be separated from the legal, the whole is void; but when they can be separated, the bad part may be rejected and the good upheld.

This is the case here. The routes to which no time has been affixed may be conceded not to have been legally designated for any railway, and the streets or avenues included in them to be open to occupation by another company. Sec. 4, Act of 1875, *supra.*

As to those then the appellant cannot be said to have acquired any right or franchise; and the terms and intent of section 7, which requires the articles to provide for the release and forfeiture to the supervisors of the county, in case the railway or railways shall not be completed within the time therein provided, can be fully satisfied. The letter and intent of the Act has been complied with; and upon default of the Company, all its rights and franchises are to be released and forfeited to the supervisors.

In the *Cable Co. Case* it was held that under a necessary construction of the charter, that company was required to suffer no penalty, except the forfeitures of "the franchise of constructing the routes which they elected to abandon," and was therefore not in compliance with the statute. It that case moreover the company was left at liberty to choose which of the twenty-nine routes covered by the articles it would complete, and for an indefinite number of years hold the privilege granted by franchise, to the exclusion of other organizations, neither building necessary roads themselves, nor permitting others to construct them. Such an option was to the public prejudice.

A different conclusion is required by the terms of the articles before us. The Company is not at liberty to select their routes, and the omission in the articles of a fixed time for the completion of the railway over certain routes is not chargeable to the Corporation, but to the commissioners, who as to these routes may be said to have failed to act. The effort to designate those routes was futile, and the evil pointed out in the *Cable Case* could not arise in this.

In conclusion we are of opinion that the petitioner upon filing the certificate and articles as required by statute (Laws 1875, *supra,* § 9), became, and that it now is a corporation. So far, therefore, as any question has been raised by the respondents, the appeal should prevail.

To that end the orders of the Special and General Terms should be reversed, and the case remitted to the Supreme Court for the appointment of commissioners.

All concur, except **Earl** and **Finch,** *JJ.,* who dissent.

Stephen W. MONK, *Respt.,*

v.

Town of NEW UTRECHT, *Appt.* *

1. Where a road in a town was laid out with a road bed sixty feet wide, flanked on either side by sidewalks eleven feet wide raised about one foot above the level of the road and bordered near the gutters with rows of trees, *held,* that the **town owed no duty to** the traveling **public to erect a fence** or railing **outside of** the exterior line of the **sidewalk** to prevent persons using the highways from walking or falling down a declivity or slope adjoining thereto, which was incident to the plan of the road and was created by its elevation above the adjacent lands, and it was not negligence on the part of the town or its highway commissioners to omit to erect such railing or fence.
2. A **town** is **not obliged to remove irregularities** in the surface of the land **outside of** the **road**, nor to erect barriers to prevent travelers from wandering into the adjoining fields.
3. Neither at common law nor by statute were **towns** under any **legal liability to respond in damages to persons injured by defects in** the **highways** until the enactment of chapter 700 of the Laws of 1881.
4. There is a **difference** in respect to such obligations **between country towns** and village **and municipal corporations.**
5. By the **Laws of 1881** the **liability of towns** is made coextensive with that of commissioners of highways, who are not liable unless they possess, or have power to obtain, means to make necessary repairs.
6. When there were sixty-five miles of road within the jurisdiction of the commissioners of the town, and to have guarded the banks or declivities along the road would have required several miles of barriers, it was in the **discretion of the commissioners to apply** the **funds** in their hands **in making such repairs as**

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* See Hubbell v. Yonkers (N. Y.), 6 Cent. Rep. 490; Bishop v. Schuylkill (Pa.), *ante,* 160.

in their judgment were most needed; and they were **not responsible for** an **error of judgment** in doing so where they have not the funds to repair all the defective places.

7. It was **error** for the trial court **to charge** the jury that if they found "that the great necessity was to keep the actual bed of the roadway safe, they were right in spending it in that way. But if you say it was of more importance to guard this highway, then they were wrong."

8. Under the method in force for laying out and building public roads **in** the **County of Kings, the officers of** the **town are not chargeable for a defect in** the **road** or omission to provide safeguards, **which arises from an error in** its **plan.** No duty except that of keeping the roads in repair when completed is imposed on such officers.

9. **Where** the **plaintiff** was much **intoxicated** and no reasonable excuse seemed to exist for his walking off this road except his intoxicated condition, *held,* that there was a lack of proof showing that plaintiff was free from **contributory negligence.**

(Decided March 1, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, reversing a judgment of the Kings Circuit dismissing the complaint in an action to recover for injuries alleged to have been caused by the defective condition of a highway. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **William Sullivan**, for appellant:

The sidewalk and slope as they existed when the accident happened having been built according to an adopted plan, the Town would not be liable, even if the improvement had been constructed by its own officers acting as its agents, and if its obligation to keep its highways in repair were coextensive with that of an incorporated city or village.

But the improvement was constructed, not by its agents but by independent public officers for whose acts or omissions in reference thereto the Town is not responsible. The construction of the street, so far as the highway commissioners were concerned, was completed when they took charge of it, and therefore the duty imposed on them by the Act (chap. 364, Laws 1878, § 9) to keep it in repair related to the street as constructed by such public officers.

They are not required to do anything more than to keep such street in the same condition in which it was then committed to their charge.

Detroit v. *Beckman*, 22 Am. Rep. 507; 34 Mich. 125; *City of Lansing* v. *Toolan*, 22 Am. Rep. 510, *note*; 37 Mich. 152; *Urquhart* v. *Ogdensburg*, 91 N. Y. 67–71.

In this respect also, the case at bar differs from *Hubbell* v. *Yonkers*, 6 Cent. Rep. 499.

Laws 1869, chap. 670, Laws 1878, chap. 364, §§ 1, 2, 5, 9; Dill. Mun. Corp. 3d ed. § 974; *Maxmilian* v. *Mayor*, 62 N. Y. 160; *Tone* v. *Mayor*, 70 N. Y. 158, 165, 166; *Ham* v. *Mayor*, 70 N. Y. 459; *N. Y. & Brooklyn Saw Mill & Lumber Co.* v. *Brooklyn*, 71 N. Y. 580; *Terhune* v. *Mayor*, 88 N. Y. 248, 251; *Bamber* v. *Rochester*, 26 Hun, 587.

In this State the obligation and liability of towns in respect of their highways, under chapter 700, Laws 1881, are prospective and only coextensive with those of highway commissioners.

Frasier v. *Town of Tompkins*, 30 Hun, 168; *Eveleigh* v. *Town of Hounsfield*, 34 Hun, 140.

If the obligation to repair Eighty-Sixth Street includes the erection of fences, it must be conceded that the obligation to repair all of the other highways also embraces similar acts.

There was no specific appropriation for the fencing of any of the highways of the Town. But the sum of $2,500 was annually appropriated for the repair of all the bridges and highways of the Town for one year; and the duty of the highway commissioners was to expend the same during the year as they deemed necessary in repairing the roads and bridges of the Town. As the annual appropriation was limited to this sum, which was actually expended by the highway commissioners in repairing the roads and bridges of the Town, but which was insufficient for the repair of all of them, exclusive of fencing, which alone would have exhausted the appropriation, they were not liable for not repairing all of them, and for not erecting fences at exposed places.

Under such circumstances the selection of the places to be repaired or fenced was referred to their discretion; and for the exercise of that discretion neither they nor the Town can be made responsible in a civil action.

Shepherd v. *Lincoln*, 17 Wend. 250; *People* v. *Adsit*, 2 Hill, 619; *Smith* v. *Wright*, 27 Barb. 622, 631, 632; *Williams* v. *East India Co.* 3 East, 192; *Frasier* v. *Town of Tompkins*, 30 Hun, 168; *Eveleigh* v. *Town of Hounsfield*, 34 Hun, 140; *Barker* v. *Loomis*, 6 Hill, 463; *People* v. *Supervisors*, 93 N. Y. 397; Laws 1869, chap. 800, § 6; Dill. Mun. Corp. 3d ed. § 949; *Wilson* v. *Mayor*,* 1 Denio, 595, 599, 600; *Weaver* v. *Devendorf*,* 3 Denio, 117, 120, 121; *Vail* v. *Owen*, 19 Barb. 22; *Barhyte* v. *Shepherd*, 35 N. Y. 238; *People* v. *Common Council*, 78 N. Y. 33; *East River Gas Light Co.* v. *Donnelly*, 25 Hun, 614; *S. C.* 93 N. Y. 557; *Cain* v. *Syracuse*, 95 N. Y. 83.

Mr. **A. Simis, Jr**, with *Mr.* **George B. Ackerly,** for respondent:

It was the duty of the highway commissioners of the Town to keep the highways in repair, and the Town is made liable for all damages to person or property by reason of defective highways, Laws 1881, chap. 700. The highway in question was laid out as provided by chap. 364, Laws of 1878; and by section 9 of said Act, the highway commissioners of said Town were directed to keep it in repair.

"It would appear to be sufficiently obvious that the duty of keeping a bridge or highway in repair extended not merely to the floor of the bridge or the road bed of a highway, but to proper guards or railings on their sides or borders when necessary for the safety or protection of the public."

Hyatt v. *Trustees of Rondout*, 44 Barb. 391, and cases cited.

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* See note at beginning and digested citations at end of this case in Lawyers' edition.[Ed.]

Municipalities owe an absolute duty to all travelers to keep their highways in a reasonably safe condition for travel.

Ring v. *Cohoes*, 77 N. Y. 88; *Gillespie* v. *Newburgh*, 54 N. Y. 468.

"Where a rail or barrier is necessary for the proper security of travelers at places on the road, which from their nature would be otherwise unsafe, and the maintenance of which would have prevented the happening of injury, *it is negligent* not to construct and properly maintain such a barrier."

Shearm. & Redf. Neg. § 391; *Hubbell* v. *Yonkers*, 35 Hun, 349.

The duty to keep the highway in repair is ministerial; and for a negligent omission to perform this duty an action lies by the party injured.

Hines v. *Lockport*, 50 N. Y. 238.

Want of funds is not a good defense.

Warren v. *Clement*, 24 Hun, 474; *Robinson* v. *Chamberlain*, 34 N. Y. 395.

"The issue being the fact of negligence, the motive or good faith of the commissioners was entirely immaterial."

Hover v. *Barkhoof*, 44 N. Y. 113; *Robinson* v. *Chamberlain*, 34 N. Y. 389; *Olmsted* v. *Dennis*, 77 N. Y. 382.

The supervisors of the several towns, as commissioners to lay out such roads, performed and completed their *quasi* judicial power by the building of the road; as such commissioners they had only to do with the road bed. After its completion their power was spent, and its future care devolves upon the highway commissioners. The duty of keeping it in repair so as to prevent its being dangerous to the public is ministerial, and for a negligent omission to perform it an action by the party injured will lie.

Hines v. *Lockport*, 50 N. Y. 286; *Urquhart* v. *Ogdensburg*, 91 N. Y. 71; *Hubbell* v. *Yonkers*, 35 Hun, 349.

Ruger, *Ch. J.*, delivered the opinion of the court:

This action was brought to recover damages occasioned to the plaintiff, by falling down a slope or declivity adjoining the road known as Eighty-Sixth Street, in the Town of New Utrecht, Kings County.

This slope descended from the northerly exterior line of the sidewalk thirty feet, at an angle of about thirty degrees, and was intercepted near the middle by a fence running parallel with the road. The road was built about the year 1874, and was laid out with a road bed sixty feet wide, flanked on either side by sidewalks eleven feet wide, raised about one foot above the level of the road, and bordered near the gutters with rows of trees. It was located partly in the Town of New Utrecht and partly in Gravesend, and extended from the Village of Bath to Fort Hamilton, both lying on or near the sea shore, about two miles apart.

The accident occurred about 10 o'clock in the evening, at a point nearly half way between the two villages, the plaintiff walking off the sidewalk and rolling down the embankment on the north side of the road, whereby he sustained bodily injuries.

The negligence complained of was the omission of the defendant to erect a railing or fence at the top of the bank sufficient to prevent persons using the highway from walking or falling down the declivity.

We are of the opinion that the Town owed no duty to the traveling public to erect such fence, and that it was not negligence on its part, or that of its highway commissioners, to omit to do so. The alleged defect was incident to the plan of the road, and was created by the elevation of the road above the level of the adjacent land. Such irregularities are not at all uncommon in rural highways, and are not supposed to present any danger to the traveling public when using ordinary care in the use of the road.

The Town had furnished a safe and sufficient road way of unusual width, whose boundaries were indicated on either side by a gutter and elevated sidewalk bordered by rows of trees, and was under no obligation to erect barriers to prevent travelers from wandering into the adjoining fields. No possible difficulty existed in this case, to prevent a traveler from following either the road or sidewalk by marks which could both be seen and felt; and it would be imposing a burden beyond all precedent to require a town to remove irregularities in the surface of the land outside of the road for fear that some traveler might wander there and thus sustain injury.

Neither at common law nor by the statute were towns under any legal liability to respond in damages even to persons injured by defects in the highways until after the enactment of chapter 700 of the Laws of 1881.

A manifest difference, in this respect, arising out of charter provisions and the obvious requirements of the situation exists between village and municipal corporations and country towns in respect to such obligations. *Hyatt* v. *Trustees of Rondout*, 44 Barb. 385.

It was held in *People* v. *Town Auditors*, 74 N. Y. 315, that "Under our system no corporate duty is imposed upon towns in respect to the care, superintendence or regulation of highways within their limits." "Commissioners of highways have by the statute the care and superintendence of highways;" and "They are responsible in a civil action for any injury resulting from their neglect to repair a highway (if provided with means for that purpose) whereby an individual sustains damages."

On the other hand the Town in its corporate character has no control over the highways. It cannot lay out a highway or discontinue one. It is not liable for failure to keep highways in repair, and has but limited corporate duties to perform in respect thereto. *People* v. *Supervisors*, 93 N. Y. 397.

By the Act of 1881, however, it was provided that towns should thereafter be liable for such injuries in cases where the "commissioner or commissioners of highways of said towns are now by law liable therefor."

It is seen that the liability of the towns is thus made coextensive with that of commissioners of highways in towns.

No absolute liability for such injuries was ever imposed by law upon such officers, but only a limited responsibility arising out of their negligence, to the extent only that they were possessed of, or had power to obtain means to make necessary repairs. *Hines* v. *Lockport*, 50 N. Y. 238; *Hover* v. *Barkhoof*, 44 N Y. 113.

It does not affirmatively appear in what manner the commissioners of the Town of New Utrecht were supplied with funds for the repair of its roads and bridges; but it is shown by the evidence of one of its commissioners that he received $2,500 during the year 1882, for such purposes.

It was testified to that such sum was all expended in that year for the ordinary repairs of the roads and bridges and was not entirely sufficient for that purpose.

The proof showed that from sixty-five to seventy miles of road were within the jurisdiction of the commissioners, and required care, expense and repair, and to have guarded the several places along said roads, where banks or declivities existed, would have required the erection of two or three miles of barriers in addition to the expense for legitimate repair of the road beds.

Under such circumstances it was confided to the discretion of the commissioners to apply the fund in their hands in making such repairs as in their judgment were most urgently needed; and they were not responsible for an error of judgment in doing so. *Garlinghouse* v. *Jacobs*, 29 N. Y. 297; *Hover* v. *Barkhoof*, 44 N. Y. 118.

It was therefore error for the court below to charge the jury that if they found "'that the great necessity was to keep the actual bed of the road way safe, they were right in spending it in that way. But if you say it was of more importance to guard this highway, then they were wrong."

The direct effect of this instruction was to authorize the jury to find the defendant liable for an error in judgment on the part of its highway commissioners in a case where they were unable from want of means to repair all of the defective places in the highways of the Town.

There was not the slightest evidence in the case as to the respective needs of the various places in the highways requiring repairs; and no ground exists upon the evidence for imputing an error in judgment to them in expending the funds in their lands.

The exception to the charge was well taken. We are also of the opinion that under the method in force for laying out and building public roads in the County of Kings, the defect, if any, in the road in question arose from an error in the plan of the road, and was not chargeable to the officers of the Town.

It is provided by chapter 670 of the Laws of 1869 that roads and streets in the towns of Kings County shall be made by certain commissioners consisting of the respective supervisors of the Towns of New Lots, Flatbush, Flatlands, New Utrecht, and Gravesend, and the chairman of the board of supervisors of Kings County. They are to have exclusive power to lay out such streets, avenues, and public places, of such width, extent and direction as they shall decide; and after the adoption of such permanent plan no street or avenue shall be laid out in such towns, except in accordance with said plan; and all streets or avenues afterwards opened shall be made to conform to such permanent plan and the lines thereof. Such plan is required to be filed in the clerk's office of the county.

By chapter 364 of the Laws of 1873 these commissioners were directed to lay out and place upon their map Eighty-Sixth Street in accordance with certain conditions therein specified for its direction and location, and this street was afterwards laid out and entered by said commissioners in conformity thereto.

It was further provided in the same Act that upon the application of any freeholder whose land should be taken for such road, the County Court of Kings County or a special term of the supreme court therein should appoint three freeholders of New Utrecht and Gravesend to appraise and award damages to the several persons whose land was required for such road, and should also assess such persons and all others owning land within 100 feet on either side of such road for the aggregate amount of such awards and the expense of making such awards and assessments. Appropriate provisions were also made to enforce and collect such assessments and awards.

Upon the confirmation of the report of such commissioners by the court it was further provided that three other commissioners should be appointed by the said courts, or one of them, in the same manner as the previous commissioners had been appointed, to regulate and grade for public travel such street, and to plant trees along the sidewalks, and erect suitable signs with the names of any intersecting streets or avenues thereon, and assess the expense thereof upon the premises lying on either side of said street within 100 feet thereof.

After the grading of said street should be completed it was provided that the owners of the adjoining premises on either side might fence their lots along the street; and it was then further enacted that the said street so "laid out and mapped should be a public highway, and the portions thereof situate within the Towns of New Utrecht and Gravesend respectively shall be kept in repair by the commissioners of highways of those towns, respectively."

We have thus stated all of the statutory provisions applying to the subject, upon which the defendant's liability, if any, must be predicated.

No complaint is made that the commissioners of highways of the defendant have not kept the road bed and sidewalks of Eighty-Sixth Street in perfect repair since they came under their charge, or that the road was not constructed in every respect, according to the plan laid down by the commissioners charged with the duty of making it.

The charge is that a grade laid out and designed by the street plan outside of the roadway and not apparently dangerous to persons traveling thereon was not rendered inaccessible to persons from the sidewalk by a fence or railing.

We are unable to see any duty resting upon the Town to make such fence. The entire duty of laying out, constructing and grading this road as a finished highway was expressly imposed upon the commissioners named in the statutes; and no duty except that of keeping the street (when completed) in repair was confided to or imposed upon the town authorities.

The statutory commissioners were clothed with power and funds to make a safe and complete road way, finished in all respects; and they undoubtedly supposed that they had done so when they turned it over to the Town.

All questions as to the feasibility and safety of the route selected and of the security of the plans of structure to be adopted, were devolved by statute upon the commissioners charged with the work of making such plans; and the duty of determining these questions was clearly judicial in its nature, dependent upon the judgment and discretion of the body authorized to perform it.

The commissioners were called upon, in constructing a plan, to decide upon the safety of the route adopted and the dangers thereby to be encountered, and if safeguards were necessary to protect travelers in passing dangerous places, to provide them; and if they failed to do so, it constituted simply a defect in the plan of the work, arising from an error in judgment as to its necessities. For such errors it is well settled that no liability arises. *Urquhart* v. *Ogdensburg*, 91 N. Y. 67; *S. C.* 97 N. Y. 238.

We also think that the order of the trial judge granting a nonsuit was supported by the lack of proof showing the plaintiff free from contributory negligence.

The evidence showed him to be the inmate of an inebriate asylum, and that on the day of the accident he had leave of absence for a day, under a pledge that he would abstain from intoxicating drinks during that time. Although he denies that he became intoxicated, he admits that he spent the entire day in going from one saloon or tavern to another, taking beer and other refreshments at each. He is described by every disinterested witness in the case as much intoxicated.

When the circumstances of the accident are considered it is rendered quite clear that it could have happened only by gross carelessness. It occurred on a clear starlit night, soon after he had been placed in the middle of a straight, wide road, upon which there was a streetcar track. The road itself was bordered by trees, gutter, and a sidewalk. He was directed to his destination by a person who had guided him half of the way and told to follow the car track. Objects could be seen plainly for 200 feet; and no reasonable excuse for his walking off this road seems to exist, except the plaintiff's intoxicated condition.

We think the order of the General Term should be reversed, and the judgment of nonsuit affirmed, with costs.

All concur.

Isaac B. ELLSWORTH *et al.*, *Respts.*,

v.

ÆTNA INSURANCE CO., *Appt.*,

1. In an **action upon** an insurance **policy** to recover **for** the value of **a stock of goods burned,** where the books and most of the papers of the plaintiff were destroyed by the same fire, an **inventory made** by the seller of the goods, assisted by the plaintiff **ten months before** the **fire,** on the purchase of the stock by the plaintiff, showing the prices then paid for the classes of goods embraced therein, some of which were burned, is **admissible** in evidence as bearing **upon** the **value of** the **goods burned.**
2. The footings of another inventory, made by plaintiff a few days before the **fire,** of the stock of goods then on hand, **are** also **admissible,**—as the best **evidence** at plaintiff's command, **to show** the **amount of** the **loss,** when supplemented by plaintiff's testimony as to the correctness of the footings and that they represented the cost of the goods, the pass books on which the last inventory was made and the bills of purchase having been destroyed by fire with the other books and papers of plaintiff.

(Decided March 25, 1887.)

APPEAL from an order of the Supreme Court at General Term in the Fifth Department, affirming an order of the Erie Special Term denying defendant's motion for a new trial upon a case and exceptions in an action on a policy of fire insurance. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **James M. Humphrey,** for appellant:

The inventory of purchase from Bennett & Bean, made November 14, 1872, was inadmissible in evidence upon the question of value of the property lost.

1 Phil. Ev. 4th Am. ed. 169; 1 Greenl. Ev. § 99, Redf. ed.; *Machin* v. *Insurance Co.* 90 N. Y. 689.

The inventory is in the handwriting of and made by a stranger who is not produced and whose absence is not explained; and it should not have been admitted.

Wilber v. *Selden*, 6 Cow. 162; *Brewster* v. *Doane*, 2 Hill, 587; *Merrill* v. *Ithaca R. R. Co.* 16 Wend. 586, 595; 1 Phil. Ev. 4th Am. ed. Cowen & Hill's Notes, 438, note 107.

Sufficient proof of its accuracy to make it competent was not given.

Merrill v. *Ithaca R. R. Co.** 16 Wend. 586; 2 Greenl. Ev. § 407; Redf. ed.

The footings of the last inventory taken by the plaintiffs a few days before the fire, and entered on an old Bennett and Bean inventory were inadmissible. There is no evidence that these papers were ever compared by anybody. No one testifies to their accuracy. No witness is asked to give the amount of stock on hand after looking at these figures. It was error to admit it.

1 Phil. Ev. 386; Cowen & Hill's Notes, p. 1065, n. 719; *Kellogg* v. *Kellogg*, 6 Barb. 116, 130.

The paper was not used to refresh the memory of any witness; it was not an original and could not be used as evidence of any fact.

Marcly v. *Shults*, 29 N. Y. 346, 351.

The admission of improper evidence is a ground for a new trial.

Hilliard, New Trials, §§ 6, 411, citing *Edwards* v. *Evans*, 3 East, 451; *Worrall* v. *Parmelee*, 1 N. Y. 521; *Dresser* v. *Ainsworth*, 9 Barb. 619; *Baird* v. *Gillett*, 47 N. Y. 186; *Foote* v. *Beecher*, 8 N. Y. Week. Dig. 520; *People* v. *Wiley*, 3 Hill, 194, 214.

Mr. **Joel L. Walker,** for respondents.

Per Curiam:

The principal errors alleged relate to the admission in evidence against the objection of the defendant, *first*, of the inventory made in November, 1872, about ten months before the fire, on the sale made by Bennett and Bean to the plaintiff, Isaac B. Ellsworth, of the stock of goods and fixtures of Bennett & Bean, and *second*, of the footings of the inventory made by Ellsworth & Son, September 10, 1873, a few days before the fire, of the stock then on hand. The admissibility of this evidence is to be determined in view of the circumstances. Upon the issues as found it was incumbent upon the plaintiffs to show the amount and value of the goods burned.

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*See digested citations at end of case in Lawyers' edition. [ED.]

The plaintiffs, after the purchase from Bennett & Bean, continued the business to the time of the fire, selling from the stock purchased of that firm, and from new stock purchased from time to time, which was mingled with the old stock.

The Bennett & Bean inventory was taken by the members of that firm, assisted by the plaintiffs and one Bowie, and was entered in a book, the articles being stated in detail, with the cost price. The sale to Ellsworth was made upon this inventory, for the net cost, $7,740.07. The book containing the inventory was delivered to and kept by the plaintiffs in the safe in the store. The inventory of September 10, 1873, was entered in pass books, the goods being classified, and the cost of each article in each class was given, and footings of the aggregate cost of each class was made. These footings, aggregating $6,325.25, were transferred by the plaintiffs and entered in the inventory book containing the Bennett & Bean inventory. The pass books and the bills of purchase were kept in a desk and were with other books and papers destroyed by the fire. The inventory book kept in the safe was not burned. The trial occurred nine years after the fire.

The plaintiffs were severally sworn as witnesses in their own behalf, and testified as to the particulars of the loss, so far as they could recall them. It appeared from their testimony that many of the goods purchased of Bennett & Bean, and specified in the inventory of 1872, were in the stock at the time of the fire, and they enumerated a large number of articles bought of Bennett & Bean, then on hand. But they were unable to specify the exact quantities, or the exact cost from recollection. The same is true as to the new goods. Under these circumstances the court admitted the Bennett & Bean inventory in evidence, as bearing upon the value of the classes of goods embraced therein, which were in the stock and were burned at the time of the fire; and the court also admitted the footings of the inventory of September 10, 1873, to be read from the Bennett & Bean inventory book. The admission of the Bennett & Bean inventory was not, at the time it was admitted, restricted in terms to the purpose named; but it was so limited in the charge. We think both this inventory and the footings of the second inventory were properly admitted.

The plaintiffs labored under great embarrassment in making out their case, owing to the burning of papers and memoranda, and the lapse of time, and seem to have given the best evidence bearing upon the issue at their command. The Bennett & Bean inventory showed what goods were purchased by Ellsworth and their cost to Bennett & Bean, and also the prices paid by Ellsworth; matters as to which the plaintiffs had no certain specific recollection. The price paid ten months before the fire, for goods burned, was some evidence of their value at the time of the fire. The footings of the inventory of September 10, 1873, were authenticated by the testimony of both the plaintiffs as correct footings of the inventory contained in the pass books; and they testified that they represented the cost of the goods. It is true that the evidence as to the quality or value of the goods burned, was not very satisfactory, and the jury, as their verdict indicates, were of this opinion; but we think the rules of evidence were not violated.

There are no other questions requiring special notice.

The order appealed from should be affirmed.

All concur.

James Walter CHRYSTAL, An Infant, by Guardian, *Respt.*,
v.
TROY & BOSTON R. R. CO., *Appt.*

1. The presence of an **infant** seventeen months old, unattended, **upon the track of a railroad,** unexplained, is proof of carelessness and inattention on the part of the mother.
2. Although the **evidence** in a case is liable to criticism as unnatural, yet **if** it is **not** so **impossible** that, as matter of law, the jury cannot believe it and rely upon it, **this court has no power to weigh** it.

NOTE.—*Negligence on part of children.* As to the rules which are to be applied in determining whether children of tender years are chargeable with contributory negligence, and as to the degree of care which others should exercise towards them, see Morrissey v. Providence & Worcester R. R. Co. (R. I.), 1 New Eng. Rep. 806; Mattey v. Whittier Machine Co. (Mass.), *Id.* 483; Nolan v. N. Y. & N. H. R. R. Co. (Conn.), *Id.* 826; Messenger v. Dennie (Mass.), *Id.* 759; Wright v. Boston & Albany R. R. Co. (Mass.), 2 New Eng. Rep. 725; Collins v. South Boston Horse R. R. Co. (Mass.), *Id.* 649, and note; Moynihan v. Whidden (Mass.), 3 New Eng. Rep. 362; Galligan v. Metacomet Mfg. Co. (Mass.), *Id.* 705; Phila. W. & B. R. R. Co. v. Layer (Pa.), 3 Cent. Rep. 881; Schilling v. Abernethy (Pa.), *Id.* 168; Biddle v. Hestonville, etc. R. Co. (Pa.), *Id.* 404; Moore v. Logan Iron & Steel Co. (Pa.), 4 Cent. Rep. 505; Erie City Pass. R. Co. v. Schuster (Pa.), *Id.* 919; Citizens Pass. R. Co. v. Costigan (Pa.), 5 Cent. Rep. 525; Oil City & Petroleum Bridge Co. v. Jackson (Pa.), *Id.* 324; Cumming v. Brooklyn City R. R. Co. (N. Y.), 6 Cent. Rep. 394; Phila. W. & B. R. R. Co. v. Gunther (Md.), *Id.* 480; Kunz v. City of Troy (N. Y.), *Id.* 493; Miller v. Pennsylvania R. R. Co. (Pa.), *Id.* 607; St. Clair Street R. Co. v. Eadie (Ohio), 1 West. Rep. 88; Chicago v. Keefe (Ill.), *Id.* 853; Stafford v. Rubens (Ill.), *Id.* 640; Saare v. Union R. Co. (Mo.), 2 West. Rep. 538; Duffy v. Missouri Pac. R. Co. (Mo.), *Id.* 198; Indianapolis, etc. R. R. Co. v. Pitzer (Ind.), 4 West. Rep. 250, and note, 258; S. C. 7 West. Rep. 396; Whitehead v. St. Louis, I. M. & S. R. Co. (Mo.), 5 West. Rep. 84; Dowling v. Allen (Mo.), *Id.* 370; Indianapolis v. Emmelman (Ind.), 6 West. Rep. 566; Muehlhausen v. St. Louis R. R. Co. (Mo.), *Id.* 857; Chicago, St. L. & P. R. R. Co. v. Welsh (Ill.), *Id.* 540; Schmidt v. Kansas City Distilling Co. (Mo.), 7 West. Rep. 124; Ecliff v. Wabash, St. L. & P. R. Co. (Mich.), *Id.* 464; Battishill v. Humphrey (Mich.), *Id.* 806; Hughes v. Detroit, etc. R. Co. (Mich.), 8 West. Rep. 100; Rafferty v. Missouri Pac. R. Co. (Mo.), *Id.* 255.

3. In an **action** to recover **for injuries** done **to an infant seventeen months old, by** the alleged **negligence of a railroad company,** where the sole negligence charged was that the engineer ought sooner to have discovered the child on the track and stopped the train before it reached him, and the evidence shows that after the engineer discovered that the child was in peril everything was done that could be to arrest the speed of the train, *held,* that it cannot be inferred that the engineer ought to or could have seen the child sooner than he did; *also,* that the **engineer had** the **right,** in broad daylight when his train is visible and its approach could be heard, **to assume** that the **child would leave** the **track** in time to escape injury.
4. The railroad **company is not responsible for** any **error in judgment,** if there was any, **on the part of** the **engineer** as to the speed of his train, the distance, age and peril of the child, and his ability to stop the train in time to protect him.
5. All that the engineer was bound to do, after the discovery of the peril, was to use **reasonable diligence** and care to avert it.

(Decided March 22, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Third Department, affirming a judgment of the Rensselaer Circuit on a verdict for plaintiff of $8,000 damages in an action to recover for injuries sustained at a railroad crossing. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **E. L. Fursman,** for appellant:

That the plaintiff was *non sui juris* imposed no additional duty upon the defendant. All that the defendant was bound to was ordinary care in running its train; and if negligence was claimed because of any alleged omission to do this, it was for the plaintiff to affirmatively show such omission.

Sutton v. *N. Y. Cent. etc. R. R. Co.* 66 N. Y. 243.

Mr. **R. A. Parmenter,** for respondent:

The court will take judidicial notice that a child only seventeen months old, who has been able to walk for about two months only, is *non sui juris*; therefore, negligence will not be predicated upon his conduct.

Prendegast v. *N. Y. Cent. etc. R. R. Co.* 58 N. Y. 652. See note to *Casey* v. *N. Y. Cent. etc. R. R. Co.* 6 Abb. N. C. 104; *Ihl* v. *Forty-Second St. etc. R. R. Co.* 47 N. Y. 317.

The negligence of the parent, whether or not imputable to a child *non sui juris,* is ordinarily a question of fact for the jury.

Mangam v. *Brooklyn City R. R. Co.* 36 Barb. 238, 239, 241; *S. C.* affirmed, 38 N. Y. 455, 457, 461; *Fallon* v. *Central Park etc. R. R. Co.* 64 N. Y. 17; *McGarry* v. *Loomis,* 63 N. Y. 107; *Smedis* v. *Brooklyn etc. R. R. Co.* 88 N. Y. 13; *Kellogg* v. *N. Y. Cent. etc. R. R. Co.* 79 N. Y. 73; *Stackus* v. *N. Y. Cent. etc. R. R. Co.* 79 N. Y. 467; *Shaw* v. *Jewett,* 86 N. Y. 616; *Massoth* v. *Del. & Hud. Canal Co.* 64 N. Y. 529.

Earl, *J.,* delivered the opinion of the court;

This action was commenced to recover for injuries caused to the plaintiff by the defendant carelessly running an engine over him upon its road. It denies that it was guilty of any negligence or fault causing the injury, and alleges that there was negligence on the part of the plaintiff's mother, a widow, which exposed him to the injury which he sustained.

The accident happened on the 4th day of September, 1877, and the action was commenced on the second day of February, 1880, and was brought to trial on the 21st day of May, 1884.

At the time of the accident the plaintiff was a nursing infant, seventeen months old, and in consequence of his injuries one of his fingers was amputated and also one of his legs above the ankle. The verdict of the jury was for $8,000.

The presence of the plaintiff, unattended, upon the railroad would, under the circumstances, if unexplained, have been conclusive proof of carelessness and inattention on the part of the mother; and hence it became important for him to show that he strayed upon the railroad track without any culpable neglect on her part.

At the place of the accident the railroad runs in a northerly and southerly direction and was crossed at right angles by Carey Avenue in a sparsely populated portion of the Village of Hoosac Falls. The plaintiff resided with his mother on the north side of that avenue, about eighty feet easterly of the railroad, in a house which stood about twelve feet northerly from the line of the avenue. He had been able to walk for only about two months, was fat and chubby, and just before the accident had been playing in the yard in front of the house. His mother, as a witness, for the purpose of exculpating herself from the charge of negligence, gave the following statement of what then took place:

She took him up and held him in her lap sitting on the front door steps of the house. Finding that he was sleepy she went into the house and sitting in a rocking chair nursed him. Seeing that he was inclined to sleep, she laid him down upon the floor and saw that he was still, and she then put a chair across the open door way while she went into another room to fix his cradle. She was gone eight or ten minutes and when she came back he was gone. The chair across the door way was undisturbed so that he must have crawled over the chair or through it in some way and passed down the steps to the front gate, which was fastened; under the gate there was a space of about six inches through which he must have crawled and then he must have passed into the street eighty feet to the railroad where he was hit by the engine and injured.

All this transpired during the eight or ten minutes she was in the adjoining room. When she came out of that room and commenced looking for him she saw him on the railroad and saw the train coming. He had never gone to that place before, and was never known before to crawl under the gate.

The counsel for the defendant contends that this story that this child was just able to walk, after being to sleep as sound as comes to a tired, well fed infant, woke up, got through or over the chair, down the steps, under the gate and down to the railroad track, all within eight or ten minutes, is so incredible, unnatural and contrary to human experience that the jury could not rely upon it as sufficient to show such care of the child on the part of his mother as the law exacts.

While this evidence is liable to much of the criticism in which the defendant's counsel indulges, we cannot say that the story, in its essential features, is so impossible or improbable that as matter of law the jury could not believe it and rely upon it. We have no power to weigh the evidence. The general term, however, having power to set aside verdicts which are contrary to the evidence, should not allow one to stand which is based simply upon evidence which may *possibly* be true.

But we are of opinion that the evidence failed to show any negligence on the part of the defendant. There is no charge that its road bed or engine, or any of the appliances upon its train were out of repair, defective or insufficient; nor is there any claim that there was any omission to give the proper signals for this crossing, or that the train was run at an improper rate of speed. The sole negligence charged, as we understand it, is that the engineer ought sooner to have discovered the plaintiff upon the track and stopped the train before it reached him.

This is the first case that has come before this court and, so far as we know, before any court in this State, wherein must be defined the responsibilities of a steam railroad company, not otherwise in fault, to one lawfully upon its track, for not seeing him and stopping its train in time to avoid injuring him.

It was in evidence, by a witness produced by the plaintiff, that the plaintiff could be seen upon the track at a point about 500 feet from where he was injured. From the evidence of the defendant's engineer it appears that when he was about forty rods from the avenue he saw a little girl upon the crossing about eight or nine years old, and that she ran from the track, and that then for the first time he saw the plaintiff. He immediately gave the signal for the brakes to be applied and reversed his engine, and the evidence shows that everything was then done that could be done to arrest the speed of the train, and that only two of the small wheels of the engine passed over the plaintiff's leg before it was entirely stopped.

There was evidence on the part of the plaintiff tending to show that there was no little girl upon the crossing just previous to the accident as testified to by the engineer, and it may be assumed that he, testifying a long time after the accident, was mistaken. But his evidence was not necessarily in conflict with that of the other witnesses upon whose memory time may also have done its work. The little girl may have come upon the track and passed off undiscovered by the other witnesses, and the plaintiff may have come upon the track soon after and may have been seen by the engineer immediately after he came upon the track and after the girl had passed off. The facts testified to by the plaintiff's mother showed that he must just have reached the track, and could have been there but a very brief time before the accident. It cannot be inferred that the engineer ought to have seen or could have seen him any sooner than he did. It is not probable, and there is no evidence to show that he was upon the track at the time the train left the depot, about 1,500 feet from the avenue; nor is there any evidence from which it could be found that he was upon the track and therefore visible to the engineer at any time before the train came within forty rods of him.

Witnesses testifying after the great lapse of time might be mistaken as to the speed of the train, the distance at which the child was first discovered upon the track, and the place where the engine was reversed. But there can be no doubt, upon this evidence, that after the engineer discovered that the child was in peril he did all he could to arrest the motion of his train. That he willfully or recklessly ran upon him after he discovered that he was in peril is inconceivable, and certainly cannot be assumed.

An engineer is not bound to stop his train the moment he sees some living object upon the track. He has the right, in broad daylight, when his train is perfectly visible and its approach must be heard and known, at least in the first instance, to assume that the object, whatever it is, will leave the track in time to escape injury. He is not bound to expect helpless infants upon the track, without sufficient knowledge or ability to escape when warned of danger. He could not know when he first saw the plaintiff that he was too young to be conscious of the danger to which he was exposed; and without the imputation of negligence, he could run on until he discovered that he was heedless of the danger. Reasonable care in the management of trains which must make their time between stations and have the right of way does not require more.

The defendant is not responsible for any error of judgment, if there was any, on the part of the engineer, as to the speed of his train, the distance, age and peril of the child, and his ability to stop the train in time to protect him. All the engineer was bound to do after the discovery of the peril was to use reasonable diligence and care to avert it, and there was no evidence which authorized the jury to find that he did not do this.

We are, therefore, of opinion that the judgment should be reversed and a new trial granted, costs to abide event.

All concur (**Peckham,** *J.*, on the ground that the evidence exculpating plaintiff's mother from negligence is so wholly incredible in its nature as not to be sufficient in law to be submitted to a jury) except **Danforth** and **Andrews,** *JJ.*, who dissent.

PEOPLE of the State of New York, *Respts.*,
v.
Lipman ARENSBERG, *Appt.**

1. **Section 7 of chapter 183 of** the **Laws of 1885,** entitled "An Act to Prevent Deception in the Sale of Dairy Products," etc., is **not in violation of** the

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*See *S. C.* 4 Cent. Rep. 542; Powell v. Commonwealth (Pa.), 5 Cent. Rep. 890.

Constitution of this State, nor subversive of the constitutional rights of liberty or the enjoyment of property.

2. Producers of butter made from animal fats or oils, called **oleomargarine,** have no constitutional right to resort to devices for the purpose of making their product resemble in appearance the more expensive article known as "dairy butter;" and the **Legislature has power to** enact such laws as it may deem necessary to **prevent** the **simulated article being put upon** the **market** in such a form and manner as to be calculated to deceive.
3. Those making and dealing in it should be protected in the enjoyment of liberty in those respects, if it possesses merits and is innocuous; but they may be **legally required to sell it for** and as **what it really is** and upon its own merits, and are not entitled to the benefit of any additional market value which may be imparted to it by resorting to artificial means to make it resemble dairy butter. The difference in market value alone makes it fraud to pass off one article for the other.
4. The statutory prohibition is aimed at a **designed** and intentional **imitation of dairy butter,** in manufacturing the new product, and not at a resemblance in qualities inherent in the articles themselves and common to both.
5. The **artificial coloring of oleomargarine** for the mere purpose of making it resemble dairy butter, and thereby enhancing its price, comes within the statutory prohibition against imitation, and such prohibition is within the power of the Legislature.

(Decided March 22, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Court of Sessions of Kings County on conviction of defendant of selling oleomargarine. *Affirmed.*

Defendant has been twice tried on the same indictment. The first trial resulted in a conviction and judgment thereon which, after affirmance by the general term, was reversed on appeal to this court and a new trial granted, for error in the charge to the jury. See 4 Cent. Rep. 542.

The second trial resulted in a conviction and judgment, which was affirmed by the general term; and defendant appealed to this court.

The facts and questions raised appear from the opinion.

Messrs. **Frederick R. Coudert, Wheeler H. Peckham** and **John N. Lewis,** for appellant:

I. The prohibition of the statute is subversive of the constitutional rights of liberty and the enjoyment of property.

The statute under which the defendant was convicted can be sustained, if at all, only upon the ground that it is a constitutional exercise of the police power of the Legislature.

Re Jacobs, 98 N. Y. 98–108, 110.

The statute in question is entitled "An Act to Prevent Deception in the Sale of Dairy Products, and to Preserve the Public Health."

(*a*.) As a health law. Nowhere in the section under consideration, nor elsewhere in the Act, is there even an intimation that there is anything detrimental to the health of a consumer, or, what is more to the point, to the public health, in the manufacture, sale and consumption of the article in question, nor was there any evidence offered to prove such a contention. On the contrary it is an established fact that it is a useful and wholesome article of food, and the courts should take judicial notice of such fact.

(*b*.) As a law for the prevention of fraud and deception. It will not be questioned that such a purpose lies within the scope of the police power; but "The police power is not without limitations, and in its exercise the Legislature must respect the great fundamental rights guaranteed by the Constitution. If this were otherwise, the power of the Legislature would be practically without limitation. Under the mere guise of Acts to protect against fraud, the Legislature cannot arbitrarily strike down private rights, invade personal freedom or confiscate private property."

Re Jacobs, supra.

To hold that a confessedly wholesome article of food may be prohibited because unscrupulous dealers may, at some time or under some circumstances, sell it for what it is not (such deception not being of a character to imperil the public health) is to establish a rule absolutely unlimited in its capacity for mischief.

True, the occasion might arise which would make it necessary that the police power should lay its hands upon any industry whatever. The individual right must give way to the public welfare. But there must be a necessity; there must be no other alternative.

Re Ryers, 72 N. Y. 1; *Re Jacobs*, 98 N. Y. 98–108, 110.

The prohibition is unnecessary. The citizen cannot be deprived of his property or restrained of his liberty, except in case of real, imperative necessity. It is not enough that fraud may be perpetrated, that deception may be made easy, nor that individuals may be imposed upon. There must be imminent danger that the general public will suffer, as the legitimate and natural consequence of the act prohibited.

The Legislature may absolutely prohibit the sale of adulterated or simulated substance, when the adulteration or simulation is harmful, and has frequently done so in such case. But this product is neither adulterated, simulated nor deleterious. It may punish as a criminal the ignorant seller of an adulterated or forbidden article, but only as a police measure, necessary to the protection of the public health. And such has been the expressed basis for the decision in each of the authorities on this question.

II. It is destructive of the constitutional guarantee of the equal protection of the laws.

People v. *Marx*, 99 N. Y. 377–385.

III. It is opposed to progress in science and the useful arts. This is not an imitation. Neither is it a "simulated substance," nor an "adulteration." Chemically and practically oleomargarine butter is identical with dairy butter; in other words it *is* butter, produced in a different way, the same product of different processes and, in the main, derived from the same source. This cannot be disputed here under our offer to prove; and being the thing itself it cannot be termed an "imitation," a "simulation" or an "adulteration."

Messrs. **Edward B. Thomas** and **William P. Quin,** with *Mr.* **James W. Ridgway,** *Dist. Atty.*, for the People, respondents—

Presented substantially the same points as are set forth in the report of the former appeal, 4 Central Reporter, 548.

Rapallo, *J.*, delivered the opinion of the court:

The offense for which the appellant was indicted and of which he was convicted was that at, etc., he "did unlawfully, willfully and knowingly have in his possession for sale, keep for sale, offer for sale, and cause and procure to be sold to certain persons," etc., "a number of pounds of a certain article and product, made and manufactured in semblance and imitation of natural butter; that is to say, butter made and produced from pure, unadulterated milk, and cream from the same," etc., the same not being then and there natural butter, as he the said Lipman Arensberg then and there well knew, against the form of the statute," etc.

The statute which the defendant was accused of violating was section 7 of chapter 183 of the Laws of 1885, entitled "An Act to Prevent Deception in the Sale of Dairy Products," etc.

That section prohibits: first, the manufacture out of any animal fat, or animal or vegetable oils, not produced from unadulterated milk, or cream from the same, of any product *in imitation or semblance* or designed to take the place of natural butter produced from milk, etc.; second, mixing, compounding with or adding to milk, cream or butter, any acids or other deleterious substances, or animal fats, etc., with design or intent to produce any article in imitation or semblance of natural butter; third, selling, or keeping, or offering for sale any article manufactured in violation of the provisions of the section.

The indictment contained three counts: the first charging the defendant with manufacturing the prohibited article; the second, with mixing with milk, cream and butter the prohibited substances; and the third with selling the prohibited article. He was acquitted on the first and second counts and convicted on the third.

The defendant contends that the provisions of the seventh section are in violation of the Constitution of this State, and subversive of his constitutional rights of liberty and the enjoyment of property; and he relies upon the decisions of this court in *Re Jacobs*, 98 N.Y. 98, and *People* v. *Marx*, 99 N.Y. 377.

The *Case of Jacobs* arose under a different statute and related to a different subject, viz.: the manufacture of cigars in tenement houses. It has no bearing upon the present cast, except in so far as it declares general principles which are sought to be applied to the statute now in question.

The case of *People* v. *Marx* has a more direct application, as it arose under the Act of which the one now under consideration is an amendment or supplement. The section under which the defendant in that case was indicted, was section 6 of chapter 202 of the Laws of 1884. That section provided as follows:

"Sec. 6. No person shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk, or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream of the same, or shall sell or offer to sell the same as an article of food."

That section was held to be unconstitutional, for the reason that the prohibition was not confined to unwholesome or simulated substances, but absolutely prohibited the manufacture or sale of any compound designed to be used as a substitute for butter or cheese, however wholesome or valuable, or however openly and fairly the character of the substance might be avowed and published; that the Act could not therefore be regarded as a health law, nor as intended to prevent deception by the sale of a simulated article as genuine; and stress was laid in the opinion upon the fact that the prohibition was not of the manufacture or sale of an article designed as an *imitation* of dairy butter, but of any article designed to *take the place* of dairy butter, however dissimilar in color or appearance the artificial product might be to ordinary dairy butter.

Other statutory provisions, aimed at the imitation of dairy butter, were referred to without criticism, and without intimating any doubt of their validity. Among those were the provisions of chapter 215 of the Laws of 1882, which prohibit the introduction of any substance into imitation butter or cheese for the purpose of imparting thereto a color resembling that of yellow butter or cheese.

Assuming, as is claimed, that butter made from animal fat or oil is as wholesome, nutritious and suitable for food as dairy butter; that it is composed of the same elements and is substantially the same article, except as regards its origin, and that it is cheaper, and that it would be a violation of the constitutional rights and liberties of the people to prohibit them from manufacturing or dealing in it, for the mere purpose of protecting the producers of dairy butter against competition, yet it cannot be claimed that producers of butter made from animal fats or oils have any constitutional right to resort to devices for the purpose of making their product resemble in appearance the more expensive article known as dairy butter, or that it is beyond the power of the Legislature to enact such laws as they may deem necessary to prevent the simulated article being put upon the market in such a form and manner as to be calculated to deceive. If it possesses the merits which are claimed for it, and is innocuous, those making and dealing in it should be protected in the enjoyment of liberty in those respects; but they may legally be required to sell it for and as what it actually is, and upon its own merits, and are not entitled to the benefit of any additional market value which may be imparted to it by resorting to artificial means to make it resemble dairy butter in appearance. It may be butter, but it is not butter made from cream, and the difference in cost or market value, if no other, would make it a fraud to pass off one article for the other.

It is claimed on the part of the defense that the substance known as oleomargarine is composed of the same ingredients as dairy butter, with the exception only that the dairy butter naturally contains a small percentage, about 5 per cent or more of butyrine, which is not to be found in the fats or oils used in the manufacture of oleomargarine, and has to be added by mingling some milk, cream or butter with the oils, and when this is done that oleomargarine and dairy butter are identical in substance, with the exception only that the former necessarily containty a smaller percentage of butyrine; that consequently oleomargarine must resemble butter, and if the manufacture of any article made in imitation or semblance of butter is prohibited, the manufacture of oleomargarine is made unlawful.

We do not think that this result follows. The statutory prohibition is aimed at a designed and intentional imitation of dairy butter in manufacturing the new product, and not a resemblance in qualities, inherent in the articles themselves and common to both. If in their essential ingredients or elements, the two articles were so identical that they must necessarily present the same appearance, without resort to any artificial means to produce the resemblance, it is argued on the part of the prosecution that in that case it would be competent for the Legislature to require that some means be resorted to by the manufacturers, to distinguish the new article from the old; that the Legislature has attempted to do this by requiring that the packages in which oleomargarine is sold be distinctly marked, and by other means; but that if all these precautions fail to prevent deception of consumers, then it is lawful to require that in the manufacture of the substance itself, some measure should be adopted to make it distinguishable in appearance from the ordinary dairy butter, such as by giving to it a different color, or some other device.

We do not deem it necessary now to pass upon this point, for in the evidence in this case there was sufficient to authorize the jury to find that the oleomargarine sold by the defendant, and that which he had in his store exposed for sale, had, by artificial means, not essential or incident to the manufacture of the article, but resorted to for the mere purpose of imitation, been made to resemble dairy butter; that it was yellow in appearance and looked like butter. It was known to the defendant to be oleomargarine and was sold and offered for sale by him as such.

There was evidence to the effect that the natural color of dairy butter was yellow, except when made in winter when the cows were not grazing; that then it would sometimes be white or pearly, but that was exceptional. The oleomargarine purchased of the defendant was analyzed by a chemist employed by the State Dairy Association, and he testified positively that it had a coloring substance in it and that it was an added color; that a jar of it produced at the trial was delivered to him in June, 1885, about eighteen months before the trial, and was then in the condition it was at the time he testified, except it was then full of a yellow preparation and sealed up; that the article was then a much deeper yellow than at the time of the trial; that it could have been made without that color; that it was a golden yellow color, which was the color of natural butter and that the natural color of oleomargarine fat was pure white.

Another witness for the prosecution, a chemist who stated that he was familiar with butter and with oleomargarine, testified that the natural color of oleomargarine was a pearly white or creamy white, and that without any artificial coloring it did not resemble butter.

Professor Chandler, called by the defense, testified that oleomargarine butter was produced by churning oleomargarine oil with milk, and that if you desired to have a dark colored butter, a certain quantity of coloring matter was added, either carrot or annotto; that generally annotto was used; that it was the same coloring matter that was used for coloring cheese and butter in the dairies and on the farms.

Being asked on cross examination whether annotto and carrots were essential ingredients in the manfacture of oleomargarine butter, he testified that they could be left out or put in; that the only object of using them was to color the butter, also that they were not essential elements of dairy butter. He also stated that oleomargarine, without any color added, had about the same yellow as butter, white or a little shade of yellow, practically white. But it is evident that he referred to winter butter, for afterwards he stated that he had observed hundreds of specimens of winter butter and they were nearly all white, about as white as oleomagarine before any coloring is put into it.

Professor Morton, another witness called for the defense, disputed the efficacy of the tests by which the witness on the part of the prosecution claimed to have ascertained that the oleomargarine sold by the defendant was artificially colored. He testified that the constituent elements of oleomargarine were precisely the same as those found in dairy butter, the difference being only in the proportions of some of them; that dairy butter when exposed to the sun would bleach white like chalk and become tallow; that the color of oleomargarine *oil* was a rich cream color and looked like melted butter; that annotto or carrot, or any of the coloring matters used in oleomargarine butter, were not at all essential to the manufacture of that article, any more than in the making of butter from cream; and the object of using them in making oleomargarine was to give it a pleasing color and make it an acceptable article, just as it was used in dairy butter when essential to make it a pleasing color; that people liked to see yellow butter; that the natural deep yellow color of butter did not indicate the richness of the butter, but that the public accepted it as a summer butter as distinguished from winter butter; that summer butter was valued more and brought a higher price, and when coloring matter was used in genuine butter the object was to make it resemble a rich flavored and more marketable butter, and the use of annotto and carrot in oleomargarine gave it a yellow color, and whatever value a yellow color gives ordinary butter.

Another witness on the part of the defense testified on cross examination that the color of butter was yellow, and varying in shade, and that of oleomargarine yellowish; that the color imparted to it was not essential to the article itself, and the object of coloring it was to make it more palatable in appearance and marketable—to give it the appearance of butter—and he did not think it would meet with a ready sale if it had no color, and that the same rule would apply to dairy butter.

The judge, in submitting the case to the jury on the third count, instructed them that they must be satisfied beyond a reasonable doubt that the defendant did sell the article called oleomargarine; that it was not made from pure unadulterated milk, or cream of the same; and they must further be satisfied beyond a reasonable doubt that the article so sold was in imitation and semblance of butter and calculated to deceive, and that if they found either of these facts in the negative it was their duty to acquit.

He further charged that it was not necessary to show that the article sold was calculated to deceive the person who bought it in this instance, but that it was in imitation and semblance of butter and calculated to deceive any person who might buy it.

Exceptions were duly taken to the charge, raising the question of the constitutionality of the Act under which the defendant was indicted; and also to refusals of the court to charge, raising the points made on the part of the defense that it was necessary that the purchaser from the defendant should have been deceived; that if the article sold was substantially identical with butter, they must acquit, and that the words "imitation or semblance" meant a fraudulent imitation or semblance as to which the court charged that the words meant an imitation or semblance likely to deceive.

The jury having found the defendant guilty, the court sentenced him to pay a fine of $100.

We think that the evidence justified the court in submitting to the jury the question whether the article sold was an imitation calculated to deceive. It was sufficient to authorize a finding that it had been artificially colored so as to imitate the most valuable kind of dairy butter; that such coloring was not essential or necessarily incident to its manufacture, and that its only object was to make it resemble dairy butter and increase its market value. There may have been some conflict in the evidence on these points, but in the main they were established.

At all events the evidence was sufficient to authorize the jury to find those facts; and we are of opinion that such artificial coloring of oleomargarine, for the mere purpose of making it resemble dairy butter, comes within the statutory prohibition against imitation, and that such prohibition is within the power of the Legislature, and rests upon the same principle which would sustain a prohibition of coloring winter dairy butter for the purpose of enhancing its market price by making it resemble summer dairy butter, should the Legislature deem such a prohibition necessary or expedient.

We have examined the various exceptions taken to the charge and refusals to charge, and to rulings on questions of evidence on the trial, and find none which requires a reversal of the judgment. An application of the general conclusions which we have reached will substantially answer them without going over them in detail.

The judgment of the General Term should be affirmed.

All concur, except **Peckham,** *J.*, taking no part.

PEOPLE, *ex rel.* James A. WRIGHT, *Appt.*,
v.
Alfred C. CHAPIN, Comptroller, etc., *Respt.*

1. **Sections 83, 84 and 85** of **chapter 427, Sess. Laws 1855,** were enacted for the benefit of purchasers who had paid their money on the strength of the title of the State, and give no authority to an owner of the **lots sold for taxes** either to make the demand that the comptroller cancel the sale, or, upon his refusal, to review that determination.
2. The **statutory power of** the **comptroller,** when exercised under those sections, **is for** the **benefit of** the **purchaser at** the **tax sale,** and can **not** be invoked in any legal sense by the **owner of** the **land sold for taxes.**

(Decided March 22, 1887.)

MOTION for reargument of appeal from a judgment of the Supreme Court at General Term in the Third Department, affirming an order of the State Comptroller refusing to cancel a State tax sale. *Denied.*

The original opinion dismissing the appeal is reported in 2 Cent. Rep. 467.

The facts appear from the opinion.

Mr. **W. B. Van Rensselaer,** for appellant.

Mr. **D. O'Brien,** *Atty-Gen.*, for respondent.

Danforth, *J.*, delivered the opinion of the court:

On November 11, 1884, the relator, by petition, represented to the Comptroller that in December, 1871, he became the sole owner of certain lots of land, numbered 18, 20, and 34, in the north half of Arthurboro Patent, in the Town of Morehouse, Hamilton County; that in 1877 they were sold for the taxes of 1870, and Nos. 18 and 20, conveyed to Ballou, and lot 34 to Peck; that the sale was void because:

"1. The corrected assessment roll for the Town of Morehouse (being the township in which said lots are situated), for the year 1870, as delivered by the Supervisor of the Town of Morehouse to the town clerk thereof, is incomplete and defective, because: *a*, there is no oath of the assessors on said assessment roll or attached thereto; *b*, that these lots belong to nonresidents, and that the number of acres of each lot is not given; *c*, that the values of the above lots are not given; *d*, that there is no fifth column at all; *e*, that there are no figures set down to show the respective sums, in dollars and cents, to be paid as a tax on said lots. 1 R. S. 395, §§ 33, 35.

2. That it does not appear from any statement in the collector's return and affidavit thereto, or the county treasurer's certificate, that the taxes for the year 1870, remaining unpaid, were assessed upon the lands of nonresidents;" and prayed, therefore, that in pursuance of the authority conferred upon the Comptroller by

section 85 of chapter 427 of the Laws of the State of New York, passed in the year 1855; that the tax sale of 1877, so far as the same relates to lots numbered 18, 20 and 34, in the north half of the Arthurboro' Patent, in Hamilton County, and State of New York, be canceled, and that any conveyance delivered by virtue of said sale of the said lots be set aside and discharged of record.

The Comptroller, after hearing, denied the application. The relator by *certiorari* sought to review that decision. Upon return made the supreme court affirmed it. The relator appealed to this court. Upon the argument the learned counsel for the relator repeated upon his points the statement of the petitioner, that "The application, made by the relator on November 11, 1884, to the Comptroller to cancel such tax sale, was made under the authority of sections 83, 84 and 85, of chapter 427 of the Session Laws of 1855;" and in reply thereto the learned Attorney-General, for the respondent, submitted as a distinct proposition that there is no statute authority for the demand made by the relator upon the Comptroller, to cancel the sale; that the sections above named and cited by the appellant were enacted for the benefit only of purchasers who had paid their money on the strength of the title of the State, and gave no right to an owner of the lots, either to make the demand that the Comptroller cancel the sale, or, upon his refusal to review that determination.

This position was not answered by the relator, upon any authority, nor other statute than that of 1855, *supra*. We sustained the view of the Attorney-General, and, without passing upon the merits, dismissed the appeal, March 2, 1886. 2 Cent. Rep. 467.

A motion for a reargument is now made by the relator, upon affidavit of his counsel, showing that the point made by the Attorney-General as to the limitation of the Statute of 1855, was not taken in the supreme court, nor anticipated by the relator as one which might be made in this court, and therefore that he failed to cite decisions and statutes bearing upon, if not controlling the question, viz.: Laws 1878, chap. 120; Laws 1885, chap. 448; *Clark* v. *Davenport*, 95 N. Y. 477.

The beginning of this remedial legislation may be found in chapter CCLXII., 262, of the Laws of 1823, which enacted, § 52, "That if the comptroller shall discover at any time before he conveys lands sold for taxes that the sale was for any cause whatever, improper, he shall not convey the land so improperly sold, but shall pay the purchasers of such lands the sum which they would be entitled to, if such land had been regularly redeemed by the owner; and the sum so to be paid shall be a charge against the county from which the return of the tax was made, if the cause why such sale was improper originated with the county."

By 1 Revised Statutes, p. 413, § 89, this provision was re-enacted so as to read "Whenever the comptroller shall discover, prior to the conveyance of any lands sold for taxes, that the sale was, for any cause whatever, invalid and ineffectual to give title to the lands sold, he shall not convey the lands so improperly sold, but shall forthwith cause the purchase money and interest thereon to be refunded out of the treasury, to the purchaser, his representatives or assigns."

And by section 91 it was provided that "If the discovery that the sale was invalid shall not be made until after a conveyance shall have been executed by the comptroller for the lands sold, it shall be the duty of the comptroller, on receiving satisfactory evidence thereof, to refund out of the treasury, to the purchaser, his representatives or assigns, the purchase money and interest thereon, and to recharge the county from which the tax was returned, with the amount of tax and interest at the rate of 7 per cent, from the time interest was charged thereon by him; and such county shall cause the same to be levied and paid as provided in the last section."

It is obvious that these provisions concern no one but the purchaser, the State, and the county or town from which the tax was returned. The Act of 1850, chap. 298, §§ 102, 104, contains the same provisions with slight verbal alterations, among others directing that after such discovery, the comptroller shall cancel the sale. This was evidently for no other purpose than to preserve the regularity of the proceedings in the refunding and recharging process, and concerned only the State on one side, and the town or county, as the case might be, on the other. These provisions reappear in 1855, as sections 83 and 85. Laws 1855, chap. 427.

It should be noticed that in no case is the comptroller authorized to recall a conveyance made by him, nor by his decision, avoid or cancel it, except as the cancellation of the sale might, by vitiating the precedent steps, destroy the regularity of the proceedings. The cancellation of the sale affected the purchaser by impairing his title in one case, and in another restored the purchase price of an ineffectual grant; it affected the town or county by compelling it to bear the burden of retaxation.

The power to cancel might be exercised upon misapprehension or misinformation; and perhaps for that reason it was enacted in 1878 (Laws 1878, chap. 120), that the comptroller should have power to set aside any cancellation of sale made by him under the Act of 1885 (*supra*) in either of three cases: "First, whenever such cancellation was procured by fraud or misrepresentation; second, whenever such cancellation was procured by the suppression of any material fact bearing upon the case; third, whenever the cancellation was made under a mistake of fact."

This also could concern only the rights or interests of the same parties.

The Act of 1885 (Laws 1885, chap. 448.) can have no direct application to the case at bar, for it was enacted after these proceedings were commenced, and after the decision of the comptroller. The statute also limits its operation by declaring that it shall not effect a proceeding pending at the time of its passage. It amends section 65 of the Act of 1855 (*supra*), by giving conclusive effect to the comptroller's conveyances after a specified time, but declares that "Such conveyances and certificates, and the taxes and tax sales on which they are based, shall be subject to cancellation, as now provided by law, on a direct application to the comptroller or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid."

Neither its validity nor construction is before us, except as it may bear by implication upon the power and duty of the comptroller under the Act of 1855. It gives no new power. The comptroller had been given none to cancel conveyances, neither his own deed, nor that of a remote grantor. He might cancel a tax sale. The court in a proper case had power to do that also, and such other acts as were essential to the protection of those affected by them, whether an owner, or mortgagee, or one otherwise interested.

The statutory power of the comptroller, when exercised, is for the benefit of the purchaser; and, for reasons briefly stated in my opinion on the first argument, cannot be invoked in any legal sense by the owner. He may, indeed, as might any other person, put the comptroller in the way to "discover" errors in the sale; but he cannot compel an investigation, nor, if one is had, review his decision.

In *Clark* v. *Davenport*, 95 N. Y. 477, the learned judge, in denying the right of the appellant to the relief sought, referred incidentally to the Statute of 1855, as giving a remedy in certain cases by the action of the comptroller under §§ 83, 85 (*supra*), and says: "No reason appears why the proceedings might not be reviewed by *certiorari*, or an application made by *mandamus* to compel him to do so," *i. e.*, to set aside the sale by reason of the irregularity and invalidity in imposing the taxes for which the sale was made."

We were not there called upon to interpret the statute; and the remark made was suggestive merely, and not the resolution of the court upon any point to be determined, nor a direct opinion even, of the learned judge by whom it was written, but rather a side blow put by way of argument. It was not necessary to the judgment rendered, nor was it put forth as ground or reason for it.

The office of comptroller was created and his powers and duties are defined by statute. As between the purchaser at a tax sale and the State, under whose authority he acted, he may decide the questions of regularity relating thereto. He has no judicial power to determine a controversy between other parties, but to "discover" a fact which, when found, is to determine his own conduct. *People* v. *Fairchild*, 67 N. Y. 334.

Looking at the case, therefore, in the light of the argument for a rehearing, we find no reason for a decision differing from that before made.

The motion for a reargument must be denied, with costs.

All concur.

PEOPLE *ex rel.*, EQUITABLE LIFE ASSURANCE SOCIETY of the United States, *Appt.*,

v.

Alfred C. CHAPIN, Comptroller, etc., *Respt.**

(Decided March 25, 1887.)

Mr. **Frank E. Smith,** for appellant.
Mr. **D. O'Brien,** *Atty-Gen.*, for respondent.

Per Curiam:

Order affirmed with costs, on authority of *People* ex rel. *Wright* v. *Chapin* (preceding case).

John A. BAGLEY, *Appt.*,

v.

Peter BOWE, *Respt.*

1. A **general assignment for** the **benefit of creditors,** of all the property of the assignor, is **not void** as matter of law **because it confers power upon** the **assignee to compound**, compromise and release **debts** owing to the assignor, nor because it confers power upon the assignee to execute, acknowledge and deliver in the name of the assignor, for such consideration in money, or other thing, as he may deem sufficient, all such deeds, bills of sale or other conveyances in writing and all such releases, contracts and other instruments, as, in his discretion, may from time to time be necessary to carry into effect the intent and purpose of the instrument.
2. Such latter power, construed with the whole context, does not confer **authority to sell the assigned property** on credit or to exchange it for other property.
3. **To authorize** the **judge to take from** the **jury** the **question of fraudulent intent** arising upon the extrinsic facts and direct a verdict, the **evidence must be undisputed,** or so certain and convincing that no reasonable mind could come to any but one conclusion; if there is ground for opposite ineferences and a conclusion either way would not shock the sense of a reasonable man, the case is for the jury, although the judge may entertain a clear and decided conviction that the truth is on this or that side of the controversy.
4. Although the **assignment** transferred all the property of the **assignor**, it may, nevertheless, have been a **fraudulent contrivance** to embarrass or delay creditors; but this was a question for the jury.

(Decided March 25, 1887.)

APPEAL from a judgment of the General Term of the Superior Court of New York City, denying plaintiff's motion for a new trial on exceptions directed to be heard at the General Term in the first instance and directing a judgment for defendant on a verdict in an action by an assignee for the benefit of creditors to recover the value of property of the assignor, sold by defendant sheriff. *Reversed.*

Plaintiff claimed such property as assignee under a general assignment made by Joseph Dart February 3, 1882, of the partnership property of the firm of Swezey & Dart and of the individual property of Joseph Dart.

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*See People, *ex rel.* Equitable Life Ins. Co. v. Chapin, 4 Cent. Rep. 183.

The failure of the firm was caused by forgeries of Swezey to a large amount, for which an attachment was placed on the firm property. Swezey absconded January 29, 1881, and Dart made the assignment both for himself and the partnership.

Certain creditors, in disregard of the assignment, caused part of the firm property to be seized and sold by the defendant in this action, the Sheriff of New York County, under attachment and execution against the partners; and plaintiff brought this action to recover the value of such property.

The defendants set up as a defense that the assignment was void on its face and also void for fraud.

It appeared at the trial that ninety-six bales of sewing twine, the property of the firm, were not intended by the assignor Dart to be conveyed to the assignee, and were not inserted in the schedule of assets, nor referred to in the lists of the assets made out by Dart and furnished to his creditors. It was at the time claimed by Dart that the bales had been consigned to the partnership and were the property of the Wilton Company of New Hampshire.

It appeared further that the Wilton Company had brought an action of replevin to recover such goods, in which it failed to show title to them. It also appeared that a trade mark belonging to the firm, of acknowledged value, called the "Peerless," was also omitted from the lists of assets and schedules, under the claim that it had been assigned on January 27 to one Reynolds in consideration of a check for $1,500, signed by him. This check has never been paid or presented for payment; and the trade mark is being used by a manufacturing corporation of which Dart, his lawyer and Reynolds are corporators and in whose employment Dart now is.

Further facts appear from the opinion.

Mr. **Edwin B. Smith,** for appellant:

Where an assignment does not in express terms authorize or require an illegal act to be done by the assignee the legal inference is that the assignor did not intend to authorize any such act.

Benedict v. *Huntington*, 32 N. Y. 219; *Jacobs* v. *Remsen*, 36 N. Y. 668; *Ginther* v. *Richmond*, 18 Hun. 232; *Kellogg* v. *Slauson*, 11 N. Y. 304, 308.

The assignment was such in terms as to pass everything which was in law and in fact the property of the assignors, "of every name and nature, not exempt from attachment by law, wheresoever situate, and by whatsoever muniments of title evidenced;" and the claim that the assignment was invalidated, because, as alleged, Dart did not intend to assign the ninety-six bales of twine and the "Peerless" trade mark, and that they were not included in the inventory, is without foundation.

Brennan v. *Willson*, 71 N. Y. 502, 505–7; *Juliand* v. *Rathbone*, 39 Barb. 97; *Trasher* v. *Bentley*, 59 N. Y. 649; 1 Abb. N. C. 39, 47; *Brennan* v. *Wilson*, 4 Abb. N. C. 279; *Heckman* v. *Messenger*, 49 Pa. 465; *Clarke* v. *Dutcher*,* 9 Cow. 674; *People* v. *Stephens*, 71 N. Y. 559; *Wyman* v. *Farnsworth*, 3 Barb. 371; *Sanford* v. *Mayor*, 33 Barb. 152; *Holdredge* v. *Webb*, 64 Barb. 22; *Doll* v. *Earle*, 65 Barb. 300; *Wilson* v. *Forsyth*, 24 Barb. 105, 107, 128; *Horwitz* v. *Ellinger*, 31 Md. 492; *Mackintosh* v. *Corner*, 33 Md. 598; *Pike* v. *Bacon*, 21 Me. 280; 2 Pars. Cont. 771; *Hemingway* v. *Hamilton*, 4 Mees. & W. 115; *Feret* v. *Hill*, 26 Eng. Law & Eq. 261; *Abbey* v. *Dewey*, 25 Pa. 413, 416; 39 Barb. 97; 4 Abb. N. C. 287; *Produce Bank* v. *Morton*, 67 N. Y. 199; *Hardmann* v. *Bowen*, 39 N. Y. 199, 200; *Brennan* v. *Willson*, 71 N. Y. 502, 506; *Miller* v. *Halsey*, 4 Abb. Pr. 28; *Shultz* v. *Hoagland*, 85 N. Y. 464, 465, 473; *Cuyler* v. *McCartney*, 40 N. Y. 222; *Browning* v. *Hart*, 6 Barb. 91; *Mumper* v. *Rushmore*, 79 N. Y. 19; *Emerson* v. *Senter*, 118 U. S. 3 (Bk. 30, L. ed. 49); *Marbury* v. *Brooks*, 7 Wheat. 556, 557 (20 U. S. bk. 5, L. ed. 522); *Brooks* v. *Marbury*, 11 Wheat. 78, 89 (24 U. S. bk. 6, L. ed. 423); *Tompkins* v. *Wheeler*, 16 Pet. 116, 118 (41 U.S. bk. 10, L. ed. 907).

Had there been aught ambiguous about the conduct of the parties, tending to show an assignment, good upon its face, to have been made with a fraudulent intent, the existence or nonexistence of such intention was a fact the determination of which should have been left to the jury.

85 N. Y. 464; *Cuyler* v. *McCartney*, 40 N.Y. 222, 236, 237; *Vance* v. *Phillips*, 6 Hill, 435, 436; *Livermore* v. *Northrup*, 44 N. Y. 107; *Seymour* v. *Wilson*, 14 N. Y. 567; *Griffin* v. *Marquardt*, 21 N. Y. 121; *Bedell* v. *Chase*, 34 N. Y. 386; *Thurston* v. *Cornell*, 38 N. Y. 287; *Griffin* v. *Cranston*, 1 Bosw. 281; *Erwin* v. *Voorhees*, 26 Barb. 127; *Mathews* v. *Poultney*, 33 Barb. 127.

Mr. Dart was advised by reputable counsel that the trade mark was not property which in its nature was subject to attachment and to sale upon execution; therefore fraud cannot be predicated of a failure to transfer it, even had it remained in the hands of the assignors to the date of assignment.

The advice so given seemed then to be based upon, or a fair inference from, authority.

Collins Co. v. *Brown*, 3 Kay & J. 423; *S. C.* 3 Jur. N. S. 929; *Leather Cloth Co.* v. *American Leather Cloth Co.* 11 Jur. N. S. 513; *S. C.* 11 H. L. Cas. 523; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218 (Bk. 27, L. ed. 706); *Campbell* v. *James*, 2 Fed. Rep. 338, 351; *Hobbs* v. *Francais*, 19 How. Pr. 567, 572; *Palmer* v. *Harris*, 60 Pa. 156.

This trade mark was assigned for value before the general assignment was determined upon. It was transferred to cancel "a subsisting and honest debt."

Bedell v. *Chase*, 34 N. Y. 386; *Livermore* v. *Northrup*, 44 N. Y. 107; *Royer Wheel Co.* v. *Fielding*, 2 Cent. Rep. 511, 101 N. Y. 504.

Even had it been dishonest, and the property not exempt from attachment, then it would have been that sale that would have been void, and not the general assignment.

Livermore v. *Northrup*, 44 N. Y. 111; *Browning* v. *Hart*, 6 Barb. 91; *Loeschick* v. *Baldwin*, 1 Robt. 337; affd. 38 N. Y. 326.

Mr. **Charles F. MacLean,** for respondent:

If the law characterizes the transactions in question as fraudulent and sufficient to avoid the assignment, the direction to the jury was proper.

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*See digested citations at end of case, Lawyers' edition. [Ed.]

The assignment in question was void under *Shultz* v. *Hoagland*, 85 N. Y. 471; *Wilson* v. *Forsyth*, 24 Barb. 105; *DeCamp* v. *Marshall*, 2 Abb. N. S. 373; *Grover* v. *Wakeman*, 11 Wend. 187; *Mackie* v. *Cairns*, 5 Cow. 549; *Judson* v. *Gardner*, 4 N. Y. Legal. Obs. 424; *Jackson* v. *Parker*, 9 Cow. 73, 86.

The omission of the trade mark because the assignor thought it was not assignable is no excuse.

Hazard v. *Caswell*, 93 N. Y. 259; *Locknood* v. *Bostwick*, 2 Daly, 521; *Corwin* v. *Daly*, 7 Bosw. 222; *Re Knox*, 1 Month. L. B. 47; *Hegeman* v. *Hegeman*, 8 Daly, 1; *Re Swezey*, 10 Daly, 107.

A fraudulent preference avoids the assignment.

Fiedler v. *Day*, 2 Sandf. 594; *Bostwick* v. *Menck*, 40 N. Y. 383.

The good will of the business was also subtracted from the assignee, although it should have passed to the assignee.

Hegeman v. *Hegeman*, 8 Daly, 1; *Williams* v. *Wilson*, 4 Sandf. Ch. 379; *Rapalee* v. *Stewart*, 27 N. Y. 310; *Brigham* v. *Tillinghast*, 13 N. Y. 215; *Moir* v. *Brown*, 14 Barb. 51; *Schufeldt* v. *Abernethy*, 2 Duer, 533; *Barney* v. *Griffin*, 2 N. Y. 365; *Porter* v. *Williams*, 9 N. Y. 142; *Gates* v. *Andrews*, 37 N. Y. 657.

Any cause which could be legitimately set up by the assignee as a justification for a course of conduct (in regard to the assigned property) in any respect different from that which the law would direct, of necessity, vitiates the assignment.

Jessup v. *Hulse*, 21 N. Y. 168; *Townsend* v. *Stearns*, 32 N. Y. 209; *Schussel* v. *Willett*, 22 How. Pr. 18; *Nicholson* v. *Leavitt*, 6 N. Y. 510; *Dunham* v. *Waterman*, and *Nichols* v. *McEwen*, 17 N. Y. 9, 22.

Andrews, *J.*, delivered the opinion of the court:

The trial judge directed a verdict for the defendant on the ground that the assignment of February 3, 1881, made by Dart, one of the firm of Swezey & Dart, to the plaintiff, was void, as having been made with the intent to hinder, delay and defraud creditors.

The assignment in form was a general assignment for the benefit of the creditors of the firm of Swezey & Dart, and individual creditors of Dart, and was executed by Dart in the firm name and also as an individual. It purported to transfer and assign to the plaintiff all the property of the firm, "real, personal and mixed, not exempt from attachment by law," for the benefit of the firm creditors, and also the individual property of Dart for the benefit of his individual creditors.

The general term affirmed the judgment and the sole point now presented is whether the question of fraud should have been submitted to the jury.

In support of the judgment it is claimed that the assignment was void on its face; but it is also insisted that the evidence of fraud extrinsic to the instrument was so conclusive that the court was justified in withholding the case from the jury, and in ruling as matter of law that fraud in fact was established.

The provisions in the instrument of assignment, upon which the defendant relies to establish its invalidity, relate to the powers conferred upon the assignee: first, "to compound, compromise and release" debts owing the assignor; and second, to "execute, acknowledge and deliver in the name of the said parties of the first part (assignors) as such copartners, or in the name of the said Joseph Dart individually, for such consideration in money, *or other thing*, as he may deem sufficient, all such deeds, bills of sale or other conveyances, in writing under seal or otherwise, and all such releases, contracts and other instruments in writing or under seal, as in his discretion may from time to time be necessary to carry into effect the intent and purpose of this instrument."

The validity of a provision in the general assignment for the benefit of creditors, authorizing the assignee to compound or compromise debts owing to the assignor, has been recently affirmed in this court, and is no longer an open question. *Coyne* v. *Weaver*, 84 N. Y. 386.

The stress of the argument against the validity of the instrument of assignment is placed on the clause conferring upon the assignee the power to execute deeds, bills of sale, or other conveyances in writing "for such consideration in money or other thing" as he may deem sufficient. This clause it is insisted authorizes the assignee to sell or dispose of the assigned property upon credit, or upon any consideration whether in money or property. If this is the true construction of the provision, there can be no doubt of its invalidity.

The law justifies and upholds trusts created by insolvent debtors of their property, through general assignments for the benefit of their creditors, only when they provide for the immediate and unconditional surrender and application of the assigned property to the payment of their debts; and any attempt to confer upon the assignee the power to delay the collection and conversion of the assets into money is held to be unlawful, and to vitiate the assignment. It has therefore been held that an authority contained in the assignment, to sell the assigned property on "credit," or for "cash or upon credit" as in the judgment of the assignee may appear best, or to convert the property into "money or available means," renders the assignment fraudulent and void. *Nicholson* v. *Leavitt*, and *Burdick* v. *Post*, 6 N. Y. 510, 522; *Brigham* v. *Tillinghast*, 13 N. Y. 215.

Construing the clause in question in view of the general rule of construction of written instruments, viz.: that a construction will be preferred which will uphold, rather than one which will destroy them (a rule applicable as well to insolvent assignments as to other instruments), and the further rule that in construing a particular clause, the whole context may be considered, we are of opinion that the clause in question should not be deemed to confer authority to sell the assigned property on credit, or to exchange it for other property.

The language of the whole paragraph seems more appropriate to a mere power of attorney than to an instrument of transfer or conveyance. It authorizes the assignee to execute deeds, bills of sale, etc., "in the name of the parties of the first part" (the assignors) a power which they would very rarely, if ever, find it necessary to exercise. But the power is in express terms limited to instruments which the assignee may deem necessary or requisite "to carry into effect the intent and purposes of this instrument."

Looking at the preceding parts of the assignment it is found that the granting clause is followed by a declaration of the trusts upon which the assignee is to take the property, the first of which is to take possession of and sell the same at public or private sale, and convert the same into money, "and next to apply the proceeds thereof" after deducting necessary costs, charges and expenses, to the payment of the debts of the assignors, in the order specified.

This explicit authority and direction to sell the assigned property, and convert the same into money, cannot be reconciled with the subsequent power to execute, in the names of the assignees, deeds, bills of sale and other conveyances "for such consideration in money or other thing" as the assignee may deem sufficient, provided the latter clause, as is claimed by the defendant, authorizes the assignee to dispose of the assigned property on credit or to exchange it.

But we are of opinion that the supposed inconsistency does not in fact exist. It is not difficult to imagine cases where, in the adjustment of property interests held in common by the assignors and third persons, mutual releases, transfers and might become necessary, setting apart in severalty to each owner his interest in the common property, or where, in the process of conversion it might become necessary for the assignee to execute instruments, upon a consideration other than the payment of money, affecting the assigned estate, but not involving any sale or exchange.

It is not improbable that the draftsman inserted this clause without any very definite purpose, following some former precedent. But however this may be, the provision is quite too vague to overcome the explicit direction in the prior clause, requiring in substance that the property should be sold for money; and especially in view of the expressed purpose of the latter clause, that the power thereby given was "to carry into effect the intent and purpose" of the instrument.

Two extraneous matters are relied upon to establish the existence of fraud in fact: *first*, that the assignor, Dart, intended to withhold from the assignee and the creditors ninety-six bales of twine owned by the firm of Swezey & Dart, upon the false and fraudulent pretense that they belonged to the Wilton Company, of which his mother-in-law was the proprietor; and *second*, the matter of the "Peerless" trade mark, belonging to the firm, used to designate warps manufactured for and sold by the firm.

The question whether the judge was authorized to take from the jury the question of fraudulent intent, arising upon the extrinsic facts, is to be determined in view of the settled rule that to justify the court in directing a verdict in any case upon the facts, the evidence must be undisputed or so certain and convincing that no reasonable mind could come to any but one conclusion. If there is ground for opposite inferences, and a conclusion either way would not shock the sense of a reasonable man, then the case is for the jury, although the judge may entertain a clear and decided conviction that the truth is on this or that side of the controversy.

The trial court or the general term is authorized to set aside a verdict and direct the issue to be retried before another jury, if in its judgment the verdict is against the weight or preponderance of evidence; but in a case which of right is triable by jury the court cannot take from that tribunal the ultimate decision of the fact, unless the fact is either uncontradicted, or the contradiction is illusory, or where, to use a current phrase, the answering evidence is a "scintilla" merely.

It is claimed on the part of the defendant that the ninety-six bales of twine were clearly and uncontrovertibly the property of Swezey & Dart, and not of the Wilton Company. It was conceded on the trial that they were the property of the firm; and it appears that the fact was so found by a jury in an action of replevin brought by the Wilton Company, against the sheriff, after the assignment.

The goods are not mentioned in the schedule of assets made by the assignee and verified by Dart, April 9, 1881. Dart was sworn as a witness on the trial. He testified that he did not intend to transfer those goods by the assignment, and the assignee had no information in respect to them until weeks after the assignment was made. The twine was manufactured by the Wilton Company, under some arrangement with Swezey & Dart, the particulars of which do not distinctly appear.

There is much evidence tending to show, and which would justify a jury in finding that Swezey & Dart owned the goods at the time of the assignment, and that Dart so understood and believed. Dart, however, testified that when the assignment was made he believed that the twine belonged to the Wilton Company, and that Swezey & Dart held it for sale only for the Wilton Company on commission, and that it was not until the decision of the replevin suit that he became satisfied that the title to the twine was in Swezey & Dart.

The relations between the Wilton Company. and Swezey & Dart were somewhat peculiar and are not clearly disclosed. Without going into further detail it is sufficient for our present purpose to say that whatever may be our view as to the preponderance of evidence we think the evidence is not of so conclusive a character as to preclude a jury from finding that the intent of Dart to withhold the ninety-six bales of twine from the asignee and the creditors was the result of an honest conviction that they belonged to the Wilton Company, and not to the assignor.

The matter of the trade mark was also, we think; for the consideration of the jury. The assignment of the trade mark to Reynolds purports to have been made for the consideration of $1,500, on the second of February, 1881, the day before the execution of the general assignment. There are certainly suspicious circumstances connected with the transaction. The consideration has never been paid.

The trade mark was transferred by Reynolds to a corporation organized a few days after the general assignment was made, of which Reynolds and Dart were two of the corporators. Reynolds, the nominal purchaser, is named in the schedule of Swezey & Dart's indebtedness, made in April, 1881, as a preferred creditor in the sum of $1,597.80, when it is clear upon the evidence that he was then indebted to the firm, after allowing all offsets, in the sum of about $1,400.

It does not affirmatively appear that Dart was cognizant of the insertion of this debt in the schedule. The circumstances in respect to the transaction with Reynolds are attempted to be explained by Dart. It is not for us to say whether the explanation is satisfactory. Reynolds was not preferred in any specific amount in the assignment itself, but generally for any claim which might be established by him against Swezey & Dart.

The assignment transferred all the property of the assignors, whatever may have been their secret intention. The assignment may, nevertheless, have been a fraudulent contrivance to embarrass and delay creditors. *Shultz* v. *Hoagland*, 85 N. Y. 465.

But this we think was a question for the jury.

The judgment should, therefore, be reversed, and a new trial ordered.

All concur.

Marie A. WITTHAUS, *Appt. and Respt.*,
v.
Frederick C. C. SCHACK, *Respt. and Appt.*

A **wife has no estate in** the **lands of** her **husband during his life,** which she can convey to another; hence the grantee in a deed from husband and wife, of the husband's land, derives title through the husband wholly; and the **widow** of such grantor, **bringing suit** after his death **to annul** the **deed** so far as it affects her dower right is, under section 829 of the Code of Civil Procedure, **incompetent to testify to** personal transactions and **communications between herself and her deceased husband,** in reference to such deed.

(Decided April 19, 1887.)

CROSS appeals from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Special Term in favor of plaintiff on the second trial of an action to set aside and cancel a deed executed by plaintiff, on the ground of fraudulent representations. *Reversed on defendant's appeal. Plaintiff's appeal dismissed.*

Reported below, 38 Hun, 560.

On the first trial of this action the court held that plaintiff was an incompetent witness to prove fraudulent representations, under the Code, § 829, and excluded her testimony and dismissed the complaint. On appeal to the general term this judgment was reversed and a new trial granted. On the new trial, on the strength of plaintiff's testimony, the court found in her favor and directed a referee to take an account, etc.

Before the account was taken, defendant appealed to the general term, where the judgment was modified, excluding from the accounting certain property, but in other respects it was affirmed. Subsequently other proceedings were had and several judgments and orders were entered in this action in reference to such accounting, some of which were favorable and others adverse to plaintiff's interest, and all of which are immaterial to the decision on this appeal. From the final judgment of the general term, affirming the proceedings, orders and judgments herein, both parties appealed to this court.

Further facts appear from the opinion.

Messrs. **John E. Burrill** and **George Zabriskie,** for plaintiff:

The plaintiff was not an incompetent witness under section 829 of the Code, because the title or interest to be affected by the action was not derived by defendant from plaintiff's husband, but from plaintiff.

Section 829 of the Code, in using the words "title or interest from, through or under a deceased person" intended to refer only to the title or interest sought to be affected by the action.

Cary v. *White*, 59 N. Y. 336–341.

This action does not affect the title acquired by the defendant from plaintiff's husband, but leaves the deed unaffected, so far as it respects her husband and the grantee.

Plaintiff's dower right was not revived by the defendant from or through the husband of the plaintiff. On the contrary, such right of dower, when inchoate, cannot be affected by any act of the husband; and when it has become vested the widow takes it, not as the representative of her husband, nor by descent, but as a contingent remainderman whose estate attaches as of the time of the seisin of the husband and becomes vested at his death.

Simar v. *Canaday*, 53 N. Y. 305; *Mills* v. *Van Voorhies*, 20 N. Y. 412; *Lawrence* v. *Brown*, 5 N. Y. 394; *Wilkinson* v. *Bush*, 3 Paige, 653.

The inchoate right of dower of the wife is as much entitled to protection as the perfected or vested right of the widow.

Mills v. *Van Voorhies*, 20 N. Y. 412; *Matthews* v. *Duryee*, 4 Keyes, 525.

Such inchoate right is a subsisting and valuable interest, to protect and preserve which she has a right of action.

1 Story, Eq. Jur. § 656; *Jackson* v. *Edwards*, 7 Paige, 408; *Ripple* v. *Gilborn*, 8 How. Pr. 456; *Simar* v. *Canaday*, 53 N. Y. 305.

An injury to such right is separate and distinct, for which the wife may, if she so elect, maintain a separate action.

Simar v. *Canaday, supra.*

Mr. **Lewis Sanders,** for defendant:

The plaintiff was an incompetent witness.

See *Sanford* v. *Ellithorp*, 95 N. Y. 48.

Ruger, *Ch. J.*, delivered the opinion of the court:

This action was brought by the plaintiff as the widow of Rudolph A. Witthaus, to cancel and annul a deed of several parcels of land in the City of New York, so far as it affected her right of dower in the parcels lying below Fifty-Ninth Street, upon the ground that her signature thereto had been obtained by the false and fraudulent representations of her husband.

The proof showed that on December 28, 1876, Rudolph A. Witthaus and the plaintiff executed and duly acknowledged a deed of ten separate parcels of real estate situate in the City of New York (lying partly above and partly below Fifty-Ninth Street) to Frederick Schack, the defendant, in fee to secure the payment of certain debts owing by Witthaus to the several persons named in the deed. It was stated therein that it was upon trust to sell and convey the land, to produce the best price that could be realized from the same and apply the moneys realized to the payment of said debts, *pro rata* according to their respective amounts.

The proof further showed that the deed was delivered to the defendant on the same day, and that he immediately entered upon the possession of the property and continued to sell, convey and rent the same until the commencement of this action in January, 1879. Rudolph A. Witthaus died by his own hand on March 19, 1877.

Upon the trial the plaintiff was herself offered as a witness to prove the fraudulent representations alleged, and upon the faith of which she claims that she was induced to sign and acknowledge the deed in question. Upon being asked to relate the conversation occurring between herself and her husband in which the representations occurred, the defendant's counsel objected to the competency of her evidence, upon the ground that it constituted personal communications between the defendant's deceased grantor and the witness, which were inadmissible under the Code. The objection was overruled by the trial judge and the defendant excepted. The witness thereupon gave evidence tending to show that on the morning of December 23, her husband requested her to join him in a deed of so much of his property in the City of New York as was situated north of Fifty-Ninth Street, to Schack, the defendant, for the purpose of securing several persons to whom he was indebted. She assented to this proposition, and further testified that when later in the day the deed was presented to her for execution and acknowledgment, her husband said that it was prepared in accordance with the agreement made between them in the morning. The evidence thus given by the plaintiff was the only proof offered as to the fraudulent representations alleged by the plaintiff.

The only question which we consider it necessary to discuss relates to the competency of this evidence under the Code of Civil Procedure. The provision of the Code, so far as it is applicable to the question in hand, may be abbreviated as follows: "Section 829. Upon the trial of an action * * * a party or person interested in the event * * * shall not be examined as a witness in his own behalf or interest * * * against * * * a person deriving his title or interest from, through, or under a deceased person, by assignment or otherwise; concerning a personal transaction or communication between the witness and the deceased person."

It is not disputed that the plaintiff is a party and interested in the event of the action, or that the subject of the inquiry related to a personal communication between the deceased person and the witness; but it is claimed, as stated in plaintiff's points, that "the plaintiff was not an incompetent witness under section 829 of the Code, because the title or interest to be affected by the action was not derived by defendant from plaintiff's husband, but from plaintiff."

The plaintiff thus seeks to stand upon the letter of the statute, and to claim exemption from its provisions by reason of the alleged creation of a contingent estate, intermediate the seisin of the husband and the execution of the deed, which it is claimed suspended the husband's title to a part of his property and created a new estate, transferable only by a conveyance from the wife.

The error in this proposition consists in the assumption that the wife has an estate in the lands of her husband during his life, which she can convey to another.

The settled theory of the law, as to the nature of an inchoate right of dower, is that it is not an estate or interest in land at all, but is a contingent claim arising not out of contract, but as an institution of law, constituting a mere chose in action, incapable of transfer by grant or conveyance but susceptible only during its inchoate state of extinguishment.

By force of the statute this is effected by the act of the wife in joining with her husband in the execution of a deed of the land. Such deed, so far as the wife is concerned, operates as a release or satisfaction of the interest and not as a conveyance, and removes an incumbrance instead of transferring an interest or estate. Her right may also be forfeited by her adultery, and thus extinguished, and barred by jointure or pecuniary provision.

It was said by *Judge* Gardiner, in *Lawrence* v. *Miller*, 2 N. Y. 245, that "Before assignment the widow has no estate in the lands of her husband; her right is a mere chose in action which cannot be sold upon execution at law; until that time it is strictly a claim." Affirmed in *Lawrence* v. *Brown*, 5 N. Y. 394.

The same learned judge said in *Moore* v. *New York*, 8 N. Y. 112: "Before assignment of dower the widow has no estate but a mere right in action, or claim which cannot be sold on execution." Citing 2 N. Y. 254; Greenl. Cruise, Dig. title, *Dower*, chap. 3, § 1; *Gooch* v. *Atkins*, 14 Mass. 378.

If this is the true character of the right of the widow prior to the assignment, that of a wife must be a right to a claim for dower, contingent upon her surviving her husband. Such a possibility may be released; but it is not, it is believed, the subject of grant or assignment; nor is it in any sense an interest in real estate. "The estate of the widow after assignment of dower is a continuation of the estate of her deceased husband."

It was held in *Marvin* v. *Smith*, 46 N. Y. 574, that "An inchoate right of dower may be released to the grantee of the husband by a proper conveyance, executed and acknowledged in the form prescribed by statute; but the right cannot be transferred to a stranger or to one to whom the wife does not stand in privity."

It was further held that the husband having previously conveyed the premises upon certain specified trusts, a mortgage upon the same subsequently executed by the husband and wife was ineffectual to bar her right of dower, the court saying: "If therefore the husband had no interest which was subject to the mortgage and passed by means of it, the mortgagee took no title to the dower right. That could only be released by a deed of her husband, conveying the estate to which it was incidental, in which she shall unite."

In *Elwood* v. *Klock*, 13 Barb. 50, it was held that where "the widow of the first tenant releases her dower before the same has been assigned to her, her release will operate, not as an assignment of dower to the widow, nor as a conveyance of it to the grantee, but as an extinguishment of her right of dower; and such release will not affect the claim to dower of the widow of a subsequent grantee of the premises."

The case of *Elmendorf* v. *Lockwood*, 57 N. Y. 322, seems in point upon the question in this case. In discussing the nature of the act of the wife in joining her husband in the execution of a deed, Earl, *C.*, said: "When she has united in the conveyance, her dower is said to be barred, relinquished, extinguished, removed. Such is the language of Kent and other legal writers. Judge Willard, in his work on Real Estate, p. 6, says: 'The inchoate right to dower is, in this State, an incumbrance upon the estate of her husband which is usually removed by her uniting with him in the deed and acknowledging the execution thereof.' And at p. 64: 'The object of uniting the wife with the husband in his conveyance of land to a third person is to extinguish her incohate right of dower.'" Continuing, *Judge* Earl further says: "When the wife unites with her husband in a conveyance properly executed by her, which is effectual and operative against her husband, and which is not superseded or set aside as against him or his grantee, her right of dower is forever barred and extinguished, for all purposes, and as to all persons."

Dwight, *C.*, writing in the same case and considering the nature of a fine in the English law, for which our system of private acknowledgments is a substitute, says: "A fine levied by a person who has no title but who afterward becomes heir will be an estoppel to his claim as heir, and yet, a release by deed would not have barred his title. The principle seems to be that the fine accompanies the estate and becomes a muniment of title, and may be resorted to by anyone who happens to be in possession of the estate. These views would prevail in the case of dower while it is still inchoate. The argument would be yet stronger after the husband's death. The estoppel would then work a transfer of the estate to the vendee under the husband's conveyance. *Lampet's Case*, 5 Coke, part 10, 46 *b*; *Helps* v. *Hereford*, 2 Barn. & Ald, 242."

It was also held in *Aikman* v. *Harsell*, 98 N. Y. 191, that "The right of a widow to dower, until it is assigned, is a mere chose in action which is not the subject of a sale upon execution at law, and before assignment or admeasurement is only a claim."

So, too, it is said by Andrews, *J.*, in *Hinchcliffe* v. *Shea* (N. Y.), 4 Cent. Rep. 214, 103 N. Y. 155: "The joinder by a married woman with her husband in a deed or mortgage of his lands does not operate, as to her, by way of passing an estate, but inures simply as a release to the grantee of the husband, of her future contingent right of dower in the granted or mortgaged premises, in aid of the title or interest conveyed by his deed or mortgage. Her release attends the title derived from the husband and concludes her from afterwards claiming dower in the premises as against the grantee or mortgagee, so long as there remains a subsisting title or interest created by his conveyance." See also *Sanford* v. *Ellithorp*, 95 N. Y. 50.

It would seem clear, from the authorities, that the act of the wife in joining her husband in the execution of a deed of his lands does not constitute her a grantor of the premises, or vest in the grantee any greater or other estate than such as he derives from the conveyance of the husband. Its effect is merely to extinguish a contingent claim existing as a possible incumbrance, and ceasing to exist by reason of the execution of the husband's deed, and to be revived only by the subsequent cancellation or annulment of his conveyance.

It is also obvious that the grantee in such deed takes title to the whole premises, solely by virtue of the title and estate of the husband, and therefore in the fullest sense derives his title "through, from and under" such grantor.

We are, therefore, of the opinion that the defendant took the title to the entire premises in dispute from Rudolph A. Witthaus, and that his wife was not a competent witness to testify to personal transactions and communications occurring between herself and her husband in reference to such deed. The defendant is, therefore, within the letter as well as the spirit of section 829 of the Code.

It follows as matter of course, from these views, that the several appeals of the plaintiff, which constitute incidents to the judgment, must fall with the reversal of the judgment.

Such appeals are, therefore, dismissed, without costs to either party.

The judgment of the courts below should be reversed upon the defendant's appeal, and a new trial ordered, with costs to abide the event.

All concur.

Re Application of NEW YORK, LACKAWANNA & WESTERN R. CO. to Acquire Real Estate of Minnie Van Zandt *et al.*

1. Where there is a **devise to one person in fee, and, in case of his death, to another,** the contingency referred to is the death of the first named devisee during the lifetime of the testator, and if such devisee survives the testator he takes an absolute fee.
2. The same rule of construction is to be applied where the alternative devise is made to depend upon the **death** of the first named devisee **"without issue,"** or "without children," etc.
3. But this rule applies only when the context of the will is silent and affords no indication of intention other than that disclosed by words of absolute gift, followed by a gift over in case of death or of death without issue; and **the tendency is to lay hold of slight circumstances in the will to vary the construction and give effect to the language** according to its natural import.

4. When the testatrix devised real estate to her daughter, without words of inheritance, and then directed that in case the daughter should die without issue, the estate, real and personal, should be possessed and enjoyed by the husband, sister and brothers of the testatrix, the addition at the end of the clause, **"the devise over** to my husband, sister and brothers **to depend upon** the **contingency of** my **daughter dying without issue," indicated** an **intention by** the **testatrix** that in the event of her daughter's dying without issue, her husband, sister and brothers should enjoy the property, without reference to any other contingency; and such construction is strengthened by the fact that the daughter was only about six years of age at the death of the testatrix.
5. *Held, further*, that the daughter took, under her mother's will, a base or **conditional fee,** defeasible by her dying without leaving issue at the time of her death; that her issue, should she leave any, would take by inheritance from her, but a **conveyance** by her **in** her **lifetime** would be **effectual** as against them, and that an indefeasible title in fee could be conveyed and the contingent, expectant estate, limited to the husband, sister and brothers of the testatrix in the event of the daughter dying without issue, cut off by their joining with her in a conveyance.

(Decided March 22, 1887.)

APPEAL from an order of the Supreme Court at General Term in the Fifth Department, affirming an order of the Monroe Special Term directing the disposal of moneys paid into court as compensation for land taken by a railroad. *Affirmed.*

The special term directed the moneys to be paid into the hands of the Treasurer of Livingston County and the interest paid to Minnie Van Zandt during her life, and after her death the principal to be paid to the persons entitled under the will of Ellen M. Wisner.

The provisions of the will and questions raised appear from the opinion.

Mr. **W. H. McMath,** for Minnie Van Zandt, appellant:

The construction for which we contend is this: that by the words "In case my daughter Minnie should die without" and the words "My daughter Minnie dying without issue," testatrix intended, dying before her (testatrix's) death without issue. Testatrix intended to make an alternative devise, to be substituted in case the estate given to Minnie never vested.

We maintain that testatrix has plainly expressed this intention in the terms used in her will. By the second clause of the will, although no words of inheritance are used, an absolute fee in the real estate is given to Minnie, subject only to the legacies amounting to $1,600, unless the intent to pass a less estate or interest appears by express terms, or is necessarily implied in the terms of the will.

3 R. S. 7th ed. p. 2205, § 1.

No implication that an estate less than an absolute fee was intended can be successfully claimed on account of the absence of the word "heirs."

Kirk v. *Richardson*,, 32 Hun, 434.

The testatrix must be considered as speaking with reference to the time of her death; and the use of the word "should" instead of the future auxiliary "shall" clearly indicates that testatrix intended that the contingency was to happen prior to her death. Note the last sentence of the third paragraph of the will:

"The devise over to my husband, sister and brothers to depend upon the contingency of my daughter Minnie dying without issue."

A devise is a disposition of property. Testatrix does not say that the possession or the vesting of the estate in the husband, etc., is to depend, but that the devise is to depend, etc. The estate given to the husband, etc., whether vested or contingent, commenced, if at all, at the death of testatrix. Where an expectant estate is created by devise, the death of testator shall be deemed the time of the creation of the estate.

3 R. S. 7th ed. 2179, § 41.

The contingency was attached to the estate given to the husband, sister and brothers, and was to be a condition precedent thereto. It must have happened before their estates could have commenced, and the words "dying without issue," therefore, if in themselves indefinite as to time, are made certain.

The contingency did not happen before their estates were created and they were defeated.

Wolfe v. *Van Nostrand*, 2 N. Y. 440.

It is to be presumed that testatrix has made a will valid in all its provisions. And the court will give such a construction, if possible, as will give some effect to every expression, rather than such as will render any of the expressions inoperative.

Trustees Auburn Seminary v. *Kellogg*, 16 N. Y. 86; 1 Jarm. Wills, last ed. 475; Redf. Sur. Pr. 2d ed. 245.

Our construction is in accord with, and the only construction that is in accord with, all the rules, as laid down by the courts.

Minnie was the sole heir of testatrix. Every presumption is in her favor.

1 Jarm. Wills, last ed. 532; *Lynes* v. *Townsend*, 33 N. Y. 570.

The fact that testatrix made the legacies chargeable upon the estate given to Minnie is evidence of an intention to give her an absolute fee.

2 Jarm. Wills, last ed. 268, 271.

The party to take, under a will, should, if possible and consistent with the terms of the will, be determined at death of testator.

Converse v. *Kellogg*, 7 Barb. 593.

The court will not favor a construction which will have the effect of devesting an estate.

Clason v. *Clason*, 6 Paige, 541.

Where an estate is given in one part of an instrument in clear and decisive terms, such estate cannot be taken away or cut down by raising a doubt upon the extent or meaning or application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that estate.

Roseboom v. *Roseboom*, 81 N. Y. 359; 1 Jarm. Wills, 480; *Freeman* v. *Coit*, 96 N. Y. 63.

A bequest or devise in terms which ordinarily pass an absolute interest, should never be cut down into a gift for life, except where such qualifications are necessary to make the whole will consistent.

1 Redf. Wills, 3d ed. 433, 434; *Briggs* v. *Shaw*, 9 Allen, 516; 1 Jarm. Wills, 474.

It requires very strong words to defeat a prior vested gift.

2 Jarm. Wills, last ed. 824.

Where a will in terms grants a fee, and a later clause qualifies it by some limitation, it is a settled and invariable rule not to disturb the prior devise, further than is absolutely necessary for the purpose of giving effect to the posterior qualifying clause.

1 Jarm. Wills, last ed. 474; 3 Barb. 64.

A clause of substitution is generally referable to the death of testator.

Maberly v. *Strode*, 3 Ves. 450; 1 Jarm. Wills, 478; 2 Jarm. Wills, 785.

The following are some of the cases in which wills containing terms similar to this were before the courts for construction:

Livingston v. *Greene*, 53 N. Y. 124; *Kelly* v. *Kelly*, 61 N. Y. 47; *Embury* v. *Sheldon*, 68 N.Y. 239; *McLoughlin* v. *Maher*, 17 Hun, 215; *Briggs* v. *Shaw*, 9 Allen, 517; *Clayton* v. *Lowe*, 7 E. C. L. 218; *Schenk* v. *Agnew*, 4 Kay & J. 405; *Miller* v. *McBlain*, 98 N.Y. 517; *Leonard* v. *Kingsland*, 67 How. Pr. 481; *Re Tallmage*, 20 N. Y. Week. Dig. 69; *Waugh's App.* 78 Pa. 436; *Mickley's App.* 92 Pa. 514.

Mr. Charles J. Bissell, for certain persons named in the will of Ellen M. Wisner, respondents:

It is submitted that the devise over to the husband, brothers and sister of the testatrix, is a valid devise as a contingent limitation, and will take effect upon the death of Minnie Van Zandt without issue.

At common law the devise over would probably have been held to be void, as importing an indefinite failure of issue; but by the Revised Statutes the language used is held to mean issue living at the death of the first taker, and hence a valid executory devise.

1 R. S. part 2, chap. 1, title 2, art. 1, § 19.

The absolute power of alienation is only suspended during the life of Minnie Van Zandt; upon her death without issue the estate absolutely vests in the persons named in the will, subject to the life estate in Reuben P. Wisner and Delia Fisk. The remaindermen and the life tenants could by joining in a conveyance at any time, convey the fee.

1 R. S. P. 2, chap. 1, title 2, art. 1, § 14; 5 R. S. Edmonds' ed. p. 307, Reviser's notes.

Possibly by the terms of section 19 of the same title and chapter, one of the life estates would be rejected and the remainder vest in possession on the death of Minnie Van Zandt, and the first named life tenant. This would not avoid the remainder.

Woodruff v. *Cook*, 47 Barb. 305; *S. C.* affirmed 61 N. Y. 638.

There are many cases in this State, where executory devises, such as the one under consideration, have been held good, and to vest an interest in the executory devisees upon the death of the first taker, without issue, long after the death of the testator.

Emmons v. *Cairns*, 3 Barb. 243; *Hill* v. *Hill*, 4 Barb. 419; *Pond* v. *Bergh*, 10 Paige, 140; *Heard* v. *Horton*,* 1 Denio, 165; *Anderson* v. *Jackson*, 16 Johns. 382; *Dumond* v. *Stringham*, 26 Barb. 104; *Norris* v. *Beyea*, 13 N. Y. 273.

In none of these cases does the question appear to have been raised whether the death without issue meant a death during the lifetime of the testator; but it is assumed by counsel and the court that it meant in each case a death without issue at any time.

In 2 Jarman on Wills, 5th Am. ed. chap. 48, the various cases arising under wills where there is a limitation over, in case of the death of the first taker, are fully discussed. The general rule appears to be that when the only contingency is the death of the first taker, the will is construed to mean a death occurring in the lifetime of the testator; for the reasons that death is a certain event, and that the testator must have intended the limitation over to take effect only in the event of the death of the first taker, prior to that of the testator, else he would have provided for a life estate in the usual way.

Kelly v. *Kelly*, 61 N. Y. 47.

But when some other contingency is annexed to the death of the first taker, not certain in itself, such as "dying without issue," the general rule appears to be (unless controlled by the context of the will) that the limitation over will take effect upon the happening of the event at any time.

2 Jarm. Wills, chap. 49, p. 783, *et seq.* and cases cited; *Nellis* v. *Nellis*, 1 Cent. Rep. 296, 99 N. Y. 505; *Buel* v. *Southwick*, 70 N. Y. 581.

Rapallo, *J.*, delivered the opinion of the court:

It may be regarded as a settled rule of construction that where there is a devise to one person in fee, and in case of his death to another, the contingency referred to is the death of the first named devisee during the lifetime of the testator, and that if such devisee survives the testator he takes an absolute fee; that the words of contingency do not create a remainder over to take effect upon the death, at any time, of the first taker, or an executory devise, but are merely substitutionary and used for the purpose of preventing a lapse in case the devisee first named should not be living at the time of the death of the testator.

This construction is uniformly adopted, unless there is some language in the will indicative of a different intention on the part of the testator. The reason assigned for this construction has been that as death is a certain event, and the time only is contingent, the words of contingency in a devise of this description can only be satisfied by referring them to a death before some particular period; and no other being mentioned, the time referred to must be presumed to have been the testator's own death. It is also founded upon the principle that, in construing wills, effect should be given, if possible, to all the words used by the testator, and that any other construction than the one which has been adopted would in every case reduce the estate of the first named devisee to an estate for life; for his death at some time is certain; and the words of inheritance at tached to the devise to him would in every case be inoperative.

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*See note to this case, Lawyers' Edition. [Ed.]

Nevertheless, it has been held that the same rule of construction is to be applied where the alternative devise is made to depend upon the death of the first named devisee "without issue" or "without children," etc. This question is thoroughly discussed in the opinion of Andrews, *J.*, in the case of *Vanderzee* v. *Slingerland*, 103 N.Y. 47, *Sub nom. Vanderzee* v. *Haswell*, 4 Cent. Rep. 176, and the learned judge comes to the conclusion that although the reason upon which the rule adopted in the first mentioned class of cases was founded, does not exist in the second, yet that it is established by precedent.

It would be useless now to go through the cases. They are very numerous, and not all reconcilable, and many of them contain special features. It is sufficient for present purposes to refer to a few of the cases.

In *Gee* v. *Mayor etc. of Manchester*, 17 Adol. & Ell. 737, the testator devised and bequeathed his real and personal estate to be divided equally among his children as follows, viz.: "I will and bequeath to my eldest son A. one seventh share of my property, to his heirs, executors and administrators." Then followed similar devises and bequests to each of the testator's six other children, and afterward a general provision in these words: "And in case any of my sons and daughters die without issue that their share returns to my sons and daughters equally among them; and in case any of my sons and daughters die and leaving issue, that they take their deceased parent's share."

It was held that the death referred to was a death in the lifetime of the testator, and that all his children having survived him, they each took a fee simple in one seventh of his realty.

It must be observed that unless that construction was adopted, the words of inheritance attached to the devise to each of the testator's children must in every event be rejected.

It was certain that each of the children would die, either with or without issue. Construing the death referred to by the testator as a death at any time, the result would be that upon the death of either of the testator's sons, for instance, without issue, his share would go to his brothers and sisters, not as his heirs but as purchasers by virtue of the limitation over to them. If he died leaving issue, such issue would take in like manner, not as his heirs, but as purchasers. He would have no estate of inheritance in any event, and could make no disposition of the fee in the realty in his lifetime, or by will. The words of the testator, purporting to give him an estate in fee, would thus be wholly rejected, and his estate, under all circumstances, cut down to a life estate.

It was on these grounds that *Lord* Campbell, in delivering the judgment of the court, held that the only mode of giving effect to all the words of the testator was by treating the words in the last clause of the will as words of substitution only, in case of a lapse, and referring the death there contemplated to a death in the lifetime of the testator.

In *Clayton* v. *Lowe*, 5 Barn. & Ald. 636, the devise was in the same form as in the case last cited. The estate was given to the testator's three grandchildren, forever. If either of them should die without lawful child or children, the share of the one so dying was was to be divided among the survivors, but if either should die leaving lawful child or children, such child or children should take the share of the parent. It is obvious that unless the death referred to was a death in the lifetime of the testator, the first named devisees could in no event take a fee.

Doe v. *Sparrow*, 13 East, 359, was a case of the same description with additional significant words, expressly referring to the testator's own death.

Woodburne v. *Woodburne*, 23 L. J. Eq. 336, was the same as *Gee* v. *Mayor of Manchester*, and was decided the same way.

The cases I have referred to rest on principles, and are founded on reasons, which are easily comprehended; but there are other cases in which the words "die without issue" are construed as referring to a death in the lifetime of the testator, where those principles are inapplicable, and the reasons do not exist; and of such cases Andrews, *J.*, in the case of *Vanderzee* v. *Slingerland*, says that they stand more upon authority than upon reason.

It is stated in Jarman on Wills (5th Am. ed. p. 783) that the general rule is that where the context is silent, the words referring to the death of the prior legatee, in connection with some collateral event, apply to the contingency happening as well after as before the death of the testator.

In *O'Mahoney* v. *Burdett*, L. R. 7 H. L. Eng. & Irish App. 388, 393, it was held that a bequest to A., and if she should die *unmarried* or *without children*, to B., was an absolute gift to A., defeasible by an executory gift over in the event of A., dying at any time, *unmarried* or without children, and that this construction could only be effected by a context which rendered a different meaning necessary.

And in *Britton* v. *Thornton*, 112 U. S. 536 [Bk. 28, L. ed. 820], it was held that under a devise to one person in fee and in case he should die *under age* and without children, to another in fee, the devise over would take effect upon the death, at any time, of the first devisee under age and without children.

To the same effect is *Edwards* v. *Edwards*, 15 Beav. 357; and see *Doe* v. *Webber*, 1 Barn. & Ald. 713, and *Anderson* v. *Jackson*, 16 Johns. 382.

But it cannot be disputed that there are several cases holding that where there is simply a devise to A. in fee, and in the event of his dying without issue, then to B., the death referred to is a death in the lifetime of the testator; and if A. survives him, he takes an absolute and indefeasable estate in fee.

See *Home* v. *Pillans*, 2 Myl. & K. 15, 19, and cases cited; *Ware* v. *Watson* 7 D. E. G. M. & G. 248.

Such appears to be the rule in Pennsylvania; *Mickley's App.* 92 Pa. 514; and the same rule has been adopted in this court; *Quackenbos* v. *Kingsland*, 2 Cent. Rep. 918, 102 N. Y. 128, and was recognized in *Vanderzee* v. *Slingerland*, 103 N. Y. 47, 4 Cent. Rep. 176, before referred to. But in that case the learned judge writing the opinion (Andrews, *J.*) says that the rule established by the court, applies only when the context of the will is silent and affords no indication of intention other than that disclosed by word of absolute gift, followed by a gift over in case of death, or of death without issue; and that indeed the tendency is to lay hold of slight circumstances in the will, to vary the construction and give effect to the language according to its natural import; and in the will which the learned judge was then construing, he found such indications.

I think that similar indications exist in the will now before us. The testatrix does not charge the legacies upon her daughter Minnie personally, but upon the real estate devised, so they would be borne by whomsoever should become entitled to that real estate. She devises the real estate to her, without words of inheritance. She then directs that in case she should die without issue, her estate, real and personal, should be possessed and enjoyed by the others named in the will. Her death without issue is a contingent event; but by adopting the construction contended for, and claimed to be established by the authorities, the court would add another contingency not specified by the testatrix, that is that she died without issue during the lifetime of the testatrix.

As if to make her intentions clearer, and to indicate that no other contingency was contemplated than the one which she had expressed, the testatrix adds, at the end of the clause: "The devise over to my husband, sister and brothers *to depend* upon the contingency of my daughter Minnie dying without issue,"—this repetition, clearly defining the testatrix's intention that in the event of her daughter's dying without issue, her husband, sister and brothers should enjoy the property, without reference to any other contingency.

The daughter was an infant of about six years of age at the time of the testatrix; and it would be a very forced construction of the language of the will to hold that the testatrix had an unexpressed intention that if the child should die the next year, or at any other time, after the death of the testatrix, the devise over to her husband, sister and brothers should not take effect.

Our conclusion is that Minnie VanZandt took, under her mother's will, a base or conditional fee, defeasible by her dying without leaving issue living at the time of her death; 1 R. S. 724, § 22; that her issue, should she leave any, would take by inheritance from her, but a conveyance by her in her lifetime would be effectual as against them; and that an indefeasible title in fee could be conveyed and the contingent expectant estate limited to the husband, sister and brothers of the testatrix in the event of Minnie's dying without issue, cut off by their joining with her in a conveyance. See *Emmons* v. *Cairns*, 3 Barb. 243, 246, *et seq.*

For these reasons we think the order appealed from should be affirmed.

All concur.

Charles F. HOLLY, *Respts.*,

v.

METROPOLITAN LIFE INSURANCE CO., *Appt.*

1. In **construing a contract between an insurance company and a policy holder,** where it is capable of two constructions, one involving a forfeiture, and the other supporting the obligation of the policy against the insurer, that **construction,** if fair and reasonable, **which does not involve** the **forfeiture, is preferred** by the court.
2. This rule is applicable only where the **words** used **in a policy leave** the **meaning in doubt;** where there is no doubt as to the meaning of the language used, such meaning must prevail in the absence of fraud or mistake.
3. Where, **after** the **premium** was **due** upon a policy, the **company,** at the request of the policy holder, **postponed** its **payment, upon** the **giving** of his **note** by the latter, for the same, **containing** the **condition** that if he failed to pay the note at maturity he should thereby immediately forfeit all claims to further insurance, and the company gave its receipt with similar condition, *held*, that **by failing to pay** such **note** when due the **forfeiture attached** and the policy holder thereby lost the right to all further insurance under his policy.
4. *Held further*, that although the policy contained a promise by the company, that upon its surrender within thirty days after the unpaid premium should be due the company would in exchange issue **a paid up policy** for the amount of premium received upon it, and although the policy holder offered to pay the note twelve days after it became due, he could not compel the company to give a paid up policy for the amount of premiums paid by him previous to the time when the one fell due for which he gave the note.*
5. **Punctuality in** the **payment of premiums** in the case of a life insurance policy is the very **essence of** the **contract;** and when payment is not made at the time, the company has the right to forfeit if such was the contract.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Special Term in favor of plaintiff in an action to compel defendant to issue to plaintiff a paid up policy of life insurance. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **William H. Arnoux,** for appellant: Cited *Howell* v. *Knickerbocker Life Ins. Co.* 44 N. Y. 276; *Wheeler* v. *Conn. Mut. Life Ins. Co.* 82 N. Y. 543; *Douglas* v. *Knickerbocker L. Ins. Co.* 83 N. Y. 504; *Blacksmith* v. *Fellows*, 7 N. Y. 401; *Oakley* v. *Morton*, 11 N. Y. 25;

**Premium notes.* As to the effect upon paid up policies, of nonpayment of interest on premium notes, see Cowles v. Continental Life Ins. Co. (N. H.) 1 New Eng. Rep. 247; Bruce v. Same (Vt.) Id. 685; Holman v. Same (Conn.) 2 New Eng. Rep. 833; People v. Knickerbocker Life Ins. Co. (N. Y.) 4 Cent. Rep. 783.

Harmony v. *Bingham*, 12 N. Y. 99; *Wiber* v. *New York etc. R. R. Co.* 12 N. Y. 245; *Wolfe* v. *Howes*, 20 N. Y. 197; *Cunningham* v. *Jones*, 20 N. Y. 486; *Ruse* v. *Mut. Benefit Life Ins. Co.* 23 N. Y. 516; *Catlin* v. *Tobias*, 26 N. Y. 217; *Tomkins* v. *Dudley*, 25 N. Y. 272; *Nelson* v. *Odiorne*, 45 N. Y. 489; *Dexter* v. *Norton*, 47 N. Y. 62; *Booth* v. *Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487. And see note to *Sands* v. *N. Y. L. Ins. Co.* 50 N. Y. 626, and *Roehner* v. *Knickerbocker Life Ins. Co.* 63 N. Y. 160.

Mr. **James M. Fisk,** for respondent:

Each note was an extension of the time of payment of the debt evidenced by it until the note matured.

76 N. Y. 521; 34 Hun, 100.

Under the terms of the policy plaintiff had thirty days after a premium, or in this case the note, became due to demand a paid up policy. This he did.

When a creditor accepts a bill or note from his debtor it will operate to suspend the right of action on the original debt until the bill or note becomes due or is dishonored.

Putnam v. *Lewis*, 8 Johns. 389; *Smith* v. *Applegate*, 1 Daly, 91.

In general, the taking by a creditor of a debtor's note for an existing indebtedness does not merge or extinguish the indebtedness; the note is simply evidence of the debt, and its operation is only to extend the time of payment; and so successive renewal notes are simply extensions from date to date of the time of, payment.

34 Hun, 102, citing *Jagger Iron Co.* v. *Walker*, 76 N. Y. 521.

The giving of the note was held not to be the making of a debt, but only the promise to pay the old one, and an extension of time for payment.

Parrott v. *Colby*, 71 N. Y. 597.

A forfeiture for nonpayment of premium is inserted in the contract for the benefit of the insurer. It may be waived by the company.

87 N. Y. 622.

A forfeiture is not favored, either in law or equity, and a provision for it in a contract will be strictly construed; and a waiver will be found on slight evidence, when the equity of the claim, as in this case, is (under the contract) in favor of the plaintiff.

Burleigh v. *Gebhard Fire Ins. Co.* 90 N. Y. 220.

When courts are compelled to choose between two constructions, the vigorous and hard, producing a forfeiture, and another natural and reasonable, and supporting the obligation, the latter construction will be preferred.

80 N. Y. 21; 90 N. Y. 220.

The policy of strict construction where forfeiture was involved, was reaffirmed in 1 Cent. Rep. 528, 100 N. Y. 421.

In such cases no other meaning will be given to the language used than a most rigid and literal interpretation will permit; and where the condition is a limitation of liability, it will not be extended by interpretation so as to include a case not clearly within the words. *Id.*

Peckham, *J.*, delivered the opinion of the court:

The defendant insured the life of the plaintiff, August 16, 1870, in the sum of $5,000, on payment of a premium of $247 and a premium of the same amount thereafter payable on the 16th of August in each year. The policy was issued for the sole benefit of Charles F. Holly, Jr., and contained a clause of forfeiture if the premium were not paid at the time mentioned. It also contained a promise that if, after three annual payments of premiums were made, the assured should fail to make payment of any further premium when due, then upon a surrender of the policy within thirty days after such unpaid premium should be due, the Company would in exchange issue a paid up policy for the amount of even dollars of premium received by it on the policy. The plaintiff had thirty days after a premium became due in which to pay it. By subsequent agreement the payment of the premium was changed from annual to semi-annual periods, and as thus changed the premiums had been paid to February 16, 1877.

The plaintiff did not pay the premium which became due on the date last named, and had not paid it on the 14th of March following. On that day he called at the office of the Company in New York; and being, as he says, short of money he asked for an extension of time, which resulted finally in his giving a note for the payment of the premium which had fallen due on the 16th of the previous February, and the note was payable in three months from its date (March 14) and contained this condition: "This note is given in part payment of the annual premium on policy numbered as per margin, with the understanding that all claims to further insurance and all benefits whatever which full payment in cash of said premium would have secured shall become immediately void and be forfeited to said Company if this note is not paid at maturity."

Contemporaneous with this note and as part of one and the same transaction the defendant gave to the plaintiff the following receipt :

"Metropolitan Life Insurance Co.,
319 Broadway New York, March 14, 1877,
Note 3 mo. due June 14, 1877.
Chas. F. Holly.

Received from the owner of policy No. 9609, 128\frac{45}{100}$, which continues said policy in force until the 16th day of August, 1877, at noon, in accordance with its terms and conditions.

Not binding upon the Company until the premium is paid and this receipt signed by
Jno. R. Hegeman
(Prem. Receipt)
Vice President."

When this note became due the plaintiff, not desiring to pay it, asked for its renewal; and the result was that the plaintiff signed another note containing a condition precisely similar to that set forth in the first one, and payable August 14, 1877, and the defendant gave up the first note to the plaintiff. When the second note became due the plaintiff failed to pay it; and on the 25th or 26th of August thereafter called at the office of the Company and offered to pay the note, which payment was refused and the claim made that the policy was forfeited by the nonpayment of the note when due.

The plaintiff subsequently commenced this action to compel defendant to comply with its agreement and give a paid up policy for the amount of premiums paid by him (over $1,700) up to the time when he failed to pay the premium due August 16, 1877.

The plaintiff has succeeded thus far. In the argument of the case here for the plaintiff, much stress was laid upon the rules governing the court in construing contracts between insurance companies and policy holders, especially when any forfeiture is to be insisted upon by the former. A strict construction it is said must be insisted upon; and the contract resulting in a forfeiture cannot be extended beyond the strict and literal meaning of the words used.

This is undoubtedly true. In cases where the meaning is not entirely plain, and where it is capable of two constructions, one involving a forfeiture and the other being fair and reasonable and supporting the obligation of the policy against the insurer, that construction is preferred by the courts which does not involve the forfeiture; not only because it is not so harsh but also because if the language be doubtful, it is that employed by the insurer, and should be taken most strongly against him. As it is said by Finch, *J.*, in delivering the opinion of this court:

"If a construction so literal and severe is intended by the insurer, he should at least say so by plain and appropriate language, and not ask the court to supply it by intendment." See *Burleigh* v. *Gebhard Fire Ins. Co.* 90 N. Y. 220.

This was said in relation to the construction to be given the words "Detached at least 100 feet" in a policy of insurance upon a lot of goods in a frame storehouse thus situated. The court held that a small office standing seventy-five feet away, which the trial court found was not an exposure and did not affect the risk, did not constitute a breach of the warranty.

But all the cases which use language of this nature as to the construction to be given words in a policy are cases where the words used leave the meaning in doubt. Where there is no doubt as to the meaning of the language used, such meaning must prevail with courts, for the simple reason that the parties have so contracted; and in the absence of fraud or mistake both must live up to their contracts or take the consequences. We entertain no doubt as to the meaning of this contract. On the 16th of February, 1877, a semi-annual payment of a premium became due from the plaintiff, which he was obliged to pay in order to keep his policy alive, or he could have made default in payment and demanded his paid up policy for the proper amount. He had thirty days from the 16th of February in which to pay the premium due that day or to make his demand for a paid up policy. He waited until the 14th of March before doing anything, and he went to the office of the defendant in New York to ask a favor, *i. e.:* the postponement of the cash payment for a short time.

This favor the Company granted, but only upon one condition which was put in writing and assented to and signed by the plaintiff. He thereby consented and agreed that if he failed to pay this note at maturity he should thereby among other things immediately forfeit all claims to further insurance.

The written receipt is to be read in connection with this note, and the whole transaction then appears to be and it was simply this: the Company asknowledged the receipt of the February premium and continued the policy in force to August 16, provided the note which was given instead of cash in payment of the premium was paid at maturity. If not, then the Company had the right to immediately forfeit the policy and all claims to further insurance, which right of forfeiture includes the very claim in suit.

When the first note became due it was renewed by the execution of another upon the same terms and conditions, due August 14, and the first note was then surrendered. By failing to pay this last note when due, the forfeiture provided for therein immediately attached, and the plaintiff thereby lost the right which he would otherwise have had to further insurance according to the tenor of his policy, but which he had agreed to give up on condition of obtaining an extension of the time in which to pay his premium, and by failing to pay it at the end of that time.

It is argued that taking the first note had the effect of designating a new period from which the default in payment of the premium should afterwards be measured, and that as the premium only became due under the final arrangement on the 16th of August, 1877, the plaintiff, by the policy, had the right to a paid up policy within thirty days after that time. This reasoning wholly ignores the condition contained in the note, and renders the language thereof meaningless. The note not only extended the time of payment of the premium, but it distinctly stated, not that failure to pay at maturity should be treated as a default, which perhaps might give the thirty days thereafter in which to surrender the policy and demand a paid up one, but the language used was entirely explicit and free from doubt, making an unambiguous agreement to absolutely and immediately forfeit all right to further insurance if the note were not paid at maturity.

To that extent it was an alteration of the terms of the policy giving thirty days after a default in which to surrender and make a demand; and instead thereof it plainly provided for a total and immediate forfeiture, if at maturity the note were not paid, If language as plain and unambiguous as this is not only to be twisted out of its natural meaning but is to be wholly ignored by courts of justice, it will be useless in the future for companies to make any effort to bind policy holders to perform their contracts. The use of language is to express ideas; and writing is resorted to in order to furnish conclusive proof of what language was used. Being certain of the language used, and the case being free from fraud or mistake, if such language is plain and susceptible of but one meaning, that meaning, even in cases of contracts regarding life insurance, must control, although a forfeiture should be the result.

Punctuality in the payment of premiums in the case of a life insurance policy is of the very essence of the contract; and when payment is not made at the time the company has the right to forfeit if such were the contract. *Atty-Gen.* v. *North Am. Life Ins.* 82 N. Y. 172–189; *People* v. *Knickerbocker Life Ins. Co.* 4 Cent. Rep. 783, 103 N. Y. 480; *New York L. Ins. Co.* v. *Statham*, 93 U. S. 24 (Bk. 23, L. ed. 789).

Here the plaintiff failed to pay his premium on the 16th of February, and was accorded the favor of a postponement until the maturity of the first note in June, and then on its failure the Company legally exercised its right of forfeiture. No stress is laid, and upon the evidence none can be laid, upon any alleged promise to renew or extend the payment of the second note. By plaintiff's own evidence there was no such promise.

The judgment must be reversed and a new trial granted, costs to abide event.

All concur.

John BELL, *Respt.*,

v.

MAYOR, Aldermen and Commonalty of the City OF NEW YORK *et al.*, *Appts.*, Impleaded with Alexander R. Fordyce *et al.*, *Respts.*

1. **Prior to** the passage of the Act to secure the payment of laborers, etc., and persons furnishing materials toward the performing of any public work in the cities of the State of New York, **chapter 315, Laws of 1878,** there was **no law by which** any **lien could attach upon public buildings** or upon the **moneys due from a city** to the contractor who did any work thereon.
2. The object of this Act is to give **security to those who** furnished supplies or **did work for** the **contractor** on public works in cities.
3. A **contract** between a person and the **trustees of public schools in** a ward of the **City of New York,** to do the mason work on a building to be erected for school purposes in such ward on a lot belonging to the city, is one made with said city, within the meaning of said Act.
4. **Individuals who furnished materials to** such **contractor** to enable him to complete such contract, which materials went into the construction **of** said **schoolhouse, are entitled to** the benefit of said Act and to the **lien** therein provided on moneys in the city treasury, due or to grow due under the contract.
5. The **title of** an **Act** may be regarded for the purpose of arriving at the real meaning of the Legislature.
6. It is not necessary that such **school trustees** should be a formal part of the city government, in order to act substantially and for the purpose of this Act as the **agents of** the **city** legally appointed, and as such executing such contract on behalf of the city.
7. The board of education was the department or bureau having charge of the work, and the comptroller of the city was the financial officer thereof; and a **filing** of **a notice of** the **lien** with the clerk of the board and with the comptroller was a fulfillment of the provisions of the second section of the Act.

(Decided March 23, 1886.)

APPEAL from a judgment of the General Term of the Court of Common Pleas of New York City, affirming a judgment entered upon report of a referee in favor of plaintiff, lienor, and such of the defendants as were also lienors, in an action to enforce a lien on certain moneys appropriated for the erection of a school building. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **David J. Dean,** for appellants:

That the board of education and school trustees constitute an agency for the administration of public duty not pertaining to the corporate functions of the City, but administered in behalf of the people of the State; and that the board is therefore independent, capable of making its own contracts, liable to be called upon to respond to the liabilities which it incurs, has been repeatedly adjudged.

Ham v. *Mayor*, 70 N.Y. 459; *Miller* v. *Mayor*, 3 Hun, 35; *Treadwell* v. *Mayor*, 1 Daly 123; *Gildersleeve* v. *Board of Education*, 17 Abb. 201; *Bell* v. *Vanderbilt*, 67 How. Pr. 332.

It is, therefore, plain that when the notices in question were filed in 1880, they were void of effect, and the claimants acquired no lien thereunder, because the contract in question was not made with "an incorporated city."

The Amendment of 1881, incorporated into the Act of 1878, has no retroactive effect, but speaks only from the time of its enactment, and has no effect upon rights or remedies accruing prior to that time.

Ely v. *Holton*, 15 N.Y. 595; *People* v. *Carnal*, 6 N.Y. 463; *Benton* v. *Wickwire*, 54 N. Y. 226.

The notices filed in 1880 are insufficient to fulfill the requirements of the statute. It is required thereby that such notices shall be filed with a department or bureau of the city government. The board of education is not a department or bureau of the city government.

Ham v. *Mayor*, 70 N. Y. 459; *Dannat* v. *Mayor*, 66 N.Y. 585.

It is true, as argued by the respondent, that if the board of education be not the head of a department or a bureau, within the meaning of this Act, there is no head of department or bureau with whom the notice may be filed, and that the claimants must, therefore, by reason of the defect of the statute, fail to acquire a lien. This argument is, however, no answer to the claim of the appellant: that the respondent may not acquire a lien by the filing of a notice with the board of education. "It is not the office of the court to supply the defects of the law, or amend it by construction, or supply its functions."

McCluskey v. *Cromwell*, 11 N.Y. 593; *Benton* v. *Wickwire*, 54 N. Y. 226; *Roberts* v. *Fowler*, 3 E. D. Smith, 632; *Mushlitt* v. *Silverman*, 50 N.Y. 360.

The requisition of the board of education in the contractor's favor created a claim against the treasurer which could be enforced by *mandamus* or by action.

People v. *Comptroller*, 77 N. Y. 45; *Dannat* v. *Mayor*, 66 N.Y. 585.

The City paid the money before the passage of the Act which gave the appellants a right to a lien; and the City thus acquired a right to be free from any other claim or demand in respect thereto. The amendatory Act of 1881 will not be construed to devest the City of such right.

Dash v. *VanKleeck*, 7 Johns. 477; *Jackson* v. *Van Zandt*, 12 Johns. 169; *Palmer* v. *Conly*, 4 Denio, 374; Dwarris, Statutes, 677.

Mr. **Joseph Fettretch,** for respondent.

Peckham, *J.*, delivered the opinion of the court:

This action is brought against the defendants, the Mayor *et al.*, to foreclose a lien upon certain moneys alleged to be in the hands of the comptroller of the City of New York, for the purpose of paying the amount due on a contract between the defendant Vanderbilt and the defendants Surland and others who were trustees of public schools in the twelfth ward of the City of New York, whereby Vanderbilt was to do the mason work on a building to be erected for school purposes in such ward. The other defendants were lienors who filed their claims upon the same moneys.

The plaintiff and the other lienors were individuals who furnished the materials to Vanderbilt to enable him to complete his contract above referred to, and such materials went into the construction of the school house.

Upon the view taken by us in this case the only question in it arises upon the construction of the Act (chap. 315, Laws of 1878) entitled "An Act to Secure the Payment of Laborers, Mechanics, Merchants, Traders and Persons Furnishing Material Towards the Performing of any Public Work in the Cities of the State of New York."

It is conceded that if that Act applies to this case the jugdment herein is right.

Prior to its passage,there was no law by which any lien could attach upon public buildings or upon the moneys due from a city to the contractor who did any work thereon. The courts had held that such great inconvenience might result from the sale of public buildings to satisfy a lien that express and clear provisions of the statute must be shown to permit it. *Darlington* v. *Mayor*,31 N.Y. 164; *Poillon* v. *Mayor*, 47 N. Y. 666; *Leonard* v. *Brooklyn*, 71 N. Y. 498.

To give some security to those who furnished supplies or did work for the contractor on public works in cities this Act was passed.

The counsel for the City challenges this contract as not being made with an incorporated city, as required by the provisions of the Act; for he says that the school trustees who signed it were part of the educational system of the State, and did not represent the City, or act in its behalf; and he cites the well known cases of *Dannat* v. *Mayor*, 66 N.Y. 585, and *Ham* v. *Mayor*, 70 N.Y. 459, and several others of like nature, to prove the correctness of his position.

The *Dannat Case* was where the contractor was to do the carpenter work on a school house in New York, bought lumber of plaintiff and gave him an order on the board of public instruction for his payment when the next installment under his contract should become due, and the order was presented to and left with the board. After the next installment became due the plaintiff presented his claim to the comptroller, and demanded its adjustment by him, which he neglected to make, and he also refused to pay the amount of the order.

This court held that the system of credits and payments of accounts provided by the Act of 1873, reorganizing the government of New York applied to all payments from the city treasurer, including payments from school moneys upon contracts of the board of education, and that the Act of 1851, relating to the common schools of the City, remained in force.

Thus to obtain payment upon a contract with the board of education it was necessary for the board to give its draft on the chamberlain, as prescribed in the Act of 1851; and this was to be delivered by the payee to the finance department as its voucher, and the other requisites of the Act of 1873 were to be complied with before the payment could be secured. This was not done in that case, and consequently the plaintiff was not successful in his action. The case is cited to show the separate and independent character of the board of education, and that it drew its own drafts and had its own system outside of the city government.

The *Ham Case* was that of an action brought against the City to recover damages for injuries alleged by the plaintiff to have been sustained by him to his property in a certain house because of the alleged negligent acts of some of the employees of the department of public instruction. The liability was sought to be placed upon the doctrine of *respondeat superior*, which rests upon the right of the employer to select his servants and to discharge them, and while in his service to direct and control them. All this was held to be lacking in that case, and that the department of public instruction, although formally constituted a part of the city government by the law as it stood in 1871 (subsequently, and in 1873, altered), yet it was charged with the performance of duties, not local or corporate, but relating and belonging to an administrative branch of the State Government, and that such board had exclusive authority as to the employment and control of subordinates and servants.

Both the cases may and should stand in full force; and still it can be held that this contract was made with an incorporated city, within the meaning of this Act of 1878.

In the first place there can be no reason given for intentionally excluding such a contract from the previsions of the Act.

The moneys to pay for services or materials, performed or furnished under all contracts of that nature, are raised by the taxation machinery of the City, and are paid into the city treasury, to be paid out in the same way as other city moneys, and by the same city comptroller. The lot upon which the building was to be erected was owned by the City and the building would be its property, but under the control, for school purposes, of the board of education. Such a contract is, therefore, within every reason that operates in that of a technical and formal contract with the City by its corporate title. Did the Legislature by the use of the words in the first section of the Act, " any contract made between any person or persons and any incorporated city in the State of New York," mean to include only such technical contracts as above referred to, or did it not also mean to include in its beneficent provisions a contract made by somebody acting under authority of law, yet in fact and substance for the

City, in regard to a public work the title to which was in an incorporated city, and was to be paid for by the moneys in its treasury, raised by taxation and disbursed by its own officers?

The exact and literal wording of an Act may sometimes be rejected if, upon a survey of the whole Act and the purpose to be accomplished or the wrong to be remedied, it is plain that such exact or literal rendering of the words would not carry out the legislative intent. And the title of an Act may be regarded also for the same purpose of arriving at the real meaning of the Legislature. *Smith* v. *People*, 47 N. Y. 330; *People* v. *Davenport*, 91 N. Y. 574.

By the title the purpose of this Act is evident and would include just such a case as is now before us. And while, if the legislative meaning in the words used by it in the body of the Act were plain and free from any ambiguity, those words would control the title, yet such is not the case here.

The section speaks of a contract between a person and an incorporated city. Can it be contended that a lawful agent of the city could not make a contract in its behalf, within the scope of his authority and within the meaning of this section, although not in so many words using the corporate title of the city in the contract? And cannot an individual or even a body corporate be an agent of the City under this Act and to carry out its object, and yet for all other purposes be a separate and distinct entity?

The question is, What is a contract between one person and an incorporated city, within the meaning of this Act?

Is the answer so absolutely free from doubt as to preclude the reference to the title or the manifest purpose of the Act, and the condition of the subject before its passage? It is thought not.

It is seen that before its passage persons in the situation of the plaintiff had no lien upon buildings or moneys due or to grow due under the contract. The lien existed in all cases except in regard to public works. The reason for including such a contract as this is plainly just as strong as if the trustees of the school board had been a formal part of the city government. We think it was not necessary that they should be such formal part in order to act, substantially and for the purpose of this Act, as the agents of the city, legally appointed, and as such executing this contract on behalf of the City.

It is not of course very important; but it appears that this was the capacity in which the trustees of the school district themselves thought they were acting, for in the contract is this provision: "This contract shall inure to the benefit of the board of education, and of the Mayor, Aldermen and Commonalty of the City of New York, as well as the parties of the first part, either of whom shall have a right of action under the same, to maintain and prosecute any interest, right or power hereby reserved to or vested in the parties of the first part."

The City has recognized the agency of the school trustees, by payments made under the contract to the contractor, before the filing of any liens.

It is further urged, in amplification of the argument upon the part of the City, that there was in this case no head of a city department or bureau in which to file a notice of claim under the second section of the Act in question, because the board of education or the trustees of public schools of the twelfth ward formed no such department or bureau of the city government within the cases above cited. But having so construed the first section of the Act as to include a case of this kind, and holding that a contract such as this was a contract substantially and for the purpose of the Act, with an incorporated city, there is no difficulty in holding that for the same purpose the board of education was the department or bureau having charge of the work, and the comptroller of the City was the financial officer thereof, and that a filing of the notice of lien with the clerk of the board and with the comptroller was a fulfillment of the provision of that section of the Act.

Coming to these conclusions, it becomes unnecessary to consider the effect of the passage of the Act of 1881 or the giving of the bond of indemnity to the comptroller.

The judgment of the Common Pleas should be affirmed, with costs.

All concur.

MAYOR, Aldermen and Commonalty of the City OF NEW YORK, *Respt.*,
v.
Nathaniel SANDS, *Appt.*

1. **Statutes** containing grants of power **should be** so **construed** as **to include** the **authority to do all things necessary** to make the object of the grant effectual and to enable the donee of the power to accomplish the expressed purpose of the Act.
2. As incident to the duties imposed upon the **comptroller of the City of New York** by chapter 323 of Laws of 1871, in reference to the creation and issuing of "consolidated stock of the County of New York," he was **impliedly authorized to contract** with defendant **for assistance in negotiating** the **loan** and placing bonds on terms advantageous to the county, **and** was authorized **to pay for such services a** reasonable commission out of the premium realized on the bonds.
3. Hence, **defendant** having **received** by indorsement **from** the **comptroller a check** received by the comptroller in payment of a part of the premium on county bonds issued under said Act and negotiated by defendant, **in payment of** his **services,** is **not liable to** the **county** for the amount of such check, **on** the **ground** that such **payment** by the comptroller **was in violation of** chapter 590, **Laws of 1857, and** chapter 190, **Laws of 1870,** which require that all moneys drawn from the treasury by authority of the board of supervisors should be upon certain prescribed vouchers. These provisions were **not** applicable to the case.
4. The fact that defendant was, at the time

of performing said service in placing the county loan, a tax commissioner of the City, did not bring him within the provision of section 115 of chapter 137 of Laws of 1870, prohibiting city officers from being interested in any contract or business the consideration for which was to be paid from the city treasury. It was **competent for a city officer to render services to the county, and to charge and receive compensation therefor.**

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Circuit on a verdict directed for plaintiff in an action to recover the value of a certain check alleged to have been misappropriated by a public officer and delivered to defendant. *Reversed.*

Reported below, 39 Hun, 519.

The facts and questions raised appear from the opinion.

Messrs. **Luther R. Marsh** and **Aaron J. Vanderpoel,** for appellant:

The transaction complained of was a county transaction. The stock negotiated by Sands for sale was county stock. The money which Sands received for his successful negotiation, the $75,000, was for services rendered to the county. This is evidenced by the receipt given for such money from Belmont & Co.

The City of New York and the County of New York were, at that time, 1871, distinct and independent corporations in fact as well as in name.

People v. *Ingersoll*, 58 N. Y. 1, 25.

In 1874 the Consolidation Act was passed. Chap. 904 of the Laws of 1874.

If the two were one before, there was no necessity for the Act of union.

The defendant was not an officer of the County of New York, and had the same right to deal with it as any private citizen. The office the defendant held, "Commissioner of Taxes and Assessments for the City and County of New York," was a city and not a county office.

Act 1867, 1 Sess. Laws, 1867, p. 981; *People* v. *Raymond*, 37 N. Y. 428, 429; *People* v. *Dunlap*, 66 N. Y. 162, 168.

The defendant, then, being a city officer, and not a county one, was under no obligation to the county, either statutory or otherwise.

As an officer of the city he owed no duty to the county. He was as much at liberty to engage to render services to the County of New York for a compensation to be paid by it, as to any county of the State.

The subsequent merger of the county into the City, or *vice versa*, cannot retroact upon a transaction occurring three years before the merger.

Unless there is a statute prohibition, the defendant, even as a city officer, could have entered into a valid compact to render services to the City even, outside of the special duties of his office of tax commissioner. There is nothing wrong in such an agreement, unless it is made so by statute—and then it is merely a wrong prohibited, and a wrong because prohibited, and not a wrong in itself.

Mayor v. *Muzzy*, 33 Mich. 61; *Jackson* v. *N. Y. Cent. R. R. Co.* 2 Thomp. & C. 653; affd. 58 N. Y. 623; *McDonald* v. *Mayor*, 32 Hun. 89; *McAdam* v. *Mayor*, 36 Hun, 340.

Certain statutes were relied on at the trial, as prohibiting the defendant from receiving the money paid him.

Section 110 of the city charter of 1870 (Sess. Laws, 1870, p. 393) does not apply for several reasons. 1. It is obvious that this section only prohibits any payment, in addition to the salary, for any services pertaining to the office. 2. The money paid to the defendant did not come from the "corporation or city treasury." It came from the County of New York.

Section 115 of the city charter has no application for the same reason.

Section 2 of chapter 57, Laws of 1843, is also inapplicable: 1. A city officer is not prevented by the mere fact of being a city officer from being interested in a contract made by him with a county, or other city or the State. 2. Here defendant had no interest in the purchase or in the sale. He had a mere compensation for service, and this service was not made by him in the discharge of his official duty. The duties of tax commissioner of the City, and the service of negotiating the sale of county bonds, were entirely distinct and unconnected.

Section 5 of chapter 583, Laws of 1872 does not apply: 1. The defendant is not seeking to hold the county liable for any indebtedness. The transaction was one *in præsenti*. The service was rendered and the payment made at the same time. 2. The presumption of law is that all acts of a public officer are legally done, until the contrary is proved.

Sistare v. *Best*, 88 N. Y. 534.

The comptroller had power, in his discretion, to make the contract with the defendant for the negotiation of the bonds: 1. Such power was conferred on him by the Act itself, for it was a necessary incident to carrying out the purposes of the Act. 2. The board of apportionment gave the comptroller this power.

On the question as to the discretion conferred upon a public officer, see *People* v. *Van Nort*, 64 Barb. 205; *People* v. *Green*, 2 Thomp. & C. 62; *Baird* v. *Mayor*, 96 N. Y. 570, 580.

The alleged cause of action set out in the complaint is not proved; nor is there any evidence upon it.

It is an action for fraud and deceit. That is the gist of the action; no other ground is alleged, nor, indeed, is any fact alleged, which, if true, would show a fraud. It is the allegation of a mere conclusion.

The plaintiff cannot abandon the fraud, and recover as on a contract for money had and received.

Ransom v. *Wetmore*, 39 Barb. 104; *Whitcomb* v. *Hungerford*, 42 Barb. 177; *Saltus* v. *Genin*, 3 Bosw. 250; *Place* v. *Minster*, 65 N. Y. 89, 102.

Mr. **Charles P. Miller,** for respondent:

Irrespective of the validity or invalidity of the agreement between Connolly and the defendant, the payment of the check to the defendant was illegal and void, and he obtained no title to it by such payment. Proof establishing the illegal payment justified the allegations of fraud in the complaint.

Supervisors of Richmond Co. v. *Ellis*, 59 N.

Y. 620; *Supervisors of Richmond Co.* v. *Van Clief*, 1 Hun, 454; *People* v. *Fields*, 58 N. Y. 504, 505.

This check for $75,000, when received by the comptroller in payment for county stock became the property of the county. The comptroller's duty was to deposit the check forthwith in the treasury, according to law, from which it could be taken only by authority of the board of supervisors acting in conformity with the statute.

People v. *Ingersoll*, 58 N. Y. 27.

The defendant, irrespective of his position as a public officer, is chargeable with knowledge of the illegality of the comptroller's conduct.

McDonald v. *Mayor*, 68 N. Y. 23; *Supervisors of Richmond Co.* v. *Ellis* and *Supervisors of Richmond Co.* v. *Van Clief*, *supra*.

The statements in the complaint that the money was paid and received willfully and corruptly, with intent to cheat and defraud, can be disregarded, and the action maintained as an action for moneys unlawfully paid and received, or as an action for wrongful conversion.

People v. *Fields*, 58 N. Y. 504, 505.

The pretended agreement between the defendant and Connolly was illegal and void by statutes prohibiting such contracts.

The defendant admits that he was a tax commissioner. He was therefere a city officer.

People v. *Raymond*, 37 N. Y. 428.

By sections 110, 115 of the Charter of 1870, Laws 1870, chap. 137, the defendant was prohibited from receiving, directly or indirectly, from the city treasury any compensation for any services other than those which he performed as a commissioner of taxes, no matter how great an advantage the City might derive from such other services.

Roosevelt v. *Draper*, 23 N. Y. 318; *Mullaly* v. *Mayor*, 3 Hun, 661; *S. C.* affirmed in 62 N. Y. 636; *McAdam* v. *Mayor*, 36 Hun, 340.

There is yet another statute prohibiting the alleged contract.

1 R. S. 7th ed. p. 858. See *Smith* v. *Albany*, 61 N. Y. 444.

The resolution of the board of apportionment does not validate the comptroller's employment of the defendant.

The powers of the board of apportionment were fixed by law. It had no authority to validate an invalid contract of employment.

Laws 1870, chap. 137, § 101, as amended by Laws 1871, chap. 574, § 8.

The pretended contract between the defendant and Connolly was illegal and void at common law. Sands was a public officer, an agent of the people, toward whom he stood in the position of a trustee. No rule is better settled than that which forbids a trustee to make any profit out of his trusteeship, other than what he is expressly allowed by law.

Smith v. *Albany*, 61 N. Y. 444; *Mullaly* v. *Mayor*, 3 Hun, 661; *Collier* v. *Munn*, 41 N. Y. 143.

The contract being illegal and void, Sand's receipt of the $75,000 was illegal and a fraud upon the county, and the plaintiff has a right to recover it.

The defendant, having moved for a nonsuit and made no request to go to the jury, cannot now claim that there were any questions of fact to be passed upon by the jury.

Bridge v. *Pierson*, 66 Barb. 514; *Frantz* v. *Ireland*, 66 Barb. 386; *Ormes* v. *Dauchy*, 82 N. Y. 443; *Dillon* v. *Cockcroft*, 90 N. Y. 649.

If, therefore, the evidence would have warranted a verdict for the plaintiff, the direction was proper.

McCall v. *Sun Mutual Ins. Co.* 66 N. Y. 506, 517.

The plaintiff was entitled to interest, and the defendant's exception to the allowance of interest was not well taken.

Phillips v. *Speyers*, 49 N. Y. 653; *McCormick* v. *Pa. etc. R. R. Co.* 49 N. Y. 303, 315; *Hyde* v. *Stone*, 7 Wend. 354.

Ruger, *Ch. J.*, delivered the opinion of the court:

This action was commenced about the year 1873, in the name of the Board of Supervisors of the County of New York to recover from the defendant the value of a certain check alleged to have been misappropriated by the Comptroller of New York and delivered to the defendant.

It was further alleged in the complaint that one Connolly was comptroller and the defendant commissioner of taxes for said city, and that Connolly, having received the check in question for the use and benefit of the county, willfully and corruptly, and with intent to cheat and defraud the county, indorsed and transferred it to the defendant, who wrongfully converted it to his own use, with like intent and purpose, and that after demand duly made upon said defendant for the same he neglected and refused to repay the moneys received thereon to the plaintiff.

The defendant, answering, denied all of the allegations of the complaint except those specifically admitted, and after admitting the official character of himself and Connolly and the receipt of the check, alleged that the same was duly indorsed and delivered to him by Connolly, in payment for services rendered to Connolly, as comptroller, in effecting a loan of money for the City and County of New York under a contract previously made between them.

The complaint did not allege any want of power in Connolly to make such contract, or to transfer the check, or any illegality in its delivery to defendant except such as might be inferred from the charge that it was corruptly and fraudulently done.

After the passage of chapter 904, of the Laws of 1874, consolidating the government of the City and County of New York, the Mayor and Commonalty of the City were substituted as plaintiff in the place of the board of supervisors.

On the trial a verdict was directed by the trial court for the plaintiff; but the grounds of the decision do not appear in the record. The defendant duly excepted to the ruling of the court. The general term affirmed the judgment, upon the ground that the act of the comptroller, in paying out the check, was contrary to the provisions of chapter 590 of the Laws of 1857, and chapter 190, of the Laws of 1870, which required that all moneys drawn from the treasury by authority of the board of supervisors should be upon vouchers, examined and allowed by the auditor and approved by the comptroller, and no money should be drawn therefrom except on a warrant drawn by the comptroller, countersigned by the Mayor and clerk of the board.

The court, assuming that the contract with Connolly was a lawful one, and that upon the performance of the services he was entitled to compensation, held that his claim was then nothing more or less than a claim against the county which should be ascertained, adjusted and paid in the mode required by law, and that the receipt and use of the check by defendant, with knowledge of its illegal use by Connolly, was a fraudulent misappropriation of the moneys represented by it which subjected him to an action to recover the same as for a fraudulent conversion thereof.

There was no attempt upon the trial to show any actual fraud intended, either by Connolly or the defendant; but the case was rested altogether upon a fraud inferable from the alleged illegality of the transaction. The undisputed evidence showed that the draft was paid to the defendant by Connolly in good faith, in satisfaction of a claim held by him against Connolly, as comptroller, for services rendered in effecting a loan of money for the county upon its bonds, to the amount of $15,000,000. The proof was undisputed that the defendant negotiated the loan, and that it was a favorable one; that the commission charged was fair and reasonable, and that the defendant was possessed of sufficient financial ability and influence to make his assistance valuable and enable him to obtain the loan upon terms advantageous to the county.

It was further shown that the services were rendered in pursuance of a contract previously made with the comptroller, to the effect that he should have one half of 1 per cent for effecting such loan, provided it was made upon favorable terms and without other expense to the county. The transaction between Connolly and the defendant sprang out of the effort of the former to execute the power conferred, and duty imposed upon him by chapter 323, of the Laws of 1871, which authorized and empowered the Comptroller of New York to create a public fund or stock, to be denominated "consolidated stock of the County of New York," and by which any holder of the present stock of the County of New York, or bonds of the said County of New York, was authorized to exchange the same for said consolidated stock, upon such terms and conditions as should be determined and offered by said comptroller. Such stock was also authorized to be issued to pay off and cancel any bonds or stock of said county falling due in the year 1871, and also to meet the requisitions on the County of New York by the State for the payment of the bounty debt in that year. Such stock was to be in the form designated by the comptroller, and signed by the comptroller and Mayor of the City and sealed with the seal of the board of supervisors of the county, and attested by the clerk of said board. All stock of the County of New York thereafter issued was to be known as "consolidated stock of the County of New York" and issued under the authority of that Act. In pursuance of the authority thus conferred the comptroller issued the bonds in question and procured them, through the assistance of the defendant, to be negotiated with A. Belmont & Co., at a premium of 4½ per cent.

No question is made as to the legality of this issue, or but that the whole proceeds of the bonds, including premiums, excepting the check in question, were applied to the purposes of the county or paid over to its treasurer by the comptroller.

It would be difficult to conceive of a grant of power conferred in broader or more comprehensive language, and which could be less restricted by conditions and limitations upon an agent's authority. No limit is imposed upon the amount of bonds to be issued, except that implied from the use to which they were to be devoted in the retirement and payment of existing obligations of the county; and no restriction as to the terms upon which they were to be disposed of, or the amount of the expenses to be incurred in their preparation, negotiation and transfer is found in the Act. The comptroller was broadly charged with the duty of creating a public fund or stock to be denominated "Consolidated stock of the County of New York," and whatever power was necessary to enable him to perform this duty was necessarily conferred upon him by the Act. Whether this was a wise or prudent grant of power, or whether in the careful exercise of it the comptroller was enabled to commit abuses or frauds upon the people of the county with impunity is not a subject for our consideration. We find the law upon the statute book, and it is subject to the same rules of construction as other statutes thus appearing. Citizens of the State, having occasion to deal with the comptroller in reference to the subject matter of the Act, had the right to rely upon its provisions and the authority apparently conferred upon him to bind the fund or principals represented by him.

It is obvious, from the language of the Act as well as the evidence in the case, that heavy liabilities of the county were becoming payable in the immediate future, and that large amounts would be required to meet its obligations, and that it was considered desirable not only to raise the money required without delay, but also that all the county's outstanding indebtedness should be funded at the same time and put upon a uniform basis as to the time of its redemption and its rate of interest.

The occasion was exceptional and extraordinary, and large and apparently almost unlimited power was therefore given to the comptroller to accomplish this object. Whenever money was required to satisfy the indebtedness of the county he was not only authorized but was charged with the duty of providing it by a sale of the bonds of the county; and whenever an exchange of the consolidated stock could be effected for the outstanding stock or bonds of the county, he was authorized to do it upon such terms and conditions as should be determined by himself. It was contemplated that enormous sums of money should pass into his hands; and its application and security were entrusted wholly to the judgment, discretion and integrity of the comptroller. In the performance of the duties cast upon him he was made independent of all other county authority or supervision, and was broadly charged with the responsibility of providing funds not only to meet the current and maturing debt of the county, but to fund all of its outstanding obligations. The moneys to be raised on the bonds, whether in premiums or principal, were undoubtedly the property of the county; and the comptroller's duty required him, except so far as they might be required for the legitimate purposes of the Act, to account to the treasurer of the county for the proceeds.

It is a matter of public history, of which courts will take judicial notice, that in the sale of bonds and negotiation for loans in behalf of States, municipalities and governments, the services of their own fiscal agents are usually, if not invariably, supplemented by the employment of bankers, brokers and other financial agencies, to aid in raising moneys for such public purposes. During the late war the Federal Government raised large sums by the issue and sale of treasury notes and bonds, which it would have been practically difficult if not impossible to do upon favorable terms but for the assistance rendered by extraneous financial agencies employed and paid by the secretary of the treasury. Most if not all of the Acts authorizing such loans, contemplated such services and authorized the secretary to pay for them, sometimes at a fixed rate, sometimes at rates not exceeding a certain limit, and often according to his judgment and discretion. Appropriations were sometimes but not always made in the Acts for the payment of these expenses. See 12 U. S. Stat. at L. p. 129, chap. 5, Laws 1861; p. 345, chap. 33, Laws 1862; p. 709, chap. 73, Laws 1863; vol. 15, p. 13, chap. 13, Laws 1864; p. 465, chap. 177, Laws 1865.

It is a matter of common knowledge that such loans in all countries of the world are usually negotiated through agencies outside of the regular financial authorities of the government making the loans. Whether their employment in the case in hand was wise and prudent, or perhaps even indispensable to the accomplishment of the object intended by the statute, cannot be determined as a question of law, for the statute gave the comptroller power to determine that question in his own discretion, subject only to the obligation to do so honestly and in good faith.

Under these circumstances the question is presented as to what were the duties of the comptroller and the extent of his power in carrying out the law.

It is a well established principle that statutes containing grants of power shall be construed so as to include the authority to do all things necessary to make the object of the grant effectual, and to enable the donee of the power to accomplish the expressed purpose of the Act.

Domat expresses the idea as follows: "All laws necessarily bear with them all the powers or incidents necessary to carry out their intention." Sedg. Stat. Law, p. 245.

Sedgwick says: "When a statute commands an act to be done it authorizes all that is necessary for its performance." Sedgwick, 228. Potter's Dwarris states the rule to be "In statutes incidents are always supplied by intendment; in other words, whenever a power is given by a statute, everything to the making of it effectual is given by implication; for the maxim is '*Quando lex aliquid concedit, concedere videtur et id per quod devenitur ad illud.*'"

The rule stated has been frequently referred to and applied in the reports of this State. It was stated by *Judge* Ruggles in *Stief* v. *Hart*, 1 N. Y. 23, as follows: "Whenever the law requires an act to be done it authorizes the agent to do what is necessary to accomplish it in the mode pointed out for its performance." In this case power in the sheriff to take goods out of the hands of a pledgee, for the purpose of a sale on execution, was implied from the authority given him to levy upon and sell the interest of the pledgeor in such goods.

In *People* v. *Hicks*, 15 Barb. 160, it was held that a statute giving power to a magistrate to examine such witnesses as might be produced before him authorized him to issue subpenas for such witnesses and to compel their attendance by the usual process of the court. *Judge* Edwards, giving the opinion of the court, says: "In an anonymous case which is reported by *Lord* Coke (12 Coke, Rep. 130), he says that on a motion made by him before the Justices of the King's Bench, it was unanimously resolved 'that when the statute gave power to justices of the peace to require any person or persons to take the oath the law impliedly gave them power to make a warrant to have the body before them.'" *Judge* Roosevelt also says "That the grant of an express power carries with it, by necessary implication, every other power necessary and proper to the execution of the power expressly granted." 1 Kent, Com. 404.

The existence of the power in question is so indisputable that it is unnecessary to pursue the discussion of the question further; and it is material only upon this point to add a few observations in relation to the necessity of paying the necessary expenses of the loan to enable the comptroller to carry out the provisions of the law. Certainly the necessity of raising the money provided for by the Act to accomplish its purposes cannot be denied. The members of the Legislature were the sole judges of this necessity; and having themselves determined that question it was the duty of the comptroller to execute the mandate of the law. Whatever he judged it necessary in good faith to do in carrying out its purpose it was lawful for him to do, provided he did not transgress any positive provision of law or violate the purpose or spirit of the Act. The statute conferred upon him large discretionary powers in carrying out its provisions; and he could not be made liable for any errors of judgment or abuse of his powers, unless they were fraudulently or illegally performed.

The necessity of incurring some expenses in the negotiation of the loan and placing the bonds authorized to be issued is, in view of the universal practice in such cases, too plain to admit of dispute; and it is obvious that unless the comptroller was vested with power to pay them the whole purpose of the Act might be defeated at its outset.

The comptroller had no general authority to contract a debt for such purpose on behalf of the county, and no special authority except such as is inferable from the Act in question. It is also plain that if he could not obtain the assistance required or the services necessary by a pledge of the credit of the county, subjecting the financial agent to the risk of an unfavorable consideration of his claims by the board of supervisors or other auditing officers of the county, he would be obliged to adopt other means to accomplish the object intended. Can it be reasonably said that the power to pay expenses from the fund raised was any more detrimental to the interests of the county than the power to pledge its credit? If the possession of one power is to be inferred from the Act, is there not equal reason to say that if its exercise is required for the purposes of the law, the other power was equally inferable? They both rest upon the same principle and are governed by the same rule; and one power is as equally open to abuse as the other.

The comptroller was directed to create a public fund, and his power was commensurate with the requirements of the task imposed upon him. It is unreasonable to say that in imposing the duty of raising the money in question upon him the Legislature intended to hamper and restrict his performance of it by denying to him the means necessary to perform it, or that its scheme was subject to be defeated by the neglect or refusal of the county officers to provide means to execute its provisions. The Act contains no reference to the intervention or co-operation of any county officers in its execution; and it is repugnant to establish principles of construction to import into its provisions requirements of prior enactments not pertinent thereto and which would be plainly destructive of its purposes.

Such was the view taken of the Act by the board of apportionment organized under chapter 583, Laws 1871, as expressed in resolutions adopted May 9, 1871. Such board, in authorizing an issue of about $9,000,000 of the consolidated stock of the county under said Act, to meet a portion of its indebtedness, provided that "The expenses incurred in providing for the issue of said stock should be paid out of the premiums received for the same."

And in the same Act, in providing for a board of apportionment, whose general authority over the finances of the county was intended to supersede that of the board of supervisors, it expressly exempted the comptroller, in the exercise of the powers conferred upon him by chapter 323 of the Act of 1871, from the authority and control of the board of apportionment, and from the prohibition therein contained against the incurring of any liability by any officers of the County of New York exceeding the appropriation made for such purposes. Laws 1871, sec. 10, chap. 585.

The statutes referred to in the opinion of the general term seem to us to have no application to the subject. They provide among other things that no moneys shall be drawn from the treasury except upon previous applications for that purpose, and in terms apply only to moneys already placed in the treasury of the county and disbursable in the regular and customary administration of its affairs upon the authority of the board of supervisors. The check in question never reached the treasury of the county; and, although it may have been the property of the county, it was still in the hands of Connolly, subject to the purposes of the Act by which he acquired its possession. He was by such Act made the agent of the county, with power to disburse so much of its funds in his hands as was necessary to carry out the purpose of the law by which he was appointed.

We are, therefore, of the opinion that the courts below erred in holding that the comptroller had no authority to pay out the check; and we are further of the opinion that no cause of action was proved against the defendant. We think that no right of action exists against the defendant in respect to this transaction, except upon proof of collusion between him and Connolly to defraud the county of the money represented by the check.

We deem it unnecessary to refer at length to a contemporaneous Act, similar in form to the one under discussion, authorizing the comptroller to create a public fund or stock, to be denominated "Consolidated stock of the City of New York," as its introduction would tend only to complicate the questions discussed. The complaint alleges that the check was the property of the county; and the proof tends to establish that it was received in payment of a part of the premium due upon a loan to the county. The City could not, therefore, have had any legal interest in its disposition or recovery.

It is claimed by the respondent that, inasmuch as the contract between Connolly and Sands provided for the payment of the same commission for negotiating city as well as county bonds, the defendant came under the provision of section 115 of chapter 137 of the Laws of 1870, prohibiting city officers from being directly or indirectly interested in any contract, work or business, or the sale of any article the expense, price or consideration of which is paid from the city treasury. The proof fails to show that Sands rendered any services to the City or made any claim against it in respect to this check. If the contract, so far as it provided for payment of services rendered the City, was void, we think it was divisible and could be enforced so far as it was authorized by law. The parties in fact did separate it, and no performance was attempted except in relation to the county loan.

We think it was competent for a city officer to render services to the county or any other employer outside of the City, and charge and receive a compensation for such services.

We have examined other objections made to the right of Sands to retain the compensation in question, arising out of the fact that he was a city officer, but think the authorities upon which they are based too obviously inapplicable to call for special discussion.

There is no evidence in the case upon which the plaintiff showed any right to recover; and it was, therefore, error for the trial court to direct a verdict in its favor.

The judgments of the courts below should, therefore, be reversed and a new trial ordered, with costs to abide the result.

All concur except **Andrews** and **Finch**, *JJ.*, dissenting.

People, *ex rel.* William H. BACON, *Appt.*,
v.
BOARD OF SUPERVISORS OF KINGS COUNTY, *Respt.*

The Board of Supervisors, by resolution, **fixed** the **salaries of** the **district attorney**, his **chief clerk** and other subordinates, at certain sums, **but** thereafter, by resolution, determined to raise by taxation and **included in** the **budget** for the then current fiscal year **a sum** for such salaries **less than** the **aggregate of** the **amounts fixed** by the first resolution. *Held*, that this action authorized the incoming district attorney to make such arrangements with his subordinates in the way of scaling down their salaries as would bring the aggregate within the sum to be raised by taxation, and **that a chief clerk appointed under such arrangement** and who accepted payment at such reduced rate **had,** after the termination of his employment, **no claim** upon the county **for** the **larger salary** fixed by the first resolution.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Kings Special Term in favor of defendant on a return to an alternative writ of *mandamus* to compel the auditing and payment of a claim. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **James Troy,** for appellant:

The salary of the chief clerk in the office of the District Attorney of Kings County was fixed by resolution of August 7, 1887, at $3,000 per annum, chapter 432, Laws 1875, and was not changed by any resolution of the Board of Supervisors as to the amount of taxation to be raised for any specific purpose.

The Supervisors voted and raised a gross sum to cover the aggregate expenses of the district attorney's office for a year, regardless of the salaries fixed by law, "an entire amount for the office," and the district attorney, equally regardless of the law relating to salaries, so arranged the same that he "used up" just the sum "limited" "the entire amount fixed for the office."

The salary of the relator having been fixed by law at $3,000 per annum and its payment by the county treasurer having been directed under authority of the Act of 1875, he was entitled to be paid that sum; and the acceptance by him of a reduced amount, especially as such reduced amount was all the county treasurer had to pay, did not in any way affect or impair his right to receive the whole.

People v. *Board of Police*, 75 N. Y. 38; *People* v. *French*, 91 N. Y. 265; *Kehn* v. *State*, 93 N. Y. 291; *Riley* v. *Mayor*, 96 N. Y. 339.

Mr. **William G. Cooke,** for respondent:

By accepting $1,500 per year the relator expressly waived all claim to any higher rate of compensation.

The cases cited by his counsel have no application. They simply decide that where a salary is regulated by statute a person agreeing with an officer to work for less does not waive his legal rate of pay; or where the law has imposed upon one officer the duty of employing persons to render service to the public and has vested in another the power to fix their compensation, the functions of the latter cannot be assumed by the former; and his action in that respect would be a nullity.

Riley v. *Mayor*, 96 N. Y. 339.

Rapallo, *J.*, delivered the opinion of the court:

The findings of fact made by the trial judge establish that the relator was appointed by Isaac S. Catlin, District Attorney of Kings County, whose term of office began on the first of January, 1878, chief clerk in the office of such district attorney, from the first of January, 1878, at a salary of $1,500 per annum; that the relator served under such appointment from January 1, 1878, until August 1, 1881, during the whole of which period he received from the treasurer of the county salary at the rate aforesaid, in equal monthly payments.

On the 17th of January, 1884, the relator presented to the Board of Supervisors a claim for upwards of $14,000, being the difference between the sum which he had received for salary and a salary at the rate of $5,000 per annum, to which he claimed to be entitled by law for the period during which he had served. This claim was rejected by the Board of Supervisors, and thereupon the relator sued out an alternative writ of *mandamus* requiring the Supervisors to audit and pay him the sum claimed, with interest, or show cause, etc.

The Supervisors having made return to the writ, the issue thus joined was tried at special term by the court, a jury having been waived, and the court rendered judgment dismissing the writ, on the ground that the relator had never presented his bill or claim to the Auditor of the County of Kings and that such auditor had never passed upon the same.

On appeal by the relator to the general term, the judgment rendered at special term was affirmed, the court holding that, upon the merits, the relator's claim was unfounded. The particular point on which the judgment of the special term was placed was not passed upon in the opinion at general term, and, without intimating any question of its correctness, we refrain from discussing it or other points of form which might be raised, as we fully concur in the conclusion of the general term, which finally disposes of the litigation.

The ground of the relator's claim is that his salary as chief clerk in the district attorney's office, was fixed by law, and that consequently the district attorney who appointed him had no power to stipulate for a reduced compensation. He concedes that the claim made in the alternative writ, that his legal salary was $5,000 per annum, is erroneous, but contends that it was $3,000 per annum, and that he is entitled to the difference between that sum and $1,500 per annum at which rate he was appointed, and which he received.

It is not claimed that the relator's salary was fixed by any statute. It is conceded that the power to fix the compensation of the district attorney and his assistants, clerks and officers, was vested by statute in the Board of Supervisors. The claim of the relator is that his salary was fixed by a resolution of the Board of Supervisors of the County of Kings, adopted on the 7th of August, 1877 (before the election of Mr. Catlin as district attorney). That resolution fixed the salary of the district attorney to be elected, and of the first and second assistants, and the salary or pay of the chief and assistant clerks, and of the several officers attached to or attendant upon the office of the district attorney; the salary or pay of the chief clerk being fixed in this resolution at $3,000 per annum. But on the 8th of November, 1877, the Board of Supervisors, by resolution, determined to raise by taxation, and included in the budget for the then current fiscal year, for salaries of the district attorney and his assistants, clerks and officers, only the sum of $22,000, which was considerably less than the aggregate of the salaries or pay of those officers as fixed by the resolution of August 7, 1877.

Although the last mentioned resolution was not, in terms, repealed or amended, we think that the action of the Board on the 8th of November plainly indicated an intention on its part to reduce the salaries to be paid in the district attorney's office to an aggregate amount which would be within the sum provided for in the tax budget, and that it was within their power to do so, as they had full authority to regulate the salaries of the persons thereafter to be employed in that office, and that authority was thus impliedly given to the incoming district attorney to make such arrangements with the subordinates to be appointed by him, in the way of scaling down their salaries, as would bring the aggregate within the sum to be raised by taxation.

The district attorney appears to have acted on this understanding. He was not compelled by law to appoint a chief clerk; but he offered the position to the relator at a salary of $1,500, which was accepted, and upon entering upon his office of district attorney he sent to the county treasurer a list of all the assistants, clerks and officers appointed by him, with the salaries to be paid to each, which salaries were in the aggregate equal to the unexpended balance of the amount provided for in the tax budget of the Board of Supervisors. The relator accepted from the county treasurer and gave receipts for his salary at the rate of $1,500 per annum, in monthly payments, during the whole time of his service; and it was not until long after his employment had terminated, viz.: January 17, 1884, that he made his claim for additional compensation.

We think the claim is without merit, and that it does not fall within the principle of the cases in which a salary fixed by statute, and attached to a public office or employment, is sought to be reduced, either by the officer making the appointment or by the officer charged with the duty of paying the prescribed salary. Here the amount of the relator's salary was within the control of the Board of Supervisors, and it is fairly presumable that by the voluntary acceptance and retention by the relator of his appointment at the reduced salary fixed by the district attorney, the Board of Supervisors was led to omit adopting a formal resolution conforming to his action. He should not now be permitted to retract his agreement. In this respect the case of *Hobbs* v. *Yonkers*, 102 N. Y. 13, 2 Cent. Rep. 764 is in point.

The judgment should be affirmed, with costs.

All concur.

Henry CLEWS, *et al.*, *Appts.*,
v.
BANK OF NEW YORK NATIONAL BANKING ASSOCIATION, *Respt.*

1. **In an action to make** defendant **bank responsible for** the **amount of a draft, on** the **ground** that the **teller** of defendant **had on inquiry** of him **if** the **certification was good, answered in the affirmative,** *held*, **that** the **plaintiff had a right,** under the circumstances offered to be proved, **to go to the jury** on the question whether the inquiry made of the teller was understood by the parties as referring to the validity of the certification at the time it was exhibited to the teller or only to the genuineness of the marks of certification and also whether it was culpable negligence to answer the question without referring to the books; and that it was error to dismiss the complaint upon the opening of plaintiff's counsel.
2. **When** the **court is divided and** the **majority concur simply for reversal,** it is **not safe to treat anything as adjudicated, except** the **precise point** in respect to which error in the judgment in the court below was made to appear.
3. Where a **complaint** is **dismissed on** the **opening** of counsel all the facts referred to in his opening or offers of proof should be considered, including facts not stated in the complaint, unless objection to proof of such additional facts is made on the specific ground that it is not admissible under the pleadings.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Court of Common Pleas of the City and County of New York, dismissing the complaint on a second trial of an action to recover the amount of a draft. *Reversed.*

January 6, 1879, the Commercial National Bank of Chicago, sold and delivered to one Wirt Dexter a draft on the defendant for $254.50, numbered 73,436. January 15, 1879, this draft was presented to the paying teller of the defendant at its banking house in New York City, and was certified by him, and the name, number and amount entered in his certification book.

February 10, 1879, the cashier of the Commercial National Bank of Chicago wrote to the cashier of the defendant stating that the draft had been indorsed and sent to the indorsee, but had not been received; that the party to whom it had been sold requested a duplicate, asking defendant to stop payment on original "which you say you have certified." Defendant thereupon instructed its paying teller not to pay the draft, and an entry was made on the certification book, opposite the entry relating to the draft: "Stop payment; see letter February 10, 1879." The paying teller also had a book in which he had made or caused to be made the entry that payment of this draft had been stopped.

February 25 this draft, which had been raised to the sum of $2,540 and altered in its date and also altered so as to make it payable to the order of the plaintiffs, was offered at the office of the plaintiffs by a person unknown to them in payment of some bonds which the person presenting the draft proposed to purchase. Thereupon the plaintiff sent a messenger to the defendant's banking house with the draft, who presented it to the paying teller, and on behalf of plaintiffs asked the latter if the certification of the draft was good. The paying teller took the draft, looked both on the face and back, and without comparing it with his books answered, "Yes;" whereupon, plaintiffs took the draft in good faith, and delivered in exchange therefor bonds and money to the amount of its face.

March 4, 1879, this draft was presented to the defendant, which refused payment thereof; and plaintiffs brought this action.

On the first trial the plaintiffs recovered a judgment which was affirmed by the general term, but reversed in this court and a new trial granted, for error in the charge to the jury.

See 89 N. Y. 418.

On the new trial the complaint was dismissed on the pleadings, and the opening of the plaintiffs. The judgment of the trial court, dismissing the complaint, was affirmed by the general term, and plaintiffs appealed to this court.

Mr. **Esek Cowen,** with *Messrs.* **Abbott Bros.,** for appellants:

The trial court had no right to dismiss the complaint, unless it was impossible for the plaintiffs to make out a case on the new trial. This court assumed that they might improve their case, and virtually decided that the complaint contained a valid cause of action, when it granted a new trial, instead of finally dismissing the complaint, on the appeal. It must be presumed, on this appeal, that the plaintiffs would have proved what their counsel, in opening, offered to prove. One of these offers was to prove the accepted meaning, among bankers in the City of New York, of the question put by the plaintiffs to the defendant's teller.

The plaintiffs had a right to make this proof.

Ehle v. *Chittenango Bank*, 24 N. Y. 548; *Wachter* v. *Quenzer*, 29 N. Y. 548; *Bissel* v. *Campbell*, 54 N. Y. 357; *Brown* v. *Brown*, 8 Met. 576; *Story* v. *Salomon*, 6 Daly, 531, affirmed, 71 N. Y. 420; *Coit* v. *Commercial Ins. Co.* 7 Johns. 385; *Astor* v. *Union Ins. Co.* 7 Cow. 202.

The case should have been submitted to the jury, upon the question of the defendant's negligence.

Mr. **Wheeler H. Peckham,** for respondent:

On a second appeal the decision on the first appeal is the law of the case, and the questions will not be reopened.

Clark v. *Keith*, 106 U. S. 464 (Bk. 27, L. ed. 302).

Rapallo, *J.*, delivered the opinion of the court:

When this case was first before us (89 N. Y. 420) it came up on an appeal by the defendant from a judgment rendered in favor of the plaintiffs, on a verdict in their favor. That judgment was reversed, and necessarily, there having been manifest error in the charge of the judge, who instructed the jury (in substance) that if the draft was presented to the teller of the defendant and he answered the question of the messenger who presented it in the manner testified to by the messenger, the plaintiffs were entitled to recover. That instruction was in effect a charge that if the messenger asked the teller whether the certification was good and the teller answered in the affirmative, that answer of itself, as matter of law, rendered the defendant liable.

Under that charge the jury were relieved from considering the circumstances proved upon the trial, and from construing the import of the question and answer, and were constrained to render a verdict for the plaintiffs, provided they believed the testimony of the messenger as to the answer which he received. They were not called to pass upon any of the questions arising upon the evidence, as to the notice which the Bank had received in relation to the draft, and the entries relating to it, contained on its own certification book and book of stopped checks, nor upon any question of negligence on the part of the teller in failing to refer to the books mentioned. The charge held that the statement of the teller that the certification was good constituted in itself, as matter of law, an absolute estoppel upon the defendant, which precluded it from disputing its liability upon the certification, for the full amount of the draft as raised subsequent to the certification, without reference to any other question. This, a majority of the court held to be error.

It by no means follows, however, that that decision established that the defendant was absolutely exempt from liability, and could not be held responsible, even if the defendant, at the time the teller said that the certification was good, had notice that it had ceased to be good by reason of the subsequent alteration of the draft or had in its possession the means of ascertaining that fact; and the jury should find that it was guilty of culpable negligence, under the circumstances, in omitting to resort to those means of information, and thus misled the plaintiffs to their injury. That is an entirely different question from the one which was adjudicated on the former appeal.

On the trial now under review the plaintiffs did not rest upon the teller's answer alone, which on the first trial was erroneously held to be of itself sufficient to make the defendant liable. They sought to go further, and to show that before answering the question the teller examined the whole of the draft, both face and back, and everything upon it. It bore plainly on its face the number 73,436.

The complaint stated the facts relating to the history of the draft and the notice to the defendant that a draft bearing that number had miscarried, and requesting the defendant to stop payment of it, and the other facts set forth in the report of this case on the first appeal; 89 N. Y. 420; and on the last trial the counsel for the plaintiffs opened the case stating fully these facts, and, after a motion to dismiss on the complaint and opening, the counsel made a further opening, stating that he expected to prove that in the ordinary usage of banks in the City of New York, it was the duty of the teller, under the circumstances of this case, before answering the question asked of him, to compare the draft with the entry in the certification book, and with the book of stopped payments and the entries made therein, which identified the draft by its number 73,436, and that the teller was guilty of gross negligence in answering the question without first making the comparison; also that, according to the usage, the question asked the teller in this case related not merely to the marks of certification, but to the draft as certified; and he also asked to go to the jury on the question whether the teller examined the whole draft, and whether his answer referred to the draft as certified, or to the marks of certification only.

After this further opening the defendant's motion to dismiss the complaint was granted, and the plaintiffs' request to go to the jury denied, and the plaintiffs' counsel excepted.

We think that the court erred in thus dismissing the complaint. Without regard to the admissibility of evidence of usage, the plaintiffs had a right, under the circumstances offered to be proved, to go to the jury on the question whether the inquiry made of the teller was understood by the parties as referring to the validity of the certification at the time it was exhibited to the teller, or only to the genuineness of the marks of certification, and also on the question whether it was culpably negligent, under the circumstances, to answer the question without referring to the certification book and the book of stopped payments, which referred to the draft in question by its number, and would have disclosed the fraud. It was promptly discovered on the following day, when the draft was presented for payment.

Neither of these questions was necessarily involved in the case as presented to us on the first appeal. The judgment then under review could not have been sustained, on the ground that the jury might have found for the plaintiffs on the two questions now referred to; and the reversal of the judgment cannot, therefore, be regarded as an authoritative decision that they were not proper for the consideration of the jury. When the court is divided, as it was on the first appeal, and the majority concur simply for reversal, it is not safe to treat anything as having been adjudicated, except the precise point in respect to which error in the judgment of the court below was made to appear, which in this case was that the judge charged the jury, as matter of law, that if they found that the question whether the certification was good was asked of defendant's teller and answered as testified to by the messenger, the plaintiff was entitled to recover.

That this charge was erroneous is all that was necessarily decided on the first appeal.

The counsel for the respondent now makes the point that in reviewing the decision dismissing the complaint, we must consider only the facts stated in the complaint itself, and that the further facts referred to in the opening of the counsel and in his offers of proof cannot be considered. We do not think this point tenable.

Where a complaint is dismissed on the opening of counsel, all the facts referred to in his opening, or offers of proof, should be considered, including facts not stated in the complaint, unless objection to proof of such additional facts is made, on the specific ground that it is not admissible under the pleadings. No such specific objection appears to have been made. If it had, it might have been met by an amendment of the complaint if necessary.

The judgment should be reversed and a new trial ordered, costs to abide the event.

Rugor, *Ch. J.*, **Andrews, Danforth,** and **Finch,** *JJ.*, concur; **Earl,** *J.*, not voting; **Peckham,** *J.*, not sitting.

Silas D. GIFFORD, Receiver, etc., *Appt.*,

v.

Michael Augustine CORRIGAN, Exr., etc., of John McCloskey, Deceased, Impleaded, *Respt.*

1. A **delivery of a deed,** not beneficial to the grantee, of property heavily incumbered, without evidence of possession under the deed or of any prior contract or negotiation between the parties, or of any knowledge in fact on the part of the grantee of the existence of the conveyance, **cannot be inferred** or presumed **from** the **bare record of** the **deed.**
2. Where the case, on the point on which a judgment is reversed by the general term, may be changed on a retrial, the **general term should order a new trial.**
3. Although expressions of judges have been found bearing upon it, the question never has been finally adjudicated in this court **whether** it is **competent for a grantor of mortgaged premises whose conveyance** was made subject to the mortgage and **contains a covenant of assumption** by the grantee, without the consent of the mortgagee, **to release** the **grantee from** the **covenant** so as to bar any remedy thereon against him by the mortgagee, and whether it makes any difference whether the release is executed before or after the mortgagee has notice of the covenant, or before or after suit commenced by him thereon.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, reversing a judgment of the Westchester Special Term as to defendant McCloskey (and granting leave to plaintiff to discontinue as to him) in an action to charge defendants with deficiency on a foreclosure sale. *Judgment modified. New trial granted.*

Reported below, 38 Hun, 350.

Property owned by the Father Matthew's Total Abstinence Society, and mortgaged for its full value to plaintiff's assignor, was by said society conveyed under order of the court for nominal consideration to John McEvoy. The deed contained a covenant on the part of the grantee assuming payment of the mortgage. Thereafter McEvoy executed and recorded a deed of the same premises to John McCloskey, Archbishop of New York, which deed also contained a like covenant on the part of said McCloskey assuming payment of the mortgage. On a sale of the mortgaged premises on foreclosure of the mortgage there was a deficiency, to recover which this action was brought against said McCloskey and William P. O'Connor, executor of John McEvoy, deceased.

At the trial at the special term, before a justice without a jury, judgment was rendered in favor of plaintiff against both defendants. On separate appeals to the general term, which were heard together, the judgment was reversed as to McCloskey, with leave to plaintiff to discontinue the action as to him and affirmed as to defendant O'Connor. The defendant O'Connor appealed to this court from that part of the judgment of the general term which was adverse to him and such judgment was affirmed. See 6 Cent. Rep. 33, in which the facts are more fully stated.

The plaintiff appealed to this court from that part of the judgment of the general term which reversed the judgment of the special term as to defendant McCloskey. Subsequent to the trial at special term defendant McCloskey died and the defendant Corrigan, as executor, was substituted in his place.

Further facts appear from the opinion.

Mr. **Ralph E. Prime,** for appellant:

The presumption of delivery and acceptance which is inferred from the reading in evidence, as in this case, of the record of the deed, rests on good authority.

Jackson v. *Perkins*, 2 Wend. 308, 318; *Lawrence* v. *Farley*, 24 Hun, 293, 295; *Fisher* v. *Hall*, 41 N. Y. 416, 423; *Fryer* v. *Rockefeller*, 63 N. Y. 268, 273; *Knolls* v. *Barnhart*, 71 N. Y. 474, 478; *Jackson* v. *Bodle*, 20 Johns. 184, 187; *Spencer* v. *Carr*, 45 N. Y. 406, 410; *Wilsey* v. *Dennis*, 44 Barb. 354, 359; *Lady Superior* v. *McNamara*, 3 Barb. Ch. 375, 378; *Moir* v. *Brown*, 14 Barb. 39, 45; *Gilbert* v. *N. A. Fire Ins. Co.** 23 Wend. 43, 46; *Van Buskirk* v. *Warren*, 4 Abb. App. Dec. 457, 460; *Tompkins* v. *Wheeler*, 16 Pet. 106 (41 U. S. bk. 10, L. ed. 903); *Halluck* v. *Bush*, 2 Root, 26; 2 Greenl. Ev. § 297.

The eighth finding of fact is of the delivery of the deed to McCloskey, and his assumption of the mortgage. McCloskey has never excepted to this finding, nor to the fifth conclusion of law which charges him with the deficiency.

This court will not review questions of fact found when there are no exceptions to the finding.

Hunt v. *Chapman*, 62 N. Y. 333.

In case of no evidence to justify a finding, an exception to that finding is necessary to a review in this court.

Gidly v. *Gidly*, 65 N. Y. 69; *Brush* v. *Lee*, 36 N. Y. 52, 53.

It nowhere appears in the case that the reversal was upon questions of fact; and if there is any evidence at all, if only a "presumption" to sustain the findings of fact, this court will not review the facts found.

Lanigan v. *N. Y. Gas Light Co.* 71 N. Y. 32.

Where it does not appear from the general term order of reversal that it was on the facts (and so it fails to appear in this case), it will be deemed to be upon the law only; and the court of appeals can only look at the facts as found and the exceptions taken.

Krekeler v. *Thaule*, 73 N. Y. 608.

The attempted release by McEvoy's executor was futile. The grantor, McEvoy, and his executor, were each powerless to release defendant McCloskey from the covenant of assumption.

Ranney v. *McMullen*, 5 Abb. N. C. 246; *Ranney* v. *Peyser*, 5 Abb. N. C. 259, note; *Hartley* v. *Harrison*, 24 N. Y. 170.

This liability, once created, is irrevocable.

Garnsey v. *Rogers*, 47 N. Y. 242; *Whiting* v. *Gearty*, 14 Hun, 501.

The fact that the general term affirmed the judgment as to O'Connor and reversed it as to McCloskey did not prevent a new trial being granted as to McCloskey.

Hubbell v. *Meigs*, 50 N. Y. 484, 489.

The general term erred in reversing the judgment as to McCloskey and inviting the plaintiff to discontinue as to him. If it was right to reverse the judgment, it should have ordered a new trial.

Astor v. *L'Amoreux*, 8 N. Y. 107; *Cuff* v. *Dorland*, 57 N. Y. 560; *Griffin* v. *Marquardt*, 17 N. Y. 28.

Mr. **E. C. Boardman,** for respondent:

There is no proof in the case that the deed from McEvoy to McCloskey was ever delivered, or that McCloskey ever took possession of the premises described therein, or that he ever accepted or even knew of the existence of the deed in question or of the fact that it had been recorded.

The production of the books of conveyances containing the record of a deed is no proof of its delivery or of its acceptance by the parties sought to be charged.

Day v. *Mooney*, 6 Thomp. & C. 382; *Best* v. *Brown*, 25 Hun, 223.

Andrews, *J.*, delivered the opinion of the court:

The defendant McCloskey in his verified answer denied that he entered into the covenant of assumption contained in the deed executed by McEvoy, and alleged that the deed was made and executed without his knowledge, and that it was never delivered to or accepted by him. The parties proceeded to trial, upon the issue so presented and the other issues in the case. The plaintiff put in evidence from the register's office in Westchester County the record of a deed dated May 8, 1878, recorded May 10, 1878, from McEvoy to the defendant McCloskey, purporting to convey to "John McCloskey, Archbishop of New York," for the nominal consideration of $1, the mortgaged premises and a lot adjacent thereto, which deed contained a covenant on the part of the grantee to assume and pay the principal sum of $3,900, on the mortgage, with interest from January 9, 1869. The deed was executed by the grantor alone.

The plaintiff rested his case against the defendant McCloskey solely upon the record. The case is bare of any circumstance or evidence showing or tending to show that the defendant McCloskey had any knowledge or information of the existence of the deed, or indeed of the existence of the mortgaged property prior to the commencement of the action, or that he was ever in possession, or that he ever had any conversation or negotiation with anyone in respect to the property. There is no evidence who put the deed upon record, or how it came to be recorded. The bare fact of the record is all that appears connecting the defendant McCloskey with the transaction. The grantor McEvoy died before the commencement of the action, and the defendant McCloskey a few months after the trial.

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*See note to this case, Lawyers' edition, and digested citations at the close. [Ed.]

In determining the question whether the plaintiff made out a *prima facie* case of the delivery to and acceptance of the deed by the grantee, certain other facts need to be noticed. McEvoy was a Roman Catholic priest. He acquired title to the mortgaged property in 1870, from the trustees of "The Father Matthew's Temperance Benefit Society of Tuckahoe," a society incorporated under the Act of April 12, 1848, for the incorporation of "benevolent, charitable, scientific and missionary societies." The conveyance of the property by the society to McEvoy was made under the order of the court, which authorized the conveyance to be made to him "for the use of the Roman Catholic Church, or the people of Tuckahoe," and the deed referred to the order as the authority under which it was executed. It appeared by the petition upon which the order was granted that the society was unable to pay the mortgage, and that the value of the premises did not exceed the amount due thereon.

The plaintiff, to maintain his claim that the deed from McEvoy to McCloskey was delivered and accepted, invokes the presumption that a party has accepted a benefit attempted to be conferred upon him, and that the record of a deed beneficial to the grantee is *prima facie* evidence of its delivery. The property was conveyed to McEvoy for church purposes; and it cannot be doubted that in executing a deed to the defendant McCloskey it was his intention to vest the title in him as archbishop, for the same purposes, whatever may be the legal effect of his conveyance, and not to vest in his grantee a personal, beneficial interest in the property.

It is well known that the title to church property in the Roman Catholic Church is frequently vested in the bishop. This tends to explain a transaction which would otherwise be peculiar, and how McEvoy may have executed a deed of the land to his ecclesiastical superior without his knowledge.

The ground of the presumption from the bare record of a deed, that it has been delivered and accepted, wholly fails in this case. The deed was not beneficial to the grantee. The property was heavily incumbered, probably to its full value. As has been stated there is no evidence of any possession under the deed, or of any prior contract or negotiation between the parties, or of any knowledge in fact on the part of the grantee of the existence of the conveyance. In most of the cases where delivery of a deed has been sought to be established, without proof of the actual fact, there are circumstances which support the presumption of a delivery, in addition to the bare record of the deed. We are of the opinion that under the circumstances of this case, a delivery cannot be presumed from the record alone, and that the conclusion of the general term upon this point was correct. See *Jackson* v. *Phipps*, 12 Johns. 418; *Jackson* v. *Bodle*, 20 Johns. 184; *Church* v. *Gilman*, 15 Wend. 656; *Elsey* v. *Metcalf*, 1 Denio, 323.

Construing the exceptions in connection with the issue raised by the pleadings, we think they fairly presented the question whether the evidence justified a finding that the defendant McCloskey made the covenant upon which he is sought to be charged. But as the case on this point may be changed on a retrial we think the court below should have ordered a new trial, and that its order should be modified in this respect.

There is another question argued by counsel, of great interest, which we do not deem it necessary to decide, as it may not again arise; the question relates to the effect of the release from the covenant of assumption executed by the executor of McEvoy to McCloskey, after the complaint in the action and the notice of *lis pendens* had been filed, but before the actual service of process on the defendant.

Is it competent for a grantor of mortgaged premises, whose conveyance was made subject to the mortgage and contains a covenant of assumption by the grantee, without the consent of the mortgagee, to release the grantee from the covenant so as to bar any remedy thereon against him by the mortgagee, and does it make any difference whether the release is executed before or after the mortgagee has notice of the covenant, or before or after suit commenced by him thereon? This question has never been finally adjudicated in this court, although expressions of judges are to be found bearing upon it. *Hartley* v. *Harrison*, 24 N. Y. 170; *Garnsey* v. *Rogers*, 47 N. Y. 233; *Dunning* v. *Leavitt*, 85 N. Y. 30; *Knickerbocker Life Ins. Co.* v. *Nelson*, 78 N. Y. 150.

Prior to *Burr* v. *Beers*, 24 N. Y. 178, as is shown by Rapallo, *J.*, in *Garnsey* v. *Rogers*, the right of a mortgagee to avail himself of the benefit of a covenant of payment, made by a grantee of the mortgagor, was regarded as an equitable right only, and was founded on the theory that "The undertaking of the grantee to pay off the incumbrance is a collateral security acquired by the mortgagor, which inures by an equitable subrogation to the benefit of the mortgagee." Denio, *J.*, *Burr* v. *Beers*, *supra*.

Assuming this to be the true foundation of the rule, the question arises, When does this equitable right of subrogation attach? It is clear that it cannot be enforced by the mortgagee until default of the covenantor to pay the mortgage according to the terms of his covenant. But does not the equitable right of the creditor to the benefit of the covenant spring into existence contemporaneously with the covenant itself, although he cannot then avail himself of it, and although he may never be in a situation which renders a resort to it necessary? This right does not rest on privity of contract between the covenantor and mortgagee. It is the application of an equitable principle long recognized, to work out the real justice of the transaction. If the right of the creditor to the collateral security springs into existence concurrently with the origin of the relation of principal and surety between the mortgagor and his grantee, ought the immediate parties to the covenant, by a mere release, to be permitted to change the situation of the mortgageee and deprive him of the security of the covenant? It is true that there is no direct contract with the mortgagee, nor is there any consideration moving between the mortgagee and the covenantor; but does the absence of a consideration between these parties justify the mortgagor in canceling a security, which he has taken for his own protection and which at the same time operates also as a protection to his creditor, and especially when this is done for the mere purpose of defeating the remedy of the latter?

The case of *Burr* v. *Beers* established the doctrine in this State that an action at law would lie in favor of the mortgagee against the grantee of the mortgagor, on the covenant of assumption. Would the defense of a release be available when the action is in this form, assuming that it would not be available in the equitable action? In truth, is the direct action on the covenant not an action founded upon the equity of the transaction, rather than upon the notion of a contract between the parties?

We leave the question raised by the release in this case undecided. We prefer not to decide it until it is squarely and necessarily presented.

The order and judgment of the General Term should be modified by directing a new trial, and, as so modified, affirmed; with costs to abide the event.

All concur, **Danforth** and **Peckham**, *JJ.*, in result.

WILES LAUNDRY CO., *Respt.*,
v.
Herman HAHLO, Impleaded with Eben C. Reynolds, Sheriff, *Appt.*

1. Where **property** is **delivered** (under an agreement which permits a lien for the work) **for the purpose of having work done thereon,** which adds to its value, it makes no difference that the **deliveries** take place **at different times,** provided they are all made **under a single contract.** The **lien** for the work done **attaches to all the property,** in the same manner as if it had all been delivered at one time, and if **part** of it is voluntarily **returned without payment** for the work, the only consequence is that the workman has abandoned a part of his security for the total amount due him, and retained his lien therefor only upon the property which remains in his possession.
2. **Where** a particular future **time of payment for** the **work** to be done is fixed, which may be **subsequent to** the **time when** the **owner is entitled to a return** of the article upon which the work is done, the workman can have **no lien.**
3. Where the parties contract for a particular time or mode of payment, the **workman has no right to** set up a right of **possession inconsistent with** the terms of his **contract,**—and in such a case there is no lien.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Third Department, affirming a judgment of the Rensselaer Circuit on a verdict directed for plaintiff in an action to recover the amount of an alleged lien for work done on goods taken from plaintiff's possession by defendants. *Reversed.*

The facts and questions raised appear from the opinion.

Messrs. **Blumenstiel & Hirsch,** for appellant:

I. Where credit is given, or where a special agreement for a particular mode of payment exists, or a particular time for such payment is provided, no lien exists.

Trust v. *Pirsson*, 1 Hilt. 292, 297; *Dunham* v. *Pettee*, 1 Daly, 112, 117, 118; *Morgan* v. *Congdon*, 4 N. Y. 552; *Devinne* v. *Rianhard*, 9 Daly, 406; *Fielding* v. *Mills*, 2 Bosw. 489; 3 Pars. Cont. 348.

II. The agreement was not an entire and single contract. Each delivery was a separate contract by itself, for either party could refuse to go on. Hence it is not within the facts or the principle of the case of *Morgan* v. *Congdon*, 4 N. Y. 552.

III. There is no lien for the work done on the goods on hand as against us, for the reason that when we levied the goods and offered to pay such amount, the right to retain them was placed on another and different ground. In such a case the lien for the true amount was waived.

LaMotte v. *Archer*, 4 E. D. Smith, 46; *Maynard* v. *Anderson*, 54 N. Y. 641; *Saltus* v. *Everett*,* 20 Wend. 267; *Everett* v. *Coffin*, 6 Wend. 608.

IV. On general principles, and unless there was an agreement to the contrary, the common-law lien for the work delivered became lost by surrendering possession of the property.

Grinnell v. *Suydam*, 3 Sandf. 132; *Dunham* v. *Pettee*, 1 Daly, 112; *Grinnell* v. *Cook*, 3 Hill, 492; *Higgins* v. *Murray*, 73 N. Y. 255; *Robinson* v. *Frost*, 14 Barb. 536.

Mr. **N. Davenport,** for respondent:

The plaintiff performed labor and furnished materials in laundering goods for Hoexter, and had a common-law lien thereon for such labor and materials, unless there was some special agreement for credit, or a future time of payment beyond completion of contract so inconsistent with such lien that it destroyed it.

2 Kent, Com. 635; *Morgan* v. *Congdon*, 4 N. Y. 552.

Partial payments, partial deliveries and the fixed price per dozen did not affect or impair the lien.

Blake v. *Nicholson*, 3 Maule & S. 168; *Chase* v. *Westmore*, 5 Maule & S. 180.

The contract was to terminate ten days after Hoexter should suspend delivery of goods; and as the time for such suspension was not limited, the contract was terminable ten days after notice by either party.

Marston v. *Gould*, 69 N. Y. 220.

But for the agreement to make monthly payments, or advances on account, the plaintiff could have recovered nothing until the completion of the contract; and the fact that the agreed price was by the dozen instead of a gross sum did not qualify or change the character of the contract.

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*See editorial note to this case, and digested citations at the close, Lawyers' edition. [Ed.]

Cunningham v. *Jones*, 20 N. Y. 486.

In the case at bar the defendants stand in no better position than Hoexter, and cannot be permitted to use any agreement or to so construe it as to destroy the plaintiff's lien, because Hoexter failed and refused to carry out such agreement on his part.

Mount v. *Williams*, 11 Wend. 77.

No usage or rule of the parties was established, from which it can be inferred that the plaintiff intended to waive its right to a lien, because the transaction in question was the first one between the parties.

Overton, Liens, p. 52.

There was but one bargain, and all the goods laundered were laundered under this one bargain; and plaintiff therefore had a lien upon all the goods in its possession at the time of the levy for the entire balance due.

Morgan v. *Congdon*, 4 N. Y. 552; *Blake* v. *Nicholson*, 3 Maule & S. 168; *Chase* v. *Westmore*, 5 Maule & S. 180; *Schmidt* v. *Blood*, 9 Wend. 268.

Rapallo, *J.*, delivered the opinion of the court:

No controverted question of fact arose upon the trial of this action. Only one witness was examined on the part of the plaintiff, and no testimony was introduced on the part of the defense. The question presented was purely one of law.

The action was brought against the Sheriff and the defendant Hahlo for having, under an execution in favor of Hahlo against one Hoexter, taken from the possession of the plaintiff a quantity of collars and cuffs which had been delivered to the plaintiff by Hoexter for the purpose of being laundered, and upon which the plaintiff claimed to have a lien to the amount of $1,747.72, being the general balance due the plaintiff for laundering the collars and cuffs so taken from it by the Sheriff, and also for laundering other collars and cuffs which had been received by it from Hoexter and returned to him before the levy in question. The only question at issue is whether the plaintiff had the lien which it claimed.

The uncontroverted facts were as follows: Hoexter was a manufacturer of collars and cuffs, and the plaintiff carried on the business of laundering for manufacturers. In June, 1884, Hoexter, through his representative, Mr. Kupfer, stated to the agent of the plaintiff that he was about manufacturing a superior line of goods on which he desired to have the laundry work of the plaintiff, and asked the plaintiff's agent whether the plaintiff could take the job, and the agent replied that the plaintiff could. An agreement was thereupon entered into, verbally, between them, that the plaintiff should do the laundry work on all collars and cuffs Hoexter should deliver to the plaintiff, at the price of 16½ cents per dozen, payable in cash as follows: that on the first of each month the plaintiff should render a bill for all goods laundered and returned to Hoexter during the preceding month, and should receive payment in cash; that cash was not to be paid at the time the goods were actually delivered to Hoexter, but cash on the first of each month, for goods returned the previous month; that there was no fixed period during which the goods were to be delivered to be laundered, but only until notice by either party; that the plaintiff might at any time refuse to do any more goods, and Hoexter might refuse to deliver any fresh goods if he chose; and whenever Hoexter should desire a general settlement and clearing out of the goods he should shut down for ten days and not send any more work, and give the plaintiff a chance to get everything out of the laundry. It usually took seven or eight days to complete the process of laundering the goods. Under this agreement Hoexter began sending goods to the plaintiff's laundry, about the 18th of June, 1884; and the business continued until the 6th of April, 1885, when it was discontinued on account of the failure of Hoexter.

The work done by the plaintiff during the continuance of the contract amounted to between $6,000 and $7,000. In the course of the business goods were generally delivered at the laundry, and laundered goods returned, every day. The stipulated monthly payments were, at first, made by sight drafts drawn by Kupfer on Hoexter. This continued until January, 1885, when a sight draft was given for the December account. After January the plaintiff received ten day drafts for the work of the preceding month, down to the close.

On the third of April, 1885, the plaintiff received for the March account a ten day draft drawn by Kupfer on Hoexter for the sum of $1,132.41. Hoexter refused to accept this draft, and it was returned protested, and was never paid, and on the 6th of April, 1885, there was a balance unpaid to the plaintiff for work, including this protested draft, of $1,747.72, and the plaintiff had on hand between 2,400 and 2,500 dozen cuffs and collars of Hoexter's which were taken by the Sheriff on the execution against Hoexter on the 25th of April, 1885, against the protest of the plaintiff's agent, who claimed a lien thereon for the above mentioned balance of $1,747.72 due plaintiff. It was admitted on the trial that the value of the goods taken was equal at least, to the plaintiff's claim of $1,747.72, and it was also admitted by the plaintiff's counsel that when the defendants took the goods, they tendered the amount due for the work done upon the particular goods which are the subject of this action.

At the close of the testimony the defendants' counsel moved for a nonsuit, on the ground that it appeared that there was no lien on the goods, and also on the ground that there was no lien upon the goods taken, for work done on other goods which had already been delivered. The court denied the motion, and no evidence being offered on the part of the defense the plaintiff's counsel asked the court to direct the jury to render a verdict for the plaintiff for the full amount. The court stated that it had great doubt as to the existence of any lien at all, but that the case was important enough to go to the general term, and accordingly directed a verdict.

To these rulings exceptions were duly taken. Judgment was entered on the verdict, and on appeal to the general term the judgment was affirmed.

If, under the agreement between the plaintiff and Hoexter, the plaintiff acquired any lien upon the goods laundered, we think that this lien attached to any goods which the plaintiff had in its possession at the close of the dealings, and to the extent of the whole balance then due to the plaintiff for work done, as well upon the particular goods remaining in the plaintiff's possession as upon those which it had previously returned to Hoexter. All the work was done under a single contract, and the lien attached to all goods delivered to the plaintiff under that contract. By returning a portion of those goods to Hoexter, the plaintiff waived only its lien upon the goods so returned, retaining it for its full amount upon the residue which remained in its possession.

This consequence results from the entirety of the contract under which the goods were delivered to the plaintiff to be laundered. If each lot of goods had been delivered to the plaintiff under a separate contract, it would have acquired only a lien upon the particular lot of goods so delivered, and only for the work done on that particular lot of goods; and when that lot was returned to the manufacturer, the plaintiff, by parting with possession would have destroyed its lien on that lot of goods, and could not transfer it to any other lot received under a separate contract. But where property is delivered for the purpose of having work done thereon, which adds to its value, it makes no difference that the deliveries take place at different times, provided they are all made under a single contract. The lien attaches to all the property, in the same manner as if it had all been delivered at one time; and if part of it is voluntarily returned without payment for the work, the only consequence is that the person doing the work has abandoned a part of his security for the total amount due him, and retained his lien therefor only upon the property which remains in his possession.

This is the doctrine recognized in *Morgan* v. *Congdon*, 4 N. Y. 552, where logs were delivered at the defendant's sawmill on different days, upon an agreement that defendant would saw into boards all the logs delivered. The defendant sawed part of them and delivered the boards without being paid for the sawing; and it was held that he had a lien upon the logs undelivered for the sawing of the others, provided all the logs were delivered to the defendant under a single contract. To the same effect are the cases of *Blake* v. *Nicholson*, 3 Maule & Sel. 168, and *Chase* v. *Westmore*, 5 Maule & Sel. 180, and other cases.

In the case last cited, wheat was delivered at a mill at various times to be ground, under a single contract to grind all the wheat furnished, at a fixed price, no time or mode of payment being agreed upon; and it was held that after delivery of a part of the meal ground, the grinder could retain the residue for the whole balance due him.

But all these cases are subject to the condition that there is nothing in the contract for doing the work, inconsistent with the right of lien, and that where a particular future time of payment is fixed, which may be subsequent to the time when the owner is entitled to a return of the article upon which the work is done, there can be no lien; and that where the parties contract for a particular time or mode of payment, the workman would have no right to set up a right to possession inconsistent with the terms of his contract, and in such a case there is no lien. 5 Maule & Sel. 186, 187.

In the present case the legal effect of the contract was that the collars and cuffs should be returned to Hoexter as fast as laundered. On this construction the parties acted throughout their dealings. Laundered goods were returned as a general rule every day during each month. The plaintiff had no right to demand pay for each lot delivered, at the time of delivery. The only witness to the contract testifies expressly that such was not the agreement, but on the contrary that it was that on the first of each month Hoexter should pay for the goods which had been laundered and returned during the preceding month. It is clear that the return of the goods to Hoexter was to precede the right to demand payment for the work, by a longer or shorter period, according to circumstances, but certainly some period of time. This is entirely inconsistent with the theory of a lien, as has often been adjudged.

The case of *Stoddard Woolen Manufactory* v. *Huntley*, 8 N. H. 441, is in point. It was an action of trover against a clothier for converting 1,000 yards of flannels which he had dressed for the plaintiff, and the defendant set up a lien for the price of his work. The work had been done under an agreement between plaintiff and defendant that the defendant should dress what flannels the plaintiff should make during the year, and finish them as fast as manufactured and bale them, the plaintiff to pay for finishing once in three months. Under this agreement, flannels had been dressed by the defendant and returned to the plaintiff for about six months, and at the end of one of the quarters the defendant had on hand two bales, for the work on which he had not been paid. The plaintiff, through its agent, demanded these bales, and the defendant refused to deliver them without being paid for the dressing. The court held that the legal effect of the contract was that the flannels were to be delivered to the plaintiff as fast as dressed, and that the dressing was not to be paid for until the end of the quarter; that by such a contract the right of lien was waived, and that even if some of the cloth remained in the defendant's hands at the end of the quarter, he was not entitled to retain it for the price of dressing. The only difference between that case and the present one is that there the work was to be paid for monthly.

There are many cases illustrating the same principle. Where it is agreed that a credit is to be given for the price of the work, not limited to a period preceding the time for the return of the article, the contract is inconsistent with the right of lien, and none can be set up. This rule has been applied even where the party for whom the work was done has become insolvent between the time of the employment and the expiration of the time of credit agreed upon. *Fielding* v. *Mills*, 2 Bosw. 489.

The same principle is applicable to liens of warehousemen, carriers and other bailees. If, by the terms of the contract, possession of the property is to be surrendered before payment, no right of lien exists.

In *Chandler* v. *Belden**, 18 Johns. 157, 162, it was held that where, by the terms of the contract, freight was not to be paid until after the delivery of the goods, the carrier could not claim a lien.

The present respondent cites the case of *The Kimball*, 3 Wall. 37 [70 U. S. bk. 18, L. ed. 50], but on looking beyond the head note into the opinion of *Mr. Justice* Field, it is certainly not an authority in favor of respondent. There, by the terms of a charter-party, part of the freight was to be paid in advance. The cargo was to be delivered within reach of the ship's tackle, and the balance of the charter money was to be payable, one half in five days, and the other half within ten days, after the discharge of the cargo. The opinion rests upon the ground that the provision, as to delivery within reach of the ship's tackle, related only to the manner of discharging, and that the credit was given only for a few days after the *discharge* of the cargo, and that it was no more than a reasonable time to enable the freighter to examine the condition of the goods, and determine whether he would accept them, and was not inconsistent with the retention of their possession by the ship owner until the charter money should be paid; distinguishing the case, in this respect, from *Foster* v. *Colby*, 3 Hurlst. & N. 705.

It is needless to multiply authorities on this point, although many might be cited. The counsel for the respondent contends that the contract being an entire one, no pay for the work done by plaintiff would become due until the termination of the contract, except for the agreement to make monthly payments, and that these payments were merely advances on account of the entire payment, and that an agreement to make these advances could not be considered as giving credit to the owner of the goods, but rather a credit to the mechanic.

We cannot agree to this construction of the contract. The payments were not advances on account, but payments in full for the work done done on goods returned during the month preceding the payment. But assuming the construction contended for, we are unable to see how it helps the plaintiff's case. The counsel concedes in his points that it was unquestionably understood that Hoexter was at liberty to take the goods as fast as they were laundered, because the nature of his business probably required it. If the contract price of the work was not due until the end of the contract, but the goods were to be delivered in the meantime, we fail to perceive how the contract was consistent with a right to a lien on the goods for that contract price.

We think that the doubt of the learned trial Judge, as to the existence of any lien at all, was well founded, and that the judgment should be reversed and a new trial ordered, costs to abide the event.

All concur, except **Peckham,** *J.*, not sitting.

James P. CONNER *et al*, Exrs., *Appts.*,
v.
Martin J. KEESE *et al.*, *Respts.*

In an **action by a sheriff on** the **bond of** a **deputy** sheriff, to recover damages suffered by the plaintiff by reason of a **false return** alleged in the complaint to have been made by the deputy, the answer of one of the defendants put the making of the return in issue, but the answers of the other defendants admitted the making of the return by the deputy, but alleged facts in justification thereof. The **plaintiff failed to show** that the **return** was **made by** the **deputy,** and was thereupon nonsuited as to all the defendants. *Held*, that the **nonsuit** was **proper as to** the **defendant who** had **raised** an **issue** as to the making of the return, **but** was **erroneous as to** the **others, whose answers, being in** effect in **confession and avoidance, raised no** such **issue** as to the making of the return as cast the burden of proving it upon the plaintiff.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Circuit dismissing the complaint in an action by a sheriff on the bond of a deputy sheriff. *Affirmed as to one defendant, reversed as to the others.*

Mr. **Henry Thompson** with *Mr.* **Robert S. Green,** for appellants:

One of the grounds urged for dismissing the complaint was that "It appeared by the execution that the return was signed by William C. Conner, sheriff, and that it did not appear that the defendant Keese had anything to do with said return."

The name of William C. Conner was subscribed to the return but there was no evidence whatever that it was signed by him. It was necessary that the return should be signed in the name of the sheriff, either by himself or by some one in his name; otherwise it would have been no return at all.

Crocker, Sheriffs, § 39.

There is no presumption that the return was not made and signed by Keese himself, as indeed it was his duty to do, and which act the sheriff would be responsible for at the suit of the party aggrieved.

Id.; Gibson v. *Nat. Bank of N. Y.* 98 N. Y. 88.

In response to this objection plaintiffs offered to show the custom of the office in the making and signing of returns.

Keese and Campbell, by their answers, admitted Keese's responsibility for the return.

Keese in no way attempted to set up that he was not connected with the return, but he expressly admits that he did make it. He says that he was instructed by the under sheriff "not to make a levy," and also "to make the return, which he did."

So also with reference to the defendant Campbell; for by his answer he expressly admits the same. He alleges that Keese was advised not to levy, but to return said writ unexecuted and unsatisfied, with his indorsement thereon, to the effect that he could not find said property, "all of which said Keese did."

Mr. **George W. Stephens,** for respondents:

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*See note to this case in Lawyers' edition. [Ed.]

The bond in suit was not given to protect the sheriff from all possible loss, but only from such as resulted from the misconduct of the deputy.

The proof adduced showed that the judgment in *Hoffman* v. *Conner* (the suit against the sheriff on the return) was the direct result of the sheriff's own act, in which there was no proof that the deputy in any way participated.

The plaintiffs' case is not aided by any admissions in the answers of the defendants Keese and Johnstone.

As to the defendant Johnstone: his answer admitted nothing, except the execution of the bond. As to him, therefore, there can be no question that plaintiffs were obliged to prove every element of their case, except the making of the bond.

As to the defendant Keese: he denies the allegations of the complaint, charging him with having falsely returned the execution unsatisfied, just as broadly as they are made. True, he says that he made the return which he did; but he not only failed to state what it was (and presumably, therefore, it was a true one, and not such a one as the sheriff had made), but he coupled it with the direct charge that he did it under the instructions of the sheriff's personal representative.

The court properly excluded evidence tending to show the custom of the sheriff's office in making and signing the returns to executions.

Rapallo, *J.*, delivered the opinion of the court:

This action was brought by William C. Conner, Sheriff of the County of New York, in his lifetime, against one of his deputies, and the sureties of such deputy on his official bond given to the sheriff. The sheriff having died the action has been continued in the name of his executors.

The condition of the bond was such as, among other things, to render the sureties of the deputy liable for any damage the sheriff should sustain by reason of any false return which the deputy might make to any process delivered to him for execution. The breach alleged was, in substance, that an execution in an action of replevin, for the return of the replevied chattels to the defendant, was issued to the sheriff and by him delivered to his deputy, Keese, for enforcement, and that the deputy made a false return to said execution; that the chattels could not be found; by reason of which false return judgment had been recovered against the sheriff, which he had paid, with costs, etc.

On the trial the plaintiffs proved the issuing of the execution. Its delivery to the deputy, Keese, was admitted. The return that the chattels could not be found, etc., signed with the name of the sheriff, and the recovery of judgment against the sheriff for the falsity of this return, were also proved. For the purpose of binding the deputy and his sureties by this judgment, it was shown that he was a witness on the trial of the action against the sheriff for the false return; and also, that by the express terms of the bond they waived notice of any action brought against the sheriff for any misfeasance or nonfeasance on the part of the deputy, and covenanted that a recovery against the sheriff in any such action should be conclusive evidence of their liability for the full amount recovered.

There remained but one link to be supplied in the chain of facts necessary to establish the liability of the defendants; that was that the return (for the falsity of which the sheriff had been compelled to pay damages and costs) had been made by the deputy, or on his report to the sheriff or under-sheriff.

That essential fact was not established by the evidence adduced on the trial of this action; and on that ground the plaintiffs were nonsuited. As to the defendant Johnstone the nonsuit was clearly right; for by his answer he put in issue all the facts alleged in the complaint bearing upon that question. The opinions of the majority of the general term are clearly right, so far as that defendant is concerned; but as to the defendants Campbell and Keese the case is different. By their answers they expressly admitted that the return was made by the deputy, Keese. The complaint alleges that Keese made the return and that it was false, by reason whereof the sheriff was made liable. The answer of defendant Campbell, after admitting the formal allegations of the complaint, setting forth that the plaintiff was sheriff; that he appointed Keese one of his deputies; the execution of the bond sued upon; and the waiver of notice therein contained; denied the other allegations of the complaint only so far as not thereafter specifically admitted, qualified or denied; and then proceeded to aver that the deputy, Keese, was willing and desirous faithfully to execute the process confided to him for execution, but that a third party claimed title to the property and was in possession thereof, and that he made the return for which the sheriff was sued, under instructions from the under-sheriff to consult the counsel of the sheriff, and to follow their advice in respect to levying upon the property; that such counsel having advised him not to execute the writ, but to make return that he could not find the property, he did make such return, contrary to his own judgment, but under the express direction of the sheriff through his counsel. The answer of the defendant Keese was to the same effect, although less particular and explicit in detail.

Of course if the matters thus set up in defense had been proved, they would have afforded a complete justification for the action of the deputy and would have absolved him and his sureties from any charge of misconduct which could have rendered them liable upon the bond. But no such proof was given or offered, and the defendants on the trial of this action rested their defense solely and singly upon the point that it had not been proved that the deputy made the return which was found to have been false; and on that sole ground the general term sustained the nonsuit.

We do not think that, as to the defendants Campbell and Keese, that fact was in issue, and that the counsel for the appellants is right in his contention that it was admitted by the pleadings. The answers of those defendants were in confession and avoidance, as would have been said of a like pleading under the common-law system, and should be held now so far as the substance is concerned. They admitted that the deputy made the return which rendered the sheriff liable, but set up as a justification that they did so pursuant to the direction of the sheriff himself, through his authorized agents. The affirmative of that issue was with them, and to sustain their defense it was necessary that they should prove their allegation. If they failed to do so, the averment of the complaint stood admitted.

The case is devoid of any evidence throwing light upon the merits of the case, and we must decide it on the record.

The judgment should be affirmed, with costs, as to the defendant Johnstone; and reversed as to the defendants Campbell and Keese, and a new trial ordered as to them, with costs to abide the event.

All concur.

Re Petition of E. H. and D. M. CAVIN, *Respts.*,
v.
John B. GLEASON, Assignee, *Appt.*

1. Upon an accounting in bankruptcy or insolvency, a **trust creditor is not entitled to a preference over general creditors of** the **insolvent,** merely on the ground of the nature of his claim; that is, that he is a trust creditor, as distinguished from a general creditor.
2. The **equitable doctrine that as between creditors equality is equity** admits of no exception founded on the greater supposed sacredness of one debt, or that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than another, unless it appears in addition that there is some specific recognized equity founded on some agreement, or the relation of the debt to the assigned property, which entitles the claimant, according to equitable principles, to preferential payment.
3. The **court may order trust property,** or its proceeds, specifically belonging to the trust included in the assigned assets of an insolvent debtor, **to be restored to the trust.** But in order to follow trust funds and subject them to the operation of the trust, they **must be identified;** or it must, at least, appear that the fund or property of the insolvent remaining for distribution includes the proceeds of the trust estate.
4. **Where** the **trust fund** was **misappropriated** by the trustee to the payment of his private debts **before** his **assignment** as an insolvent debtor and did not pass into the hands of his assignee, **it is not entitled to a preference** in payment from the funds in the hands of the assignee.

(Decided April 19, 1887.)

APPEAL from an order of the Supreme Court at General Term in the Fourth Department, affirming an order of the Delaware Special Term in favor of petitioners in a petition for the payment of a claim in full by an assignee for the benefit of creditors. *Modified.*

In the year 1883 Seth H. White was doing business as a private banker at the Railway Bank, an unincorporated bank, in the Village of Delhi, New York.

On or before January 3, 1883, one J. P. Gould, of Minneapolis, Minn., applied to White to procure a loan to him of $3,000 on bond and mortgage. January 3, 1883, said White entered into an arrangement with the petitioners to take the loan and furnish the $3,000, which was made up as follows: an overdue promissory note payable to E. H. Cavin, on which there was due the sum of $1,000 and interest, also a note payable to E. H. Cavin for $495 and interest, two certificates of deposit of said Seth H. White, banker, one for $285 and one for $495, also a certificate of deposit in the Delaware National Bank for $200; $106 in cash and a note executed by D. M. Cavin to said White for $226.61 to make up the balance. Said White received these securities and obligations as money, and gave them the following receipt:

"Received January 3, 1883, of E. H. Cavin and D. M. Cavin $3,000, for investment with J. P. Gould, of Minneapolis, Minn., and when I deliver to them the bond and mortgage agreed upon this receipt is to be delivered up to me."

The bond and mortgage never were procured by White but soon after said January 3, 1883, White turned most of these securities into money, and with the exception of $30 of such funds used the entire amount in payment of his own obligations. White, becoming embarrassed and not having made the investment as he had agreed, January 11, 1883, made an arrangement with the petitioners by which he gave back to them their note $226.61, and an assignment of an interest in a certain land contract, as collateral security for the payment of the balance of said $3,000. Upon this land contract the petitioners realized sufficient to reduce their claim against White to the sum of $877.27.

January 12, 1883, White made a general assignment to Gleason in trust for his creditors. The funds in the hands of the assignee were sufficient to pay petitioner's claim in full, but not sufficient to satisfy the claims of other creditors of White.

Petitioners filed this petition, asking to be paid their balance of $877.27 in full, out of the funds in the hands of the assignee, upon the ground that their original claim arose out of trust funds in the hands of the assignee, and that they have the lawful right to follow the same in his hands.

The court at special term granted the prayer of the petitioners. On appeal to the general term the order was affirmed and defendant appeals to this court.

Further facts appear from the opinion.

Mr. **J. B. Gleason,** for appellant:

The prior title of the original owner and his right to retake the property, followed changes of form of the trust property *so long as it could be traced* from one specific form into another specific form. This is merely an equitable extension of the law of bailments.

Scott v. *Surman*, Willes, Rep. 400; *Taylor* v. *Plumer*, 3 Maule & S. 562.

Upon an accounting in bankruptcy one creditor cannot claim a general lien upon the fund, simply upon the ground that he is a trust creditor.

Ferris v. *Van Vechten*, 73 N. Y. 125.

The equitable doctrine demands for its application that the trust fund or money shall be traced and identified as existing in the new form into which it has been converted.

Whitecomb v. *Jacob*, 1 Salk. 160; *Trecothick* v. *Austin*, 4 Mason, 29; 2 Kent, Com. pp. 623, 624; *Kip* v. *Bank of N. Y.* 10 Johns. 63; approved 73 N. Y. 121; Perry, Trusts, § 128; *Butler* v. *Sprague*, 66 N. Y. 392; *People* v. *Merchants Bank*, 78 N. Y. 269; *Van Alen* v. *American Nat. Bank*, 52 N. Y. 1; *Dows* v. *Kidder*, 84 N. Y. 121; *Hooley* v. *Gieve*, 9 Abb. N. C. 8; *People* v. *City Bank of Rochester*, 96 N. Y. 32; *Re Le Blanc*, 14 Hun, 8; *Re Smyth*, 2 How. Pr. N. S. 431.

The conclusions of law of the trial court, to the effect that the trust fund has been traced into the hands of the assignee, are inconsistent with its express finding of fact that the fund was all paid out before the assignment.

Messrs. **Johnson & Kemp,** for respondents:

A trust is created whenever an obligation rests upon a person, arising out of a confidence reposed in him to apply property faithfully and according to such confidence.

2 Bouv. L. Dic. 615; 4 Kent, Com. 295; 3 Bl. Com. 431.

No particular form of words is requisite to create a trust. The court will determine the intent from the general scope of the language.

10 Johns. 496; 4 Kent, Com. 305.

Perhaps the terms "merged" or "extinguished" would more properly be employed in defining what we understand to be the defendant's position in reference to our original claim.

It is well settled that merger never occurs in equity, unless justice or intent of parties demands it.

35 N.Y. 279.

The intention of the parties is the controlling consideration when it has been made known or can be inferred from their acts or conduct.

7 Wait, Act. & Def. 324 and cases cited; *Campbell* v. *Carter*, 14 Ill. 286.

An agreement under seal does not merge the debt if it is given and accepted as collateral only.

7 Wait, Act. & Def. 325; *Charles* v. *Scott*, 1 Serg. & R. 294.

In *Butler* v. *Miller*, 1 N. Y. 496, it was held in substance that taking a higher security would not merge the original debt in a case where the security was intended merely as collateral.

14 Johns. 404; 7 Cow. 662; 7 Wend. 248; 15 Wend. 155.

It was not necessary for the petitioners to trace the identical trust fund into the hands of the assignee to entitle them to an order directing him to pay the balance of their claim in full.

Van Alen v. *American Nat. Bank*, 52 N. Y. 1. See also, 75 N. Y. 598; 84 N. Y. 121; 96 N. Y. 32; 104 U. S. 303 (Bk. 26, L. ed. 769).

Andrews, *J.*, delivered the opinion of the court:

It may properly be conceded that the $3,000 received by White from the petitioners on the third day of January, 1883, for investment in the Gould mortgage, constituted in his hands a quasi trust fund, which White was bound to use for the specific purpose contemplated, and which he could not divert to any other use without committing a breach of trust. The securities which formed the greater part of the fund were immediately convertible into money; and authority in White to make such conversion was implied, but only as a means of realizing the money with which to make the mortgage loan.

The securities while in the hands of White remained the property of the petitioners, and when converted by him their title attached to the proceeds of the converted property. White collected the securities actually or constructively. He collected the notes against third persons and drew the money deposited in the Delaware National Bank. The two certificates of deposit issued by himself, amounting in the aggregate to $780, he accepted as money.

It is material to a proper understanding of the question presented, to state a few other facts, which appear in the record.

White was a private banker. On the 5th of January, 1883, two days after the transaction with the petitioners to which we have alluded, he was taken sick, and on or about the 9th of January a run commenced on the bank; and on the 12th of January he made a general assignment to the defendant, Gleason, for the benefit of creditors, having at the time on hand in cash assets only the sum of $64.75.

The Gould mortgage was never procured by White, and he made no investment for the petitioners of the $3,000, received on the third day of January. On the contrary it was found by the judge at special term that White, after receiving and collecting the securities, and prior to the 11th day of January, in violation of his trust, used the entire fund of $3,000 (except the sum of $30 which came to the hands of the assignee) in paying his personal debts and liabilities. But on the 11th of January, the day prior to the making of the assignment, for the purpose of securing the claim of the petitioners, he transferred to them a land contract, from which and other sources the petitioners have realized sufficient to reduce their claim to the sum of $877.27.

It was admitted on the hearing of the petition, which took place in January, 1885, that the assignee had then on hand proceeds of the assigned estate sufficient to pay the said sum of $877.27; but it was conceded by the petitioners that the assigned estate was insufficient to pay in full the debts of the assignor.

The special term has granted the prayer of the petitioners and made an order directing the assignee to pay the claim of the petitioners out of the money in his hands; and this order was affirmed by the general term. The order in effect appropriates out of the assigned estate the sum of $877.27 to the payment of the claim of the petitioners, in preference to the claims of the general creditors.

The petitioners, to maintain the order in question, rely upon the rule in equity that as between *cestui que trust* and trustee, and all parties claiming under the trustee otherwise than by purchase for valuable consideration, without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust. *Pennell* v. *Deffell*, 4 DeG. M. & G. 387, Turner, *L. J.*

This settled doctrine of equity has its basis in the right of property. The owner of personal property which, by the wrongful act of his agent or trustee, has been changed and converted into chattels of another description may elect to treat the property into which the conversion has been made as his own. Upon such election the title to the substituted property is vested in him as fully as if he had originally authorized the wrongful act, which title he may assert in a legal action to the same extent as he could have asserted title in respect to the original property.

The reason of the doctrine is stated by *Lord* Ellenborough in the leading case of *Taylor* v. *Plumer*, 3 Maule & S. 562, in language often quoted. "For," he says, "the product or substitute for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail."

The question in that case involved the legal title to certain stock and bullion which an agent of the defendant, intrusted by his principal with money to invest in exchequer bills, had wrongfully misapplied to the purchase of the stock and bullion, intending to abscond with it and go to America; and the court sustained the defendant's title.

The courts go very far to protect the rights of property against a wrong doer. They follow it through whatever changes and transmutations it may undergo in his hands, and as against the wrong doer transfers to the changed and altered product the original title, however much the original property has been increased in value by his labor or expenditure, provided only that the product is still a chattel and is composed of the original materials. *Silsbury* v. *McKoon*, 3 N. Y. 379.

But a court of law as a general rule can deal only with the legal title; and when the legal identity of the property is destroyed, or the property cannot be traced specifically into another thing, it is powerless to give relief, except by action for damages against the wrong doer. This is implied in the language of *Lord* Ellenborough already quoted; and that language is followed by an illustration of his statement that the right to follow property only ceases when the means of ascertainment fail, "which," he remarks, "is the case when the subject is turned into money and mixed and confounded in a general mass of the same description."

It is not important to inquire whether later decisions have not established, even in respect to strictly legal actions, a somewhat less stringent limitation upon the right of pursuit than that indicated in the language just quoted. But it is unnecessary to pursue this inquiry here. It is clear that in this case the trust fund has been dissipated and lost by the act of the trustee. It is neither specifically in the hands of the trustee or of his assignee, nor is it represented by other property into which it has been converted. The fund according to the finding (with the exception of the sum of $30) was paid out on the debts of White before the assignment.

Plainly there is no room for any contention that the petitioners have legal title to any of the assigned property. The sole inquiry is whether a case is made for equitable intervention in favor of the petitioners, in the administration of the insolvent estate. It is clear we think that upon an accounting in bankruptcy, or insolvency, a trust creditor is not entitled to a preference over general creditors of the insolvent, merely on the ground of the nature of his claim; that is, that he is a trust creditor as distinguished from a general creditor. We know of no authority for such a contention. The equitable doctrine that as between creditors equality is equity admits, so far as we know, of no exception founded on the greater supposed sacredness of one debt, or that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than another, unless it appears in addition that there is some specific recognized equity founded on some agreement, or the relation of the debt to the assigned property, which entitles the claimant, according to equitable principles, to preferential payment. If it appears that trust property specifically belonging to the trust is included in the assets the court doubtless may order it to be restored to the trust. So also if it appears that trust property has been wrongfully converted by the trustee, and constitutes, although in a changed form, a part of the assets, it would seem to be equitable and in accordance with equitable principles that the things into which the trust property has been changed should, if required, be set apart for the trust; or, if separation is impossible, that priority of lien should be adjudged in favor of the trust estate for the value of the trust property or funds or proceeds of the trust property, entering into and constituting a part of the assets. This rule simply asserts the right of the true owner to his own property.

But it is the general rule, as well in a court of equity as in a court of law, that in order to follow trust funds and subject them to the operation of the trust, they must be identified. A court of equity, in pursuing the inquiry and in administering relief, is less hampered by technical difficulties than a court of law; and it may be sufficient to entitle a party to equitable preference in the distribution of a fund in insolvency that it appears that the fund or property of the insolvent remaining for distribution includes the proceeds of the trust estate, although it may be impossible to point out the precise thing in which the trust fund has been invested, or the precise time when the conversion took place. The authorities require at least this degree of distinctness in the proof before preference can be awarded. See *Van Alen* v. *American Nat. Bank*, 52 N. Y. 1; *Newton* v. *Porter*, 69 N. Y. 133; *Ferris* v. *Van Vechten*, 73 N. Y. 113; *Pennell* v. *Deffell*, *supra; Frith* v. *Cartland*, 2 Hem. & M. 417.

The facts in this case fall short of the proof required, within any case which has come to our notice. The trust fund, with the single exception mentioned, was misappropriated by White to the payment of his private debts prior to the assignment. It cannot be traced into the property in the hands of the assignee, for the plain reason that it is shown to have gone to the creditors of White in satisfaction of their debts.

The courts below seem to have proceeded upon a supposed equity springing from the circumstance that by the application of the fund to the payment of White's creditors, the assigned estate was relieved *pro tanto* from debts which otherwise would have been charged upon it, and that thereby the remaining creditors, if entitled to distribution without regard to the petitioners' claim, will be benefited. We think this is quite too vague an equity for judicial cognizance; and we find no case justifying relief upon such a circumstance.

In a very general sense all creditors of an insolvent may be supposed to have contributed to the assets which constitute the residuum of his estate.

The case of *People* v. *City Bank of Rochester*, 96 N. Y. 32, seems to have been misunderstood. The question considered in this case was not raised there, and it was not claimed in that case that the proceeds of the checks of Sartwell, Hough & Co., the petitioners, had not gone into the general fund of the bank, or that they had not passed in some form to the receiver. The court did not decide nor intend to decide that the petitioners would have been entitled to a preference in case the proceeds of the checks had been used by the bank, and were not represented in its assets in the hands of the receiver.

For the reasons stated we are of opinion that the orders of the Special and General Terms should be modified, by reducing the sum directed to be paid by the assignee to the sum of $30, with interest from April 19, 1883, but without costs to either party.

All concur.

Thomas J. CHAMBERLAIN *et al.*, Exrs. of Benjamin Chamberlain, Deceased, *Appts.*,

v.

Hascal L. TAYLOR *et al.*, *Respts.*

1. A **general devise of lands in trust** to executors **to sell** and convey them **vests no title in the trustees.**
2. A **will** directed that testator's residuary real estate be divided into two equal parts, "one of said parts to be paid" to a certain religious corporation and "the other of said parts to be paid by my executors" to a certain educational corporation,—continuing as follows: "And I give, bequeath and devise all my real and personal estate not hereinbefore specifically devised and bequeathed, to my said executors in trust for the payment of the bequests and legacies hereinbefore specified and ready to be paid; and for the purpose of executing such trust I hereby authorize and empower them to sell and convert all my real and personal estate into cash, and for that purpose authorize them to execute and deliver the necessary conveyances, assignments and releases of the same and to sell such estate or any part thereof at such time or times and upon such terms as to them shall seem proper." The executors conveyed certain of their decedent's real estate, and, the same being in the adverse possession of the defendants, brought this action of ejectment for the benefit of their grantee. *Held*,

   (*a*) That under the statute, **no estate** in land **vested in** the **trustees** under the above provisions of the will, since they were not authorized thereby to receive the rents and profits.

   (*b*) That if the **power to sell** conferred by the will might be exercised **as a power** in trust, although the provisions of the will were inoperative to create **a valid** express trust under the statute, yet in that event the **title** would, as provided by the statute, **descend to** the **heirs at law,** subject to the execution of the power.

   (*c*) That the claim that title in the executors was to be implied from the intent expressed in the clause containing the devises to said corporation is refuted by the adjudication in 43 N. Y. 424, holding that said **devises** were **invalid** to the extent of one half of the residuary estate, **as** being **in conflict with the statute forbidding** testamentary **bequests to religious corporations,** etc., in excess of one half of the testator's property.

   (*d*) That as testator's personal estate was more than sufficient to satisfy all valid legacies, an intent to satisfy devises by a sale of real estate cannot be drawn from said provisions of the will, and that therefore there was **no equitable conversion of the realty** so as to take it out of the statutory rules for the descent of real estate.

   (*e*) That there was no valid devise of the land either to the executors or to any other persons, and nothing to prevent its regular **descent to** the **legal heirs of** the **testator.**
3. The law never considers **a conversion of real into personal property** to have taken place, unless there has been a valid devise of the property in dispute in some form to a specified beneficiary and the purposes of the will require it to be done.
4. The **decision in** *Chamberlain* v. *Chamberlain*, 43 N.Y. 424, in which the present plaintiffs were defendants, and which held that such portion of testator's estate as was not well disposed of by will descended to his heirs at law and next of kin, *held*, **under** the **doctrine of stare decisis, to be controlling** in the present case.
5. The **deed** of the land in suit, executed **by** the **executors, has no affirmative effect** in supporting the cause of action.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Fifth Department, affirming a judgment of the Cattaraugus Circuit in favor of defendants, on a verdict directed by the court in an action of ejectment. *Affirmed.*

Reported below, 36 Hun, 24.

The facts and questions raised appear from the opinion.

Messrs. **E. D. Northrup** and **William F. Cogswell,** for appellants:

I. This will vested in the plaintiffs the whole undisposed of real estate of the testator, including the premises in question. By clauses 18 and 22 of said will they were directed to "sell and convert all his real and personal estate into cash," for the purpose of distribution, etc.

This provision operated in law as an equitable conversion of the real estate into money, and the title to it vested in the executors.

Chamberlain v. *Chamberlain*, 43 N.Y. 425, 431; *Vincent* v. *New House*, 83 N. Y. 512; *Robert* v. *Corning*, 89 N. Y. 239; *Dodge* v. *Pond*, 23 N. Y. 69, 76; *Power* v. *Cassidy*, 79 N. Y. 603, 613; *Shumway* v. *Harmon*, 6 Thomp. & C. 626; *Stagg* v. *Jackson*, 1 N.Y. 212; *Forsyth* v. *Rathbone*, 34 Barb. 388, 405; Leigh & D. Equitable Conversion, 5, 109; *Reading* v. *Blackwell*, 1 Baldw. C. C. 172: *Moncrief* v. *Ross*, 50 N. Y. 431; *Tickel* v. *Quinn*, 1 Dem. 425: *Irish* v. *Huested*, 39 Barb. 411; *Lent* v. *Howard*, 89 N. Y. 169; *Hatch* v. *Bassett*, 52 N. Y. 361; *Shaw* v. *Chambers*, 48 Mich. 355; *Craig* v. *Leslie*, 3 Wheat. 563 (16 U. S. bk. 4, L. ed. 460).

II. The twenty-second clause of said will says that they may make the sales "at such times and upon such terms as to them shall seem proper;" hence, it becomes their imperative duty to make such sale and conversion of the land in question, and to reduce it to possession to effectuate such sale.

Haight v. *Brisbin*, 96 N. Y. 132.

The authorities cited by the court below are not in point.

The case of *White* v. *Howard*, 46 N. Y. 144, is not in point; it was one of a discretionary future conversion, after decease of the testator.

The case of *Chitty* v. *Parker*, 2 Ves. Jr. 271, cited in Leigh & D. Equitable Conversion, 95; 5 Law Lib. 49, was one where all the legacies had been paid out of the personal estate; and there was no further purpose of the will to be subserved, and the legacies were definite in amount.

The case of *Hawley* v. *James*, 16 Wend. 61, was a case of total failure or lapse.

A wide distinction exists between cases of an entire lapse and where there is only a partial lapse, as the authorities hereinafter cited show.

Where there is a total lapse, there is no equitable conversion; but where the lapse is only partial it is otherwise.

The case of *Giraud* v. *Giraud*, 58 How. Pr. 175, was also an action for the construction of a will, for the purpose of defining what should become of the proceeds of the equitable conversion, and is not a parallel to the case at bar.

In the case at bar the will directed a sale of the real estate in question. The estate is to be divided and paid, and invested in a certain manner, etc.

See *Phelps* v. *Phelps*, 28 Barb. 139; *Harris* v. *Slaght*, 46 Barb. 503, is nearly parallel to the case at bar; *Van* v. *Barnett*, 19 Ves. 102; *Kirkman* v. *Miles*, 13 Ves. 338; *Ashby* v. *Palmer*, 1 Meriv. 296. See also *Maberly* v. *Strode*, 3 Ves. 450; *Gourley* v. *Campbell*, 66 N. Y. 174-5; *Leavitt* v. *Wolcott*, 65 How. Pr. 51; 1 Wms. Exrs. 417 and cases cited; *Downing* v. *Marshall*, 1 Abb. App. Dec. 543; 2 Spence, Eq. Jur. 242; *Burley* v. *Evelyn*, 16 Sim. 290.

The executors have no power to partition the land itself among these many claimants of one half and the residuary legatees of the other half.

If this is not so, every sale of the real estate of the testator that the executors have made is void.

Throughout the whole administration of the estate, in all the various litigations that have arisen therein, the validity of those sales has been recognized and never questioned until the trial of this action.

29 Alb. L. J. 107.

The recent case of *Mott* v. *Ackerman*, 92 N. Y. 539, confirms this rule and also, at page 551, decides that the time is unlimited within which the executors may convey.

Hood v. *Hood*, 85 N. Y. 561; *Messenger* v. *Casey*, 18 N. Y. Week. Dig. 71; *Robert* v. *Corning*, 89 N. Y. 239.

The case of *Kearney* v. *Missionary Society*, 10 Abb. N. C. 274, cites *Chamberlain* v. *Chamberlain*, 43 N. Y. 424, 431, in support of the rule we have invoked, and also shows that the conversion took place, "out and out" at the death of the testator, and that the equitable conversion was not defeated by the inability of the beneficiaries to take the full amount of the gift in their favor, and that the lapsed portion was distributed as personalty.

Arnold v. *Gilbert*, 5 Barb. 190.

Betts v. *Betts*, 4 Abb. N. C. 318, citing *Chamberlain* v. *Chamberlain*, at page 386, confirms the same rule, and at page 418 and 419 citing *Smith* v. *Claxton*, 4 Madd. 484, clearly establishes this rule. And it also cites *Bogert* v. *Hertell*,* 4 Hill, 492, 501, in which Nelson, *Ch. J.*, shows that where there is only a partial failure of the purpose of the conversion, the conversion takes place nevertheless. And in *Downing* v. *Marshall*, 4 Abb. App. Dec. 662, 667 the rule is affirmed.

Fisher v. *Banta*, 66 N. Y. 468; *Re Mahan*, 32 Hun, 78.

In *Kane* v. *Gott*, ** 24 Wend. 641, 659, *Judge* Cowen says that the land is to be treated "as if the testator had himself sold land and then bequeathed the consideration money."

The devise to the plaintiffs, as executors, in trust, vested in them the title to the land in question.

Siegel v. *Anger*, 13 Abb. N. C. 368; *Belcher* v. *Belcher*, 30 Alb. L. J. 438; *Re Riverside Park*, 20 N. Y. Week. Dig. 117; *Byrnes* v. *Baer*, 86 N. Y. 219; *Morse* v. *Morse*, 85 N. Y. 53, see page 59 as to equitable conversion; *Robert* v. *Corning*, *supra*; *Jackson* v. *Schauber*, 7 Cow. 194.

The devise of all the estate of the testator, to the plaintiffs, by necessary implication, included the rents and profits thereof.

Lent v. *Howard*, 89 N. Y. 169; *Allen* v. *DeWitt*, 3 N. Y. 285.

In *Lent* v. *Howard*, a case of mere power of sale, *Judge* Andrews states the rule as follows: "Where the general scheme of the will requires a conversion, the power of sale operates as a conversion immediately."

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*See digested citations at end of case, Lawyers' edition. [Ed.]

**See editorial note to this case, and digested citations at the close, in Lawyers' edition. [Ed.]

Everitt v. *Everitt*, 29 N. Y. 71, 82, 98; 1 Edm. Stat. at L. 678, § 55, subd. 2; *Hatch* v. *Bassett*, 52 N. Y. 359; *Armstrong* v. *Cummings*, 20 Hun, 313.

So when it is requisite for division of the real estate among the heirs, the conversion takes immediate effect.

Stagg v. *Jackson*, 1 N. Y. 206; *Dodge* v. *Pond*, 23 N. Y. 69; *Lyons* v. *Mahan* and *Tickel* v. *Quinn*, 1 Dem. 180, 425.

Messrs. **D. H. Bolles** and **John G. Hall** with **Cary, Rumsey & Jewell,** for respondents:

The law is well settled that conversion takes place only so far as is necessary to carry the will into effect; and in case (as here) the will, which in terms, converts the whole, becomes by judgment or otherwise, as effectual as to a part, no conversion takes place as to that part.

McCarty v. *Terry*, 7 Lans. 236; *Giraud* v. *Giraud*, 58 How. Pr. 175; *Hawley* v. *James*, 5 Paige, 444; *S. C.* 16 Wend. 61; *Downing* v. *Marshall*, 23 N. Y. 381; *White* v. *Howard*, 46 N. Y. 144.

Ruger, *Ch. J.*, delivered the opinion of the court:

This is an action of ejectment to recover possession of 156 acres of land situated in the County of Cattaraugus, brought by the plaintiffs as executors of the will of Benjamin Chamberlain. The plaintiffs claim that Benjamin Chamberlain died seised of an estate in fee simple in such land, in February, 1868, and that therefore a power of sale, as well as the title thereto, became vested in them by virtue of the provisions of his will. They also claim that, having executed the power of sale by conveying the lands to one Freeman in 1880 for a valuable consideration, and such deed being void by reason of an adverse possession by the defendants at the time of its execution, this action is brought under the statute for his benefit to recover such lands.

It is an elementary rule in ejectment that the plaintiff must recover, if at all, upon the strength of his own title and not upon the weakness of his adversary's; and this being so it will be unnecessary to consider the defenses pleaded in the answer, unless we come to the conclusion that the plaintiffs derived title to the premises under the will of the testator.

Upon the trial the court directed a verdict for the defendants, holding that the plaintiffs had shown no title in the premises; and the general term, on appeal, affirmed such judgment.

The question presented is determined by the provisions of the will and such additional force as may be given to the plaintiffs' claim by reason of the conveyance to Freeman, and the provisions of the statute authorizing an action for his benefit in the name of his grantors.

The provisions of the will are somewhat voluminous, but so far as they bear upon the questions under discussion are substantially comprised in its eighteenth and twenty-second subdivisions which read as follows: "18th. I hereby further will and direct that all my estate not otherwise herein before disposed of be divided into two equal parts, one of said parts to be paid to the Centenary Fund Society of the Erie Annual Conference of the Methodist Episcopal Church, to be by said corporation invested and kept permanently invested, and the interest and income thereof used and expended by said corporation for the benefit of Alleghany College at Meadville, Pennsylvania, in such manner and for such specific purposes as said corporation shall direct; and that the other of said parts be paid by my executors to the trustees of the Chamberlain Institute, to be by said trustees permanently invested in bonds and mortgages upon productive farming lands in this State, such mortgages to be first liens; the said principal to be kept permanently invested, and the interest and income thereof to be received by said trustees and by them used in the payment of the salaries of tutors and professors employed to teach in said institute, and in purchasing books and apparatus for the library of said institute," etc.

"22nd. I hereby further nominate and appoint as executors of this my last will and testament, Thomas J. Chamberlain, Amos Dow, Charles P. Adams and Alonzo Kent. And I give, bequeath and devise all my real and personal estate not herein before specially devised and bequeathed, to my said executors in trust for the payment of the bequests and legacies herein before specified and ready to be paid; and for the purpose of executing such trust I hereby authorize and empower them to sell and convert all my real and personal estate into cash, and for that purpose authorize them to execute and deliver the necessary conveyances, assignments and releases of the same, and to sell such estate or any part thereof at such time or times and upon such terms as to them shall seem proper."

It is of course well settled that a general devise of lands in trust to executors, to sell and convey them, vests no title in the trustees. *Manice* v. *Manice*, 43 N. Y. 304.

It will be observed that the testator has not by any express language attempted to vest the title of his real estate in his executors, and that is not claimed by the appellants; but they seek to imply his intent to do so from a consideration of the various provisions of the will, and mainly from that authorizing them to convert his real estate into cash. An unanswerable objection to such an implication seems to us to arise from the express provisions of the statute relating to uses and trusts, which practically forbids it unless, in addition to the creation of a valid trust, the power to take the rents and profits is also given to the executors.

It is not claimed that the devise contained in such clause is brought within the description of any of the express trusts authorized by statute, unless it may be that permitted by subdivision 2 of section 55, article 2, title 2, chapter 1, part 2, of the Revised Statutes, allowing the creation of a trust "To sell, mortgage, or lease land for the benefit of legatees, or to satisfy charges on it."

We are, however, of the opinion, for several reasons hereafter stated, that such a trust was not thereby created. The will directs the executors to divide the testator's whole residuary estate into two parts, one of which is directed to be paid to the Centenary Fund Society, and the other to the trustees of the Chamberlain Institute, and for the purpose of making such division they are authorized and empowered to sell and convert all of his real and personal estate into cash.

Undoubtedly a strong implication arises from the use of the word "paid" in directing the satisfaction of the legacies, that it was intended by the testator that the real estate should be converted into money and thus handed over to the legatees; but there is no imperative direction given to sell the lands, neither do the purposes of the will require such a sale; and a legal performance of the duties enjoined upon the executors could have been effected by a distribution of the property in specie to the legatees.

The distribution or division of the residuary estate between the named legatees was the main object contemplated by the testator, and not its sale; and although he might have intended a conversion of the real estate, it does not affect the transfer of the title unless the intention to do so is manifested in the mode and language required by the statute. That expressly provides in the case of such a trust that no estate in the land vests in the trustees unless they are also authorized to receive the rents and profits of the same. Sec. 56, R. S. *supra*.

Although the provisions of the will are inoperative to create a valid express trust under the statute, yet the power therein conferred might still be exercised as a power in trust; but in that event it is also expressly provided that the title shall descend to the heirs at law, subject to the execution of the power. R. S. §§ 56, 58, 59; *Cooke* v. *Platt*, 98 N. Y. 35; *Konvalinka* v. *Schlegel*, 6 Cent. Rep. 79; *Downing* v. *Marshall*, 23 N. Y. 366.

It was held in *Cooke* v. *Platt* that a merely discretionary power of sale in the executors for purposes of distribution, even though connected with the right to receive the rents and profits, did not vest them with title to real estate. Much less would this be so where no power to take rents and profits was given by the will or inferable from any of the purposes therein contemplated. See also *White* v. *Howard*, 46 N. Y. 162.

The cases of *Lent* v. *Howard*, 89 N. Y. 175, and *Donovan* v. *Van De Mark*, 78 N. Y. 244, cited by the appellants, are not in conflict with the views expressed but rather tend to support them. In the first case it was held that the will did not vest the title in the executors, but that it descended to the heirs; but under the special provisions of the will it was decided that the right to the rents and profits of the real estate was separable from the right to the possession, and that those received by the executors intermediate the death of the testator and the execution of the power of sale were intended to be given to and belonged to the executors for the purposes of the will.

In *Donovan* v. *Van De Mark* it was held that the will devised the real estate to the executor in trust with power, either directly or inferentially, to receive the rents and profits and apply them according to his judgment, and that therefore a valid trust was created and a legal title vested in the trustee. In that case the right to take the rents and profits was by the will clearly intended to be given to the executor, and in that respect differs from the case at bar.

The argument that title in the executors was to be implied from the intent expressed in sections 18 and 22 to give it to them is effectually refuted by reason of the adjudication of this court in 43 N. Y. 424, holding that said devises were invalid, to the extent of one half of the residuary estate, as being in conflict with the provisions of the statute forbidding testamentary bequests to religious and other charitable societies or corporations in certain cases, in excess of one half of the testator's property. Laws 1860, chap. 360.

The case shows that the real estate of the testator embraced but a small portion of his property, and that the personal estate was much more than sufficient to satisfy all of the valid legacies. It was, therefore, the duty of the executors to satisfy such legacies from the personal estate; and resort to the real estate for such purpose could be had only when they were expressly charged upon it. An intent to satisfy these devises by a sale of the real estate cannot, therefore, be drawn from the provisions of this will. It is clear that there has been no valid devise of the land, either to the executors or to any other persons, and nothing to prevent its regular descent to the legal heirs of the testator. It is a settled principle of law that the legal rights of the heir or distributee to the property of deceased persons cannot be defeated, except by a valid devise of such property to other persons. *Haxtun* v. *Corse*, 2 Barb. Ch. 521; *Jackson* v. *Schauber*, 7 Cow. 195; *Post* v. *Hover*, 33 N. Y. 597; *White* v. *Howard*, 46 N. Y. 144; *Hawley* v. *James**, 16 Wend. 61.

It was said by the Chancellor in *Haxtun* v. *Corse*, 2 Barb. Ch. 521, that "It was not sufficient to deprive an heir at law or distributee of what comes to him by operation of law, property not effectually disposed of by will, that the testator should have signified his intention by his will that his heir or distributee should not inherit any part of his estate. But to deprive an heir or distributee of his share of the property which the law gives him in case of intestacy the testator must make a valid and effectual disposition thereof to some other person." It is, therefore, quite plain that the executors did not take title to the lands in question under the will, unless such claim can be supported upon some other theory than the one discussed.

It is however urged that the authority given the executors to sell and convey the real estate for the purposes of the will worked an equitable conversion, and so changed its character as to take it out of the operation of the rules provided by statute for the descent of real estate.

As we have seen, under the construction given to this will, there was no necessity in satisfying its purposes that there should be a conversion; and equity will never presume a conversion, unless it is demanded to accomplish the lawful purposes expressed in the will by the testator.

Judge Allen said, in 43 N. Y. 431, "If the residuary bequests are valid, there was an equitable conversion of the whole estate into personalty;" but he then proceeded to show that they were valid only to the extent of one half the value of the property; and it follows as a corollary from such conclusion that an equitable conversion had not taken place.

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*See editorial note at beginning and digested citations at close of this case, Lawyers' edition. [Ed.]

This question came under consideration in *White* v. *Howard*, 46 N. Y. 162, where Grover, *J.*, said: "To constitute conversion of real estate into personal, in the absence of an actual sale, it must be made the duty of and obligatory upon the parties to sell in any event; such conversion rests upon the principle that equity considers that as done which ought to have been done. A mere discretionary power of selling produces no such result." It was also held in that case that so far as the will made no valid disposition of the real estate it vested in the heirs.

While in the determination of the claims of heirs, devisees and legatees, arising under a will, the law will consider a conversion of real into personal property to have taken place for certain purposes in special cases, it never does so unless there has been a valid devise of the property in dispute in some form, to a specified beneficiary, and the purposes of the will require it to be done. It was said by *Judge* Earl, in *Wilder* v. *Ranney*, 95 N. Y. 12, that "There may have been a conversion of this real estate into personalty for many purposes, but not for all purposes. It physically remained real estate, taxable as such, controllable as such, and it could only be conveyed as such; and the rules of law generally applicable to real estate remained applicable to this."

In that case it was held that an equitable conversion of the real estate did not authorize its sale and conveyance by one executor without the co-operation of his coexecutor.

The decision of this case might also, we think, have been rested altogether upon the former determination of this court in *Chamberlain* v. *Chamberlain*, 43 N. Y. 425, which rendered the questions therein determined *stare decisis*. The validity of the trust attempted to be created by the provisions in question, having there come under consideration, it was held that in so far as the testator attempted by the residuary clause to give to the institutions therein named more than one half of his residuary estate, his effort was ineffectual, and that such portion of his estate as was not well disposed of by will descended to the testator's heirs at law and next of kin.

Under this decision and in accordance with the *remittitur* transmitted to it, judgment was on the 3d of October, 1871, entered in the supreme court, in the clerk's office of Cattaraugus County, by which it was determined "that the real estate of the said Benjamin Chamberlain, which he held or owned at the time of his decease, descended to his heirs at law, subject to the execution of such of the valid and effectual provisions of said last will and testament as relate to or affect the same; and exempt as aforesaid from any claim or right of dower on the part of the said Lucy Chamberlain; and that in case, after the payment of the debts of the testator and the execution of the valid and effectual provisions of said last will and testament, there shall remain any surplus from the personal estate of said testator, such surplus shall and is hereby declared and held to belong to and shall be distributed and divided between and among the next of kin of said testator as their rights shall appear, in the manner provided by law in cases of intestacy."

The action in which this judgment was rendered was brought by one Calvin J. Chamberlain, in behalf of himself and the other heirs at law and next of kin of Benjamin Chamberlain against the plaintiffs herein, the executors of the said Benjamin Chamberlain, and the principal legatees under such will, to obtain a construction of its provisions. A necessary result of this determination under the doctrine of *stare decisis* is to foreclose all parties from the right or privilege of reopening or discussing again the questions therein determined.

It was said by Denio, *J.*, in *Towle* v. *Forney*, 14 N. Y. 425, that "The cases, however, are extremely rare in which the determination of the highest appellate court can be properly departed from when the same legal question again arises before a court of the same government. If it shall be thought that an erroneous rule has been established by the adjudication relied on as a precedent, it is better that it should be changed by the Legislature by an Act which cannot retrospect than that the courts should overturn what they have themselves established, and thus disappoint all who have acted upon the rule which had been considered settled. If this is so where an abstract rule of law, determined in a prior case, is sought to be applied to new facts, the reason is stronger where, as in this case, a series of particular acts has been passed upon and held to produce a given legal result, and the same identical facts are again before the court between other parties. In such a case, there being no pretense of collusion and no reason to impute carelessness or inattention to the judges, the determination should be considered final and conclusive upon all persons in interest or who may become interested in the question, as well as upon the parties to the particular action." *Chase* v. *Chase*, 95 N. Y. 373.

This application of this doctrine to the case in hand seems particularly appropriate, inasmuch as a large estate has been administered by the present plaintiffs in accordance with the principles declared in the former decision, and the entire known property of the testator converted and distributed among the heirs at law, next of kin and legatees, by a judicial settlement before the surrogate, acquiesced in by all parties interested. As early as 1875 a large sum derived from the residuary estate had been equally distributed by judicial proceedings between the residuary legatees and the next of kin; and said legatees had executed and delivered to the plaintiffs proper vouchers acknowledging full satisfaction of their legacies.

But one question remains to be discussed, and that relates to the effect which the deed from the executors to Freeman has upon this action. It is clear that such a deed, being void under the statute, could have no affirmative effect in supporting the cause of action. While the statute in such a case authorizes the grantee in the deed to maintain an action in the name of his grantor to recover possession of the lands described from the occupant thereof, it is obvious that such deed adds nothing to the original right of the grantors. Code Civ. Proc. § 1501.

The intent of the statute was to enable the grantee to avail himself of a title which overreached the right of the adverse possessor and barred such possessor from making the objection that the plaintiff in the action had parted with his title. Such an action can be maintained independently of the consent of the grantor, and is supposed to be conducted by the grantee alone for his own benefit; but it must necessarily be sustained, if sustainable at all, upon the validity of the title originally existing in his grantor. It is brought in his name and upon the theory of an original right in him to the possession of the property. But it has been seen that the plaintiffs never acquired any title or right to the possession of the disputed premises. The title to the premises, originally existing in their testator, passed at the time of his death to his heirs; and from that time they alone had a right to the property and the exclusive right to maintain an action for its possession.

The power of sale given by the will to the executors could be made effectual only by its valid exercise, and this it is clear has never been effected. They stand, therefore, as plaintiffs in this case, precisely as though its exercise had never been attempted and they were asserting only the rights to the property which the will gave them. As we have before shown, they did not take the title by the will; and they have shown no other right to recover in this case.

The judgment should be affirmed.

All concur.

Thomas J. CHAMBERLAIN *et al.*, Exrs., etc., *Appts.*,
v.
Hascal L. TAYLOR *et al.*, *Respts.*

(Decided April 19, 1887.)

Messrs. **E. D. Northrup** and **William F. Cogswell,** for appellants.

Messrs. **John G. Hall** and **D. H. Bolles,** for respondents.

Ruger, *Ch. J.*, delivered the opinion of the court:

This case differs from the preceding case of *Chamberlain* v. *Taylor* only in respect to the execution of the power of sale contained in the will of Benjamin Chamberlain.

No proof was given in this case of any attempt to execute such power of sale; and the right of the plaintiffs to recover was rested wholly upon the right in the real estate conferred upon them by the will.

As we have seen in the preceding case, the title did not pass to them; and the judgment must, therefore, be affirmed.

All concur.

PEOPLE, *ex rel.* George W. OSTRANDER *et al.*, *Respts.*,
v.
Alfred C. CHAPIN, as Comptroller etc., *Appt.*

1. The **comptroller** can be **required by mandamus to hear** and determine an **application** made to him **by a purchaser at a state tax sale** of real estate, **to cancel** the **sale** and refund the purchase money, where the purchaser alleges that the tax was invalid and presents proofs in support of his allegation. Laws of 1855, chap. 427.
2. The **comptroller's power** to cancel such sales is not restricted to cases where the invalidity appears on the face of the proceedings, but **may be exercised** in cases **when** the **invalidity depends upon extrinsic facts** to be established by evidence before him offered by the the purchaser, either before or after the deed.
3. Where a **power is given by statute,** everything necessary to make it effectual, or requisite to attain its end, is implied.
4. The **power to cancel implies power to receive evidence** of the defect, and to act upon such evidence. The comptroller has power to receive affidavits and to administer oaths to witnesses produced before him, on such inquiry.

(Decided April 19, 1887.)

APPEAL from an order of the Supreme Court at General Term in the Third Department, affirming an order of the Albany Special Term granting a peremptory writ of *mandamus* compelling the Comptroller to hear and determine an application to set aside a state tax sale. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **Denis O'Brien,** *Atty-Gen.*, for appellant:

It is submitted that it was the intention of the Legislature only to clothe the comptroller with power to correct any errors made by himself as an officer of the State, or any error that appears on the face of the record, and that he cannot be compelled to act as a court of inquiry at the suggestion of every purchaser at a tax sale.

Section 848 of the Code of Civil Procedure gives the comptroller no judicial powers in the case in hand.

People v. *Chapin*, 2 Cent. Rep. 467; *Mayor* v. *Davenport*, 92 N. Y. 612; *Cagwin* v. *Hancock*, 84 N.Y. 537.

If the Comptroller had any discretion to exercise upon the question of entertaining the application of the relators herein, then the court at special term had no right to sit in judgment upon his exercise thereof, or to coerce his action in that behalf.

People, ex rel. Demorest, v. *Fairchild,* 67 N.Y. 334.

The question in this case is not simply whether the Comptroller had the right or power to receive an affidavit or to examine a witness who voluntarily appears before him, but whether, "coupled with his lack of power to compel the attendance of witnesses" or to protect himself against imposition from falsehood and perjury, he should be compelled, by *mandamus,* to entertain such a proceeding, and to receive such evidence. It is submitted that his discretion in this particular is no more the subject of review by the courts than his action would be in case he had entertained the application, heard the evidence, and then denied it. He did hear the application, but refused to receive or be bound by the evidence offered.

People, ex rel. Hammond, v. *Leonard,* 74 N.Y. 443.

But the refusal of the Comptroller to entertain the application of the relators, and to take the action requested of him, may be upheld upon any ground that now appears, which could not have been remedied if the point had been raised by the comptroller upon the application.

Allard v. *Greasert,* 61 N.Y. 4.

The papers presented to the Comptroller show that the sale sought to be set aside took place in 1871 and the irregularity complained of took place between 1861 and 1865. The Comptroller should not be compelled to entertain such a proceeding as this after such an unreasonable delay.

People, ex rel. Millard, v. *Chapin,* 5 Cent. Rep. 916; *People. Sheridan,* v. *French,* 31 Hun, 618.

Mr. **Arthur L. Andrews,** for respondents:

A *mandamus* is the proper remedy.

The power to make cancellation of invalid tax sales is conferred upon the Comptroller by the statute.

Laws 1855, chap. 427, §§ 83, 85.

Any person interested in a power conferred by statute may apply for a *mandamus* to compel an exercise of the power.

People, Ward, v. *Asten,* 49 How. Pr. 405; affirmed in 62 N.Y. 623; *People, Boltzer,* v. *Daley,* 37 Hun, 461.

The Comptroller is authorized to take such proofs of alleged irregularities as will enable him to determine whether the sale is ineffectual to give title.

It is urged, on the part of the Comptroller, that he has no power to summon witnesses, nor are they liable to punishment in case of false testimony.

Whenever a power is given by statute, everything necessary to make it effectual or requisite to attain the end is implied.

1 Kent, Com. 464; *Stief* v. *Hart,* 1 N.Y. 20.

It is respectfully submitted that the views of the respondents are sustained by the decision of this court in *Clark* v. *Davenport,* 95 N. Y. 477.

Rapallo, *J.,* delivered the opinion of the court:

The question presented by this appeal is whether the Comptroller can be required by *mandamus* to hear and determine an application made to him by a purchaser at a state tax sale of real estate, to cancel the sale and refund the purchase money, where the purchaser alleges that the tax was invalid, and presents proofs in support of his allegation.

Chapter 427 of the Laws of 1855, § 83, provides as follows: "Whenever the comptroller shall discover, prior to the conveyance of any lands sold for taxes, that the sale was *for any cause whatever* invalid or ineffectual to give title to the land sold, the lands so improperly sold *shall not be conveyed;* but the comptroller *shall cancel* the sale, and *forthwith* cause the purchase money and interest thereon to be refunded, out of the state treasury, to the purchaser, his representatives or assigns."

Section 85 provides that if the discovery that the sale was invalid shall not be made until after the conveyance, it shall be the duty of the comptroller *on receiving evidence thereof* to cancel and refund, etc., and to recharge the county, from which the tax was returned, with the amount refunded.

The tax sale in this case was made by the Comptroller in 1871, for the unpaid taxes of the years 1861 to 1865, inclusive, upon certain lands in the Town of Wells in Hamilton County. The purchaser paid the purchase money and received the usual certificates of sale, and afterwards assigned them to the relators. No deed appears to have been given by the Comptroller conveying the land sold.

The relators claim that they have found that the board of supervisors of the County of Hamilton did not in any of the years for the taxes of which the lands were sold, estimate and set down in the assessment rolls, the sums to be paid as a tax upon the lands, as required by 1 R. S. 395, § 33; and this omission, the relators allege, rendered the sale invalid, and ineffectual to give title to the lands sold.

Or on about the 8th of December, 1885, they made application, by petition in writing, to the Comptroller for a cancellation of the sales, and the refunding of the purchase money. Their petition set forth the sale and the issuing of the certificates, and alleged that the supervisors of the several towns of Hamilton County, and Town of Wells, failed to extend the tax on the several assessment rolls, as a board of supervisors, but delegated to each individual member to do the same and did not subsequently ratify said extension. The petition was accompanied with the certificates of the sales and the assignments thereof.

In August, 1886, the relators, through their counsel, requested the Comptroller to take action on their application, and produced to him the affidavit of the clerk of the board of supervisors of Hamilton County, who was in office during the year 1861 to 1865, both inclusive, and also the affidavit of one of the members of said board, substantiating the allegations of their petition; and at the same time offered to produce satisfactory evidence of the defect alleged, from witnesses who knew the facts.

On the 20th of August, 1886, the Comptroller sent to the attorneys for the relators the following communication refusing their request.

"State of New York,
Comptroller's Office,
Albany, August 20, 1886.

In the Matter of the Request to Grant Application 223 on the Production of Satisfactory Proof of Irregularities not Patent on the Face of the Records.

Stedman, Thompson & Andrews,
Albany, N. Y.

Gentlemen: While I do not question the force of the authorities cited by the applicant in making this special request, and while I have no reason to doubt his ability to produce before me evidence of the kind and force that would be required upon a trial in court, it, nevertheless, seems to me that his request is, practically, that I should assume judicial powers and functions not conferred upon me. The so-called common-law evidence which the applicant offers to produce before me, would not, after all, be evidence in any technical sense. It would be such, superficially; but it would not and could not be invested with the attributes, or expose the witness giving it to the penalties, accompanying the giving of true or false testimony under legal oath before a duly qualified tribunal. The applicant's request is, therefore, denied.

Respectfully Yours,
Alfred C. Chapin, Comptroller."

The relators thereupon, on affidavits stating the foregoing facts, made a motion in the supreme court at special term for a writ of *mandamus* commanding the Comptroller to proceed to hear, act upon and determine the application made by the relators, and to receive such evidence, to be offered by the applicants, as would be competent in a court of justice, or such proof as is authorized by statute.

In opposition to the motion the Comptroller presented his own affidavit, setting forth his letter of August 20, and alleging that, in his belief, the statutes of this State did not clothe him with the power to examine, in a judicial capacity, evidence *aliunde* the record, for the reasons set forth in said letter.

The position taken by the Comptroller thus appears to have been that the Act of 1855, authorizing him to cancel tax sales and cause the purchase money to be refunded to the purchaser, or his assigns (Laws of 1855, chap. 427, § 83), applied only to cases where the invalidity of the sale appeared upon the face of the proceedings, and that he had no power to cancel a sale where the invalidity did not thus appear, but had to be established by extrinsic evidence.

The motion for a *mandamus* was granted by the court at special term, and the order was affirmed at general term; and the Comptroller now appeals to this court.

We are of opinion that the powers of the Comptroller, under the Statute of 1855, are not so restricted as he contends. The statute, so far from providing merely that he may cancel the sale on discovering that it is invalid for any cause appearing on the face of the proceedings, enacts that when he discovers that it is *for any cause whatever* invalid or *ineffectual to give title to the lands sold*, he *shall* cancel the sale and *forthwith* cause the purchase money, with interest, to be refunded to the purchaser.

This statute was evidently intended to vest the Comptroller with power to make restitution to purchasers at tax sales, of the purchase money paid by them, whenever it should be found that the sale was ineffectual, for any reason, to enable them to obtain title to the land which they had bought and paid for. This was just to the purchasers, who were entitled under section 63, of the same Act of 1855, to a title in fee, but who at the time of the passage of the Act of 1855 would have had no legal remedy to recover back their money from the State in case their title failed. It is not certain that they would have any remedy now unless one is afforded by the Act of 1855. The remedial feature of that Act is also supported by consideration of sound policy, as it was calculated to encourage persons to bid at tax sales, by the assurance that they would either get title to the land they bought, or a return of their money, and were not likely to lose both. It was beneficial to the land owner, because it tended to make his land bring a better price at the sale, and also to the State, as it tended to enable it to collect its unpaid taxes, by encouraging purchases at tax sales.

To restrict the Comptroller in this power of canceling sales, to cases where the invalidity appears upon the face of the proceedings, would not only do violence to the language of the statute, but would frustrate its intent. The intent was to protect the purchaser in case the sale was found to be ineffectual to give him title. This protection would be very inadequate if it left him to take the risk of all the many other defects which might exist in a tax title. As to those, the purchaser would have had no remedy except by petitioning the Legislature in case his title proved invalid, for in 1855 there was no other mode of obtaining redress from the State; and it is at least questionable whether the subsequent statutes, establishing the board of audit and the board of claims, would afford a remedy.

Section 85 of the same Act shows very clearly that by the words "for any cause whatever" the intention was to provide for cases where the invalidity depended upon extrinsic facts, to be established by evidence, for that section provides for the cancellation of the invalid sale after the Comptroller's deed has been executed, and declares it to be the duty of the Comptroller *upon receiving evidence* that the sale was invalid, to cancel it and refund the purchase money. It cannot be conceived that the Legislature intended to draw a distinction between the two cases, and to provide that where a deed had been executed the Comptroller should receive evidence, and that where no deed had been executed he was not empowered to receive evidence of the invalidity of the sale. Taking the two sections together it seems plain that it was intended that in both cases the Comptroller should receive evidence, and that it was implied that the purchaser, who was the party interested, should have the right to offer such evidence.

The Act of 1873, chap. 120 (referred to in the opinion of Peckham, *J.*, at special term), is confirmatory of this view. That Act provided for setting aside cancellations whenever they have been obtained by fraud, misrepresentation or suppression of any material fact, or by a mistake of fact.

This statute is entirely inconsistent with the theory that the Comptroller was limited in his power of cancellation to defects appearing on the face of the proceedings and could not consider extrinsic facts. The Comptroller objects that the affidavits produced to him, and the testimony of witnesses offered on the part of the relators, were not evidence in a technical sense, because he was not vested with judicial powers and functions, and such affidavits and testimony would not expose the witnesses to the penalties accompanying the giving of false testimony under legal oath before a duly qualified tribunal. This is one of the grounds upon which he bases his refusal to consider or act upon the proofs offered.

We think the Comptroller had legal authority to receive and act upon the proofs offered, and that they did constitute legal evidence. He was clearly authorized to decide the question of the validity or invalidity of the tax sales, at least as between the State and the purchaser, and for the purpose of determining whether the purchaser was entitled to have the purchase money paid by him refunded out of the state treasury. This was in the nature of a judicial function conferred upon him by law. It is a general principle that where a power is given by statute, everything necessary to make it effectual, or requisite to attain its end, is implied. 1 Kent, Com. 464; *Stief* v. *Hart*, 1 N. Y. 20, 30.

To enable him to decide whether or not the tax sales were invalid, for any cause whatever, and ineffectual to give title, it was necessary that he should receive evidence of the facts showing their invalidity. The power to cancel therefore implies power to take proof of the defect. Indeed, in section 85 it is in terms made the duty of the comptroller to receive evidence that the sales were invalid and to act upon such evidence. That section says that "*It shall be the duty of the Comptroller, on receiving evidence thereof, to cancel the sale*," etc.

If witnesses should be produced before him he is expressly authorized by law to swear them; 1 R. S. 185, § 1; and all the power required to enable him to conduct the investigation is conferred upon him by section 823 of the Code of Civil Procedure, which provides, among other things, that "Where an *officer*, board or committee, to whom, or to which, application is made to do an act in an official capacity, requires information or proof *to enable him or it to decide upon the propriety of doing the act*, he or it may receive an affidavit for that purpose;" and the same section provides that whenever an officer, etc., is authorized to receive an affidavit he may swear the deponent.

The Comptroller was thus vested, at the time the application was made to him by the relators, with legal authority not only to receive the affidavits tendered, but also to administer oaths to the witnesses who might be produced before him; and section 96 of the Penal Code is broad enough in its provisions to subject a witness or deponent to the pains and penalties of perjury for swearing falsely on such a hearing or inquiry by the Comptroller.

The learned attorney-general, in support of the Comptroller's appeal, takes the further point that the statute was intended to provide only for cases where the invalidity results from some defect in the proceedings of the Comptroller himself, in respect to the sale. We can find nothing in the statute to support this theory. The provision is that if, *for any cause whatever*, the *sale* should be discovered to have been *invalid*, or *ineffectual to give title*, the purchase money shall be returned and the sale canceled. If the tax itself, which was the foundation of the power to sell, is found to have been void, the sale, however regularly conducted, is ineffectual to give title to the land sold. The failure of title is the essential ground upon which restitution is to be made. The argument that the only invalidity which the Comptroller can consider is a defect in his own proceedings is conclusively answered by section 84 of the same Act, which provides that if the error originated *with the town or county officers*, the amount refunded shall be charged to the county and reassessed by the board of supervisors and paid to the state treasurer.

Some criticism is made upon the language of section 83, viz.: that if the Comptroller shall *discover* that the sale was invalid, etc., he shall cancel it, etc. The statute could not have been intended to be confined to cases where the Comptroller, by his own unaided researches and without suggestion from anyone else, makes the discovery. We think that the meaning was that where he shall find, or it shall be made apparent to him, that the defect exists, he shall act. When the purchaser satisfies him by evidence that he can get no title under the sale, we think that it is his duty to discover it and to cause the purchase money to be refunded. Section 85 expressly provides that "on receiving evidence" of the invalidity he shall act.

We are also of opinion that *mandamus* is the proper remedy to set the Comptroller in motion, where he refuses to entertain or act upon an application of this description. It is not claimed that he can be directed by that writ how to decide the question, but only to receive the evidence and exercise his judgment upon it. Being vested by the statute with power to decide, the purchaser (whose money is in the state treasury), having a legal interest in having his right to a return of it determined, is entitled to apply for a *mandamus* to compel the exercise of the power.

Besides, the statute is in terms mandatory, and declares that on discovery of the defect the Comptroller *shall cancel* the sale and cause the purchase money to be *forthwith* refunded.

The relators presented to the Comptroller *prima facie* evidence which, if true, showed that the taxes and the sales were invalid and that they were entitled to be refunded the purchase money; *Bellinger* v. *Gray*, 51 N. Y. 610, 617; *People* v. *Hagadorn*, 104 N. Y. 6 Cent. Rep. 658; and they offered to produce further satisfactory evidence of the facts alleged.

We think it was the duty of the Comptroller to hear and decide the case, and that the *mandamus* was properly granted.

The order should be affirmed.

All concur.

PEOPLE, *ex rel.* Henry MORGENTHAU, *Appt.*,

v.

Artemas S. CADY, Clerk of Arrears, *Respt.*

1. The **words "belonging to the same owner,"** in Laws 1843, chap. 230, art. 3, § 8, providing that, **in advertising lots to be sold for** the nonpayment of **taxes in New York City,** it shall be the duty of the comptroller to advertise all lots lying contiguous to each other and belonging to the same owner, in one parcel, unless otherwise requested by such owner,—do not **mean** simply the technical owner of the title, but **the person in whose name** as owner or occupant the **lots are assessed.**

2. A sale of land for a term of years for nonpayment of taxes in New York City is not rendered void by the fact that the **notice to redeem required** the owner to pay the tax, with **interest from** the **date of sale, whereas** the **purchaser did not pay** his money upon such sale **until** some time **thereafter.**

3. A **notice** of sale, etc., required by section 20 of article 3 of said Act, made out in July, 1868, to the person appearing as assessed on the assessor's book for 1867, must be taken to be a notice to the then **last assessed owner** of the premises.

4. Section 23 of article 3 of said Act requires that the **affidavit of service** of said notice shall be **made by a person "residing in the City of New York;"** the affidavit in this case had the venue of "City and County of New York," and continued, "I, ——— ———, of the City of New York, do solemnly swear," etc. *Held,* that the intendment was that the person making the affidavit was a resident of the city; that the statute does not require the fact of residence to be stated in the affidavit; and that so long as the fact exists it would seem sufficient.

5. An **affidavit** stating that said **notice was served** by "leaving the same with a member of the family of the person last assessed as owner, at his place of residence, No. 68 Fifth Avenue," *held,* a **sufficient** compliance with section 21 of article 3 of said Act.

6. A **commissioner of deeds** is authorized to take said **affidavit of service,** and where the venue of the affidavit is stated as "City and County of New York" and the certificate thereto is signed by a person as "Commissioner of Deeds," the presumption is that the person so signing is a commissioner of deeds within the place stated in the venue.

(Decided April 19, 1887.)

APPEAL from an order of the General Term of the Superior Court of New York City, affirming an order of the Special Term denying a motion for a peremptory writ of *mandamus* to compel defendant to accept a payment for taxes and interest. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **Alexander B. Johnson,** for appellant:

Relator has a lawful right to pay this tax unless the sale was valid, and the notice necessary to cut off the right of redemption was served as required by law.

Desty, Tax. p. 890; *Bensel* v. *Gray*, 12 Jones & S. 375; *Clementi* v. *Jackson*, 92 N. Y. 594; *Townshend* v. *Cady*, 19 Jones & S. 318; *Townshend* v. *Cady*, 18 Jones & S. 399; *Hilton* v. *Bender*, 69 N. Y. 81; *Miner* v. *Beekman*, 50 N. Y. 343.

The lease given on such sale furnishes no evidence *per se* of the regularity of any of the proceedings, either prior to the sale or subsequent to it.

Striker v. *Kelly*, 7 Hill, 9; *Doughty* v. *Hope*, 1 N. Y. 79; *Vogler* v. *Walsh*, 22 Hun, 140.

The sale was invalid because the two lots were contiguous to each other and were advertised and sold separately, without the request of the owner.

Laws 1873, chap. 230, art. 3 § 8.

The owner is aggrieved by the enhanced expense thereby created.

The case of *Cunningham* v. *Cassidy*, 17 N. Y. 276, has no application.

The alleged sale herein was in a proceeding in derogation of the common law and the effect of it would be to devest an owner of property without notice and for a trifling sum of money. A proceeding in derogation of common law must be strictly pursued.

Cooley, Tax. p. 324.

The notice to redeem required redemption by paying interest from date of sale, to wit: January 20, 1866; whereas, the purchaser paid his money February 12, 1866, and the notice was therefore wholly void.

Haddock v. *Cady*, Daily Reg. April 7, 1886.

The taxes were void and the sales based on them were void; the one lot in 1860 was assessed to A. Carrigan and the other to Mrs. Lyons; at such times Mrs. Gray was the owner.

Section 5, chapter 410, Laws of 1867, did not apply to any assessment already made.

1 R. S. 389; *Whitney* v. *Thomas*, 23 N. Y. 281; *Paillet* v. *Youngs*, 4 Sandf. 60; *Sanders* v. *Leavey*, 34 Barb. 75.

The right of relator to pay this tax was conceded at the special term unless the notice was filed as required by sections 20–23, *et seq.*

Laws 1843, chap. 230, art. 3; *Donahue* v. *O'Conor*, 13 Jones & S. 278.

There must be a substantial compliance with the law.

Newell v. *Wheeler*, 48 N. Y. 486; *Hilton* v. *Bender*, 69 N. Y. 79.

The notices filed and served are wholly defective, are not in compliance with the statute, and do not operate to cut off the owner's right to redeem.

The Act of 1843 only required that the notice should be served upon the last assessed owner; this was imperative in every case.

Laws 1843, chap. 230, art. 3, § 20.

The intention of the Law of 1843 was undoubtedly to give the actual owner notice. Because at the period of its enactment and up to 1867, the tax would be void if not assessed to the actual owner.

1 R. S. 389; *Whitney* v. *Thomas*, 23 N. Y. 281; *Paillet* v. *Youngs*, 4 Sandf. 60; *Gilbert* v. *Havemeyer*, 2 Sandf. 506; *Sanders* v. *Leavey*, 38 Barb. 75; *Newell* v. *Wheeler*, 48 N. Y. 486.

In 1867, prior to the assessment for the year previous to the service of these notices, this requirement was dispensed with so far as New York City was concerned.

Laws 1867, chap. 410, § 5.

The next change was made by chapter 381, Laws of 1871, requiring service of such notice in all cases, upon the actual owner.

By this change of the law the year prior to the notice of these services, the policy of the Act of 1843 was unintentionally defeated.

Relator therefore claims the strictest construction of these statutes in his favor.

These notices show upon their face that they were not served upon the last assessed owner.

The learned justice at special term erred in his conclusion that the burden of proof was upon the owner to show that there was no service upon the last assessed owner; because the Act of 1843 throws that burden upon the purchaser.

To perfect his title he must preserve his notice and file it with proof of service in order to devest the owner's title. Even the certificate of the comptroller is not conclusive upon this point.

Jackson v. *Esty*, 7 Wend. 148; *Bush* v. *Davison*, 16 Wend. 553; *Doughty* v. *Hope*, 1 N. Y. 79.

A. Carrigan is notified that the lot was taxed in his name as owner on the assessors' book of the twelfth ward for the year 1867.

This notice is dated July 25, 1868.

Upon May 1, 1868, the assessment for the year 1868 was completed and the notice should have been directed to and served upon the person who was assessed as owner in the year 1868.

Re Schell, 76 N. Y. 432; *Re Scholle*, 14 Hun, 14.

The affidavit of Kingsland that he served the notice is defective, in that it does not show that Kingsland resided in New York. The description "of New York" does not necessarily show that he resided there; he may have done business there, and described himself in that manner, while he, in fact, resided elsewhere.

The affidavit is defective in that it does not show where service was made. It says at "68 Fifth Avenue." The justice at special term says the burden of proof is upon the relator to show that "68 Fifth Avenue" is not in New York.

The relator could not show that it was not in New York any more than he could show it was not in Brooklyn, Philadelphia or any other large city.

These presumptions cannot be indulged in cases where, by adverse proceedings, the owner of land is devested of his title for a trivial sum.

The purchaser must see to it that the notice of proof of service complies strictly with the law.

Hilton v. *Bender*, 69 N. Y. 79; *Cruger* v. *Dougherty*, 43 N. Y. 107.

The affidavits of service were not sworn to before any officer authorized to administer oaths in such a case, and therefore are a nullity on their face.

A commissioner of deeds is a creature of the statute and his duties and powers are definitely prescribed.

The Revised Statutes provide as follows:

Section 41. Commissioners of deeds appointed for any county or city have power: 1, to take the proof and acknowledgment of conveyance and the discharge of mortgages; 2, to take the acknowledgment of bail in any action in the supreme court and in the court of common pleas in the county for which they were appointed, or in the mayor's court of the city for which they are appointed, and in the City and County of New York, in any action in the superior court of law therein; 3, to take the acknowledgment of satisfaction of judgments in the court of common pleas of the county for which they are appointed, or mayor's court of the city for which they are appointed, or in the supreme court, and to perform such other duties as are or may be enjoined by law.

Section 49 provides: "Whenever any oath or affidavit is or may be required or authorized by law in any cause, matter or proceeding (except oaths to jurors and witnesses in the trial of a cause, oaths of office and such other oaths as are required by law to be taken before particular officers), the same may be taken before any judge in any court of record, any circuit judge, supreme court commissioner, commissioner of deeds, or clerk of any court of record, and when certified by any such officer to have been taken before him, may be read and used in any court of law or equity of record, or not of record, within this State, and before any officer, judicial, executive or administrative, before whom any such cause, matter or proceeding may be pending."

2 Edm. ed. pp. 293, 294; chap. 3, pt. 3, title 2.

Section 49 applies only to matters pending before the courts. Therefore it follows that a commissioner of deeds was not authorized to administer an affidavit such as appears in this case.

The affiant could not be convicted of perjury if the statements made by him were false, and such an instrument stands on the same footing as a foreign passport.

Stanton v. *Ellis*, 16 Barb. 319; *Lane* v. *Morse*, 6 How. Pr. 394.

Mr. **D. J. Dean**, for respondent:

The sale for taxes was not invalid.

The right to avoid the sale for taxes was undoubtedly lost by aquiescence and unexplained neglect.

Cunningham v. *Cassidy*, 17 N. Y. 276; followed in 9 Daly, 22.

The very statute on which the relator relies, in his application for *mandamus*, expressly provided that the lease given by the city to the purchaser at a tax sale should be "conclusive evidence that the sale was regular, according to the provisions" of the Act.

Laws 1843, chap. 230, art. 3, § 2.

Peckham, *J.*, delivered the opinion of the court:

The relator herein asks the court to compel the defendant by *mandamus* to accept certain moneys sufficient in amount, as he alleges, to pay the taxes and interest on two certain lots in the City of New York for the year 1860, and to give receipted bills therefor. The defendant is Clerk of Arrears in the city and has refused to give such receipt, on the ground, among others, that there are no arrears of taxes against the premises for the year spoken of, because they have been sold for such arrears, and the sale took place January 20, 1866, and on the 19th of January, 1869, a lease thereof was granted for 1,000 years for each lot.

Several different grounds are stated in relator's affidavit, upon which this application is based, all of which have been held untenable by the special and general terms; and from this adverse determination he has appealed here.

The more material grounds will be noticed in their order.

First. It was claimed that the sale was illegal and conveyed no title to the purchaser because of the alleged violation of the eighth section of the third article of chapter 230 of the Laws of 1843, relating to the collection of taxes in the City of New York.

It seems that the premises in question were known in 1860 as lots 13 and 14, block 1272, of the twelfth ward of the city, and were contiguous lots. Lot 13 was in 1860 assessed to A. Carrigan, and the other lot was assessed to Mrs. Lyons, and the taxes so assessed remained unpaid until January 20, 1866, when each lot was sold for such arrears.

The relator alleges that these lots belonged to the same owners (Rose Hannah Gray and Florence Kuberly) from August 1, 1859, to April 4, 1866; that they were contiguous to each other, and that the city comptroller advertised said lots for sale in separate parcels without the consent or request of the owner.

The section of the statute in question reads as follows: "Section 8. In advertising houses and lots, improved or unimproved lands, to be sold for the nonpayment of taxes, it shall be the duty of the comptroller to advertise all the houses and lots or other lands lying contiguous to each other and belonging to the same owner, in one parcel, unless otherwise requested by such owner."

We are of the opinion that the words "belonging to the same owner" in the above section do not mean simply the technical owner of the title, but as therein used they mean the person in whose name as owner or occupant the lots are assessed. The assessment rolls are the only record the comptroller has before him from which to decide who is the owner, and in cases where the land was assessed to the occupant (as in some cases it might be, 1 R. S. 389, § 2; *Whitney* v. *Thomas*, 23 N. Y. 281, 285) the comptroller would be without any evidence of ownership.

It cannot be supposed that under such circumstances the statute contemplated a search by the comptroller through the register's office, to find out whether the lands which were assessed to different occupants but which were contiguous were not owned by the same owner, for the purpose of deciding whether to advertise them in one parcel or not. For this purpose the person assessed must be assumed to be the owner.

If contiguous lots were assessed to the same occupants, it would be reasonable to say that the statute contemplated an advertisement of both lots in one parcel; while if they were assessed to different occupants, it would justify a separate advertisement by the comptroller, even though it should subsequently turn out that the lots belonged to the same owner, unless some proof of ownership should have been given before advertising, and some demand should have been made to advertise in one parcel.

This construction gives to the statute a reasonable meaning, one easily capable of being carried out, and with a fair presumption that the object of the provision would be attained. That object we think was to prevent an unnecessary accumulation of costs of advertising, where the lots were contiguous, and being assessed to the same person one advertisement would answer every purpose. Within this construction the separate advertisement of these contiguous lots was proper. We do not mean, by putting our decision on this ground, to say that the statute is not merely directory on this point. We leave that question open.

Second. Another ground upon which the sale is alleged to be void is set up in the following language: "Deponent further says that deponent believes that said Cady based his refusal to accept such money on a pretended sale for nonpayment of such tax; and deponent alleges that such sale, if had, was wholly void * * * 2d. Because the comptroller, by his notice to redeem, required the owner to pay such tax with interest from date of sale, to wit: January 20, 1866; whereas, the purchaser did not pay his money upon such sale until the 12th day of February, 1866."

No copy of this notice to redeem is set forth in the moving papers, and its contents appear only as above stated. Under section 1 of article 3, of this chapter the comptroller proceeds to advertise for sale and to sell lands upon which taxes have been unpaid for a certain time. The sale takes place at the time named in the advertisement, unless the taxes are paid in the meantime, and the lands are sold for the lowest term of years which a person will bid and pay the taxes due thereon. A certificate of sale is to be given, describing the lands purchased, stating the term of years for which they were sold, the sum paid, and the time when the purchaser will be entitled to a lease.

There can be no doubt, as it seems to us, that the term of years for which the bid is made commences to run from the time of the bid, which is the day of sale. The time when the purchaser is to be entitled to his lease should also be reckoned from the date of the sale. As these two periods commence running from that date, we think the certificate of sale should also bear the same date. The certificate is simply a written acknowledgment or proof that the sale itself has taken place. It is the sale which is the foundation for all subsequent proceedings; and upon such sale is based the right to convey the title to the purchaser when the time expires which will entitle him to the conveyance for the term he bid at such sale. This formal written certificate may perhaps as matter of fact be actually made out and delivered some time after the sale; but it is executed and takes effect by virtue of the sale and relates back to that time, and in contemplation of law is then given and should be thus dated.

It is further provided, by the second section of that article, that six months before the expiration of two years after the sale the comptroller again advertises that unless the land be redeemed by a certain day it will be conveyed to the purchaser.

If the person claiming title to the land shall not within two years from the *date of the certificate* pay the proper amount to the comptroller he loses his land. It is thus seen that, the date of the sale and the date of the certificate of sale being properly coincident, there is nothing material in the fact that the sale in this case was on the 20th of January, while the purchaser did not pay his money until the 12th of February following. The time of the payment of the purchase money does not determine the date of the certificate; and as there is no allegation as to what that date was, it will be presumed here that it was the proper date, viz.: the date of the day of sale.

We are aware that it has been argued that the certificate of sale should be dated as of the day when issued, if not actually issued on the day of sale, for it is then, as it is said, that the purchaser pays his money; otherwise the owner in redeeming has to pay interest to the purchaser at the rate of 14 per cent between the day of sale and the day when the purchaser pays the amount of his bid, while during that time the money has been in the pocket of the purchaser. This may be a possible result in practice, if the comptroller does not insist (as he may) upon immediate payment of the amount of his bid by the purchaser.

But this interest is imposed chiefly by way of penalty upon the delinquent taxpayer; and the fact that, as practically conducted, the sales by the comptroller may sometimes result in the payment to the purchaser of interest for a short time upon moneys not yet advanced by him, is not of much weight in that view of the law. It is certainly of not enough weight to cause us to vary from a construction of the statute which we think reasonable and proper, where the result of the opposite construction might be to avoid the bar of the statute in all cases where the day of sale and the date of the certificate were different, and the notice to redeem called for payment of interest from the earlier date.

Third. The relator claims that the notices which section 20* of the third article of the same statute requires should be served by or in behalf of the purchaser (after he has received his conveyance) upon the person last assessed as owner, were not served on such person; and the fact as he claims appears upon the face of the notice.

As to lot 13, one notice is directed to the Asylum for Lunatics as the occupant at that time (July 26, 1868), and another to "A. Carrigan, last assessed owner of said premises;" and the latter notice, bearing the same date as the other, states that the lot (13) was taxed in that name on the assessors' book for the year 1867. The same facts with different names apply to lot 14. The criticism made is that the assessors' book for 1868 was at that time, July 26, 1868, the last book, and hence the notice was addressed to one appearing on a former but not necessarily the last roll, and that therefore it did not appear that the notice was to the person last assessed as owner.

We have no doubt that in July, 1868, the person assessed in 1867 was the last assessed owner. The assessments against persons and property in New York City at that time were commenced on the first Monday of September in each year (Laws 1859, chap. 302, § 7); and these assessments were put in books called "The Annual Record of the Assessed Valuation of Real and Personal Estate:" and these books were open for examination and correction from the second Monday of January until the first day of May in each year, and after that the books were closed to enable assessment rolls to be made. The rolls are thus taken from these record books which contain the assessments made since the prior September and which were concluded by the second Monday of January and were then open for revision; and hence, the assessment rolls, existing in July, 1868, were based upon the assessments made from September, 1867, which were the last assessments then in existence, and the notice in July, 1868, to the person appearing as assessed on the assessors' book for 1867, must be taken to be a notice to the then last assessed owner of the premises.

Fourth. It is further claimed that it does not appear that the person making the affidavit of service of the notice provided for in said section 20, of article 3, was a person residing in the City of New York as is required by the twenty-third section of the same article. The affidavit has the venue of "City and County of New York" and continues, "I, Phineas C. Kingsland, of the City of New York, do solemnly swear," etc.

I think here is a fair intendment to be made that the person thus swearing was a resident of the city.

The fact that the affidavit of a person residing in the city was made necessary by the statute may be properly considered with reference to the meaning of the expression "of the City of New York" contained in the affidavit. The fact of residence must exist; but we find nothing in the statute expressly requiring such fact to be stated in the affidavit; so long as it exists it would seem sufficient, and certainly so when there is no hint that he was not a resident of the city.

Fifth. Another ground taken is that the affidavit fails to state where the service was made, the statute requiring it to be served personally or by leaving it at the dwelling house of the occupant and person last assessed as owner, with any person of suitable age, etc. Sec. 21, same Act.

The affidavit stated that the notice was served by leaving the same with a member of the family of the person last assessed as owner, at his place of residence, No. 68 Fifth Avenue.

This is sufficient. The statute does not make it necessary that the city of residence should be stated. Leaving the same at the dwelling house of the occupant is the requirement of the statute, when the service is not made personally; and an affidavit showing the service upon a member of the occupant's family at his place of residence, naming the street, is surely sufficient.

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*This section is as follows;

"Section 20. Whenever any lands or tenements sold for taxes in the City of New York, and conveyed in the manner provided by law, shall, at the time of conveyance, be in the actual occupancy of any person, the grantee to whom the same shall have been conveyed, or the person claiming under him, shall serve a written notice on the person occupying such lands or tenements; and in all cases on the person last assessed as owner, whether the property be in occupancy or not, provided such person has a residence, or actually resides, in the City of New York, stating in substance the sale and conveyance, the person to whom made, and the amount of consideration money mentioned in the conveyance, with the addition of 42 per cent on such amount as the said lands or tenements were struck off for at the time of the sale, and the further addition of the sum paid for the lease and advertisements; and stating also that unless such consideration money, and the said 42 per cent, together with the sum paid for the lease and advertisement, shall be paid to the said comptroller for the benefit of the grantee, within six months after service of such notice, that the said conveyance would become absolute, and the occupant and all others interested in the lands or tenements be barred from all right and title thereto during the term of years for which such lands or tenements shall have been conveyed." [Ed.]

If the requirements were that the service was to be made in New York we think the inference that the service was there made is a fair one, considering that the venue of the affidavit was in that city, and that the taxed premises were there situate, and that service was to be made upon the owner last assessed and upon the occupant.

Sixth. It is also claimed that the affidavit was not sworn to before any officer authorized to administer oaths. It was sworn to before a commissioner of deeds of New York City. The Revised Statutes provided that an oath or affidavit when required in any cause, matter or proceeding, might be taken, among others, before a commissioner of deeds and when certified by him to have been taken before him might be read in any court, or before any officer, judicial, administrative or executive, before whom any such cause, matter or proceeding might be pending. 2 R. S. 284, § 49.

This gave ample authority to the commissioner. The affidavit purports by its venue to have been taken in the City and County of New York, and it is signed by a person as commissioner of deeds. Upon an affidavit with such a venue the presumption is that the person signing himself commissioner of deeds is such within the place stated as the venue.

We have thus gone over the principal grounds relied upon in the brief submitted by the counsel for the appellant. We have also examined all the others. We think there was no error in the decision of the case; and,

The order of the General Term of the Superior Court of the City of New York is, therefore, affirmed, with costs.

All concur.

Henry K. S. WILLIAMS, *Respt.*,

v.

MAYOR, etc., OF NEW YORK *et al.*, *Appts.*

1. When the **State,** by the Act of 1813, **granted to the City of New York** wharf rights which might extend into the deep water covering its own land, it granted **property in the land covered by** the **wharf** and occupied by it, **and an easement for approach of vessels** to its front; and that easement the **State could not**, by its own sole action, take away or **destroy without** awarding adequate **compensation.**
2. The **Act of 1857, settling** the **bulkhead lines** for the Port of New York, operated upon the existing restrictions as to exterior lines and gave the City authority to locate wharves upon land of the State under water at a new line, with an easement of approach in front and of access from the land, and **authorized** the **City to fill up** and occupy the open **space between** the **new line and** the **land** as a necessary incident to the use of and access to the new wharf; and such filling, so permitted by the State, would **give** the **new made land to** the **City.**
3. The **State did,** by its earlier Acts and their recognition in 1857, **permit solid filling on its lands** under water within the bulkhead lines, **and** by that process **part with its title** and transfer it to him who lawfully made the new land as an approach to the docks.
4. Hence, when the **City,** being owner of the upland in front of which the harbor commissioners' line had been established under the Act of 1857, **made a deed to private individuals** of "All that certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or Harbor of New York and so much thereof as has already been made and gained," etc., together with the "estate, right, title and interest" that the City "may have or may lawfully claim in the premises conveyed, by virtue of their charter and the various Acts of the People of the State of New York," such deed **conveyed** the **right to make and own a** solid **filling** between **an** old wharf and a new one on the new line, **and** an **easement, as** against the State, **for** the **approach of vessels** over the land of the State under water in front of the harbor commissioners' line.
5. While the effect of the **Acts** of the Legislature is to convey a title to the City to all land belonging to the State between the new bulkhead and the City's old wharf and land, it is **not** their effect to **convey to private proprietors all land belonging to** the **State between** the **land of such proprietors and** the **new bulkhead line,** because the private owner has no interest in the new bulkhead which can carry him over the intervening space, and the City has.
6. **When a private owner's land** and wharf right will be **taken away** and destroyed **by** the **new** extension **line and structures** of the Dock Department of the City of New York, **he is entitled to** adequate **compensation.**

(Decided April 19, 1887.)

APPEAL by defendants from a judgment of the Supreme Court at General Term in the First Department on an amicable submission, directing a reference to ascertain damages to plaintiff from the building of a pier in front of his premises by the Board of Department of Docks of New York City. *Affirmed.*

For the purposes of this appeal it was agreed between the parties that the judgment of the general term should be regarded as a final judgment, and that the assessment of damages in case said judgment was affirmed be made after filing the *remittitur.*

Plaintiff held the premises in question, a wharf or dock and adjoining land abutting on the Hudson River between Twenty-Fifth and Twenty-Sixth Streets as extended and west of Thirteenth Avenue in the City of New York, as grantee of all the right, title and interest, privileges, etc., that were acquired by Thomas Williams and others, and by Jeremiah Towle, under two several deeds from the City of adjoining water lots, dated respectively December 20, 1858, and November 29, 1859.

The injury complained of was the filling in, in front of plaintiff's premises, and the construction of "pier No. 55" out from said filling, thereby destroying plaintiff's dock and otherwise injuring such premises.

The facts and questions raised appear from the opinion.

Mr. **James C. Carter,** for appellants:

Plaintiff's assertion of title is founded solely upon the conveyance by the City of New York; but at the time that conveyance was executed the City had no title to the land and none could then have passed to its grantee. The State alone had the title.

The only ground upon which the plaintiff makes any pretense that the City owned this land at the time of its conveyances in 1858 and 1859 to the plaintiff's predecessors, is that the Harbor Commissioners' Acts of 1857 and 1858 operated as a conveyance by the State of the tract in question to the City. There is no foundation for this view.

There are no words in either of these Acts importing a conveyance of land; nor was it any part of the purpose of these Acts to effect any transfer of title. Their sole object was to check encroachments upon the navigable waters around New York by drawing a line at which all filling up should be arrested.

It may well enough be that a permission by the State to a riparian proprietor to fill up and occupy land under water in front of his premises would be equivalent to a grant of the fee. But no such permission is contained in the Harbor Commissioners' Acts, and none can be implied. Indeed, were implication in such a case permissible, no ground for it can here be found. The purpose of these Acts was simply to prevent filling up beyond a certain line, not to permit it up to such line. The point is fully covered by authority.

People v. *N. Y. etc. Ferry Co.* 7 Hun, 105; *S. C.* 68 N. Y. 71.

Plaintiff's grantors gained no easement over the land under water in front of their lands. Their grantor, the City, had no lands outside of the grant and could not create any easement over them. And it has always been the settled law of this State that the Sovereign, as the owner of the land under water in front of riparian proprietors, can fill it up and improve it as it may think fit, without giving any ground of complaint to such proprietors.

Gould v. *Hudson River R. R. Co.* 6 N. Y. 522; *Barney* v. *Keokuk*, 94 U. S. 324 (Bk. 24, L. ed. 224).

If the State of New York has ever conferred upon the City the right to create such an easement over its own lands the authority can be gathered by implication only. A settled principle of construction forbids a resort to this mode of deriving a title or right. Whoever asserts that the Sovereign has surrendered or impaired its title to its own lands, more especially those over which absolute control in the Sovereign is requisite to the discharge of the most important public functions, can sustain his assertion only by pointing to the express and unequivocal language of the Sovereign contained in some deed or statute.

Mayor of Allegheny v. *Ohio etc. R. R. Co.* 26 Pa. 255, 360; *Monongahela Nav. Co.* v. *Coons*, 6 Watts & S. 101, 113; *Hagan* v. *Campbell*, 8 Porter, 9, 25: *Townsend* v. *Brown*, 4 Zab. 80, 87; *Stevens* v. *Paterson etc. R. R. Co.* 34 N. J. Law, 532, 534; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 544, 549 (36 U. S. bk. 9, L. ed. 736, 822, 824); *Dubuque etc. R. R. Co.* v. *Litchfield*, 23 How. 66, 88 (64 U. S. bk. 16, L. ed. 500, 509); *Newton* v. *Comrs.* 100 U. S. 561 (Bk. 25, L. ed. 712); *Binghamton Bridge Case*, 3 Wall. 51, 75 (70 U. S. bk. 18, L. ed. 137–143); *Mills* v. *St. Clair Co.* 8 How. 579 (49 U. S. bk. 12, L. ed. 1205); *Perrine* v. *Chesapeake Canal Co.* 9 How. 177 and *Butler* v. *Pa.* 10 How. 414 (50 U. S. bk. 13, L. ed. 94, 477); *Richmond etc. R. R. Co.* v. *Louisa R. R. Co.* 13 How. 78 and *Bank of Ohio* v. *Knoop*, 16 How. 376 (57 U. S. bk. 14, L. ed. 58, 980); *Leavenworth etc. R. R. Co.* v. *U. S.* 92 U. S. 741 (Bk. 23, L. ed. 637).

Mr. **Frank A. Irish,** also for appellants:

The City at the time of the grants to Williams and Towle in 1858 and 1859 did not own the strip of land between Thirteenth Avenue and the Harbor Commissioners' bulkhead line of 1857, and could not give title thereto.

It cannot be argued that a grant from the State is implied from the Act of 1858, which repeals the prohibition in the Act of 1855 against making grants, or from the Act of 1857 against solid filling further into the water than the line thereby established.

See *People* v. *N. Y. & Staten Island Ferry Co.* 7 Hun, 105; 68 N. Y. 71.

The general power of the City to lay out wharves, or exterior streets, gave it no authority to make a private grant of the strip in question such as the plaintiff claims, and does not in any way strengthen his position.

Various Acts of the Legislature granted this power; and it is understood that the plaintiff expects in some manner to justify his claim by some reference to their authority. See the following Acts:

Dongan Charter, § 2; Colonial Act, Oct. 1, 1691, chap. 18; Montgomerie Charter, § 16; Laws 1787, chap. 61; Laws 1798, chap. 80; Laws 1813, §§ 177–182, 219–236.

The exterior streets or bulkheads, and the piers projecting therefrom, and the slips or basins formed by such piers and streets required or permitted to be built under these Acts, are all public wharves and slips, the same as the public streets of the City. This has been settled by numerous adjudications.

Comrs. of Pilots v. *Clark*, 33 N. Y. 251, 264, 265; *Radway* v. *Briggs*, 37 N. Y. 256, 258; *Taylor* v. *Atlantic Mut. Ins. Co.* 37 N. Y. 275, 283, 284; *Re N. Y. Cent. etc. R. R. Co.* 77 N. Y. 248, 257; *Marshall* v. *Guion*, 11 N. Y. 461, 471; *Comrs. of Pilots* v. *Erie R. Co.* 5 Robt. 381, 382: *Taylor* v. *Beebe*, 3 Robt. 262, 268; *People* v. *Mallory*, 46 How. Pr. 281; 2 Thomp. & C. 78; *Mayor* v. *North Shore etc. Ferry Co.* 55 How. Pr. 155.

The defendants are not estopped by anything contained in the grants to Williams and Towle from showing the plaintiff's want of title to the strip in question, or to the wharfage arising therefrom.

The things granted were: (*a*) the soil, within the limits named; (*b*) incidentally, the wharfage to arise from a private wharf to be built on this soil.

The grant does not contain any express covenants respecting the title to the premises conveyed, and in this respect it differs from the Astor grants involved in the case of *Langdon* v. *Mayor*, 93 N. Y. 129.

Those grants had a general covenant for quiet enjoyment in the usual form. The present grants have no covenant for quiet enjoyment.

Where the grant is expressly limited to the present interests of the grantors they will not be estopped or precluded from claiming the premises under a subsequent grant to them.

Rawle, Cov. Title, 3d ed. p. 417, 4th ed. p. 393; Herman, Estoppel, ed. 1886, pp. 784, 785, 826–828.

It is so held in this State in the case of *Douglas* v. *Cruger*, 80 N. Y. 15, 19; *National Fire Ins. Co.* v. *McKay*, 5 Abb. Pr. N. S. 445, 454; *Sparrow* v. *Kingman*, 1 N. Y. 247; *Shoemaker* v. *Johnson*, 35 Ind. 33; *Gee* v. *Moore*, 14 Cal. 472; *Pike* v. *Galvin*, 29 Maine, 183; *Lowndsdale* v. *Portland*, 1 Oreg. 381, 395; *Gibson* v. *Chouteau*, 39 Mo. 536; Rawle, Cov. Title, 3d ed. 404, note 2.

The point in question has been decided in this State in cases involving quitclaim deeds.

Jackson v. *Wright*, 14 Johns. 193; *Jackson* v. *Bradford*, 4 Wend. 619; *Jackson* v. *Hubble*, 1 Cow. 613, 616; *Cramer* v. *Benton*, 64 Barb. 522.

And in many cases in other States:

Allen v. *Sayward*, 5 Maine, 227; *Partridge* v. *Patten*, and *Sweetser* v. *Lowell*, 33 Maine, 483, 446; *Harriman* v. *Gray*, 49 Maine, 537; *Robertson* v. *Wilson*, 38 N. H. 48, 52; *Doane* v. *Willcutt*, 5 Gray, 328, 338; *Comstock* v. *Smith*, 13 Pick. 116; *Sydnor* v. *Palmer*, 29 Wis. 226, 247; *Read* v. *Whittemore*, 60 ,Maine, 479; *Bruce* v. *Luke*, 9 Kan. 201; *Holbrook* v. *Debo*, 99 Ill. 372; *Sanford* v. *Sanford*, 135 Mass. 314; *Bogy* v. *Shoab*, 13 Mo. 365; *Blanchard* v. *Brooks*, 12 Pick. 47, 66; *Miller* v. *Ewing*, 6 Cush. 34; *Morrison* v. *Wilson*, 30 Cal. 344; *Cadiz* v. *Majors*, 33 Cal. 288; *Graham* v. *Graham*, 55 Ind. 23; *Allen* v. *Holton*, 20 Pick. 458; *Frank* v. *Darst*, 14 Ill. 304.

The plaintiff can make no claim with respect to the strip between Thirteenth Avenue and the bulkhead line, because he is bound by the covenant in the grants to permit it to be taken for the purpose of a street by the defendants, without compensation.

Langdon v. *Mayor*, 93 N. Y. 129.

The clause referred to is applicable to every part of the premises granted, and refers to streets that "hereafter may be laid out through the premises granted," as well as to those existing.

The department of docks has laid out a new street, River Street, through, across or over, the whole of the strip in question, the bulkhead forming the outer edge of said strip, and also over the land under water in front thereof. The River Street in question has been "laid out and designated" pursuant to authority of law.

Laws 1870, chap. 383, § 34; 1871, chap. 574, § 6.

The plans adopted have been approved by the Legislature.

Laws 1884, chap. 517; 1882, chap. 410, § 712.

It may perhaps be urged by the plaintiff that an exception cannot technically be made of a street not then existing, and the location of which was undetermined; but without question the court will give it effect as a reservation of the power to lay out streets in the future and to appropriate any part of the premises described for that purpose. It has so construed similar clauses where as exceptions they could not take effect.

Thompson v. *Gregory*, 4 Johns. 81; *Dygert* v. *Matthews*, 11 Wend. 35; *Rose* v. *Bunn*, 21 N. Y. 275; *French* v. *Carhart*, 1 N. Y. 96; *Putnam* v. *Stewart*, 97 N. Y. 411.

The reservation of the right to lay out streets, roads or highways in the future over premises granted, or to appropriate some part of the premises granted, for some purpose or use to arise in the future, has frequently been the subject of adjudication and been recognized in the courts.

French v. *Carhart*, 1 N. Y. 96; *Groat* v. *Moak*, 94 N. Y. 115; *Hart* v. *Connor*, 25 Conn. 331; *Thruston* v. *Masterson*, 9 Dana, 228; *Tuttle* v. *Walker*, 46 Maine, 280; *Adams* v. *Morse*, 51 Maine, 497; *Van Ohlem's App.* 70 Pa. 57; *Galloway* v. *Wilder*, 26 Mich. 97.

The plaintiff's claim, under the grants, to the title and right of possession and occupancy for private purposes, of the strip between Thirteenth Avenue and the bulkhead line of 1857 cannot be upheld, because to do so would make Thirteenth Avenue an inside street and thus completely destroy the effect of the Act of 1837, which lays it out as a public exterior street or wharf.

There have been frequent adjudications, to the effect that additions, by accretion, both artificial and natural, to public streets or highways along a river, acquire and partake of the same public nature as such streets or highways.

The courts have only inquired to see whether clear proof existed of an intention to lay out a public street or wharf adjacent to the water highway; and when this has been done the adjudications are absolutely uniform and unbroken that the addition becomes a part of the public street.

People v. *Lambier*, 5 Denio, 9; *Barclay* v. *Howell*, 6 Pet. 499, 512 (31 U. S. bk. 8, L. ed. 478); *New Orleans* v. *U. S.* 10 Pet. 662, 717 (35 U. S. bk. 9, L. ed. 573); *Wood* v. *San Francisco*, 4 Cal. 190; *Godfrey* v. *Alton*, 12 Ill. 29; *Balliet* v. *Commonwealth*, 17 Pa. 509; *Stetson* v. *Bangor*, 60 Maine, 313; *Hoboken Land Co.* v. *Hoboken*, 36 N. J. Law, 540; *Jersey City* v. *Morris Canal Co.* 12 N. J. Eq. 548; *Newark Lime Co.* v. *Newark*, 15 N. J. Eq. 64; *Lockwood* v. *N. Y. & New Haven R. R. Co.* 37 Conn. 337; *Peck* v. *Providence Steam Engine Co.* 8 R. I. 353; *Kennedy* v. *Jones*, 11 Ala. 63.

Looking at the case with reference to the grant of wharfage, etc. accruing at a wharf built on the bulkhead line, the plaintiff has no easement or right over the land under water in front thereof, and no right to prevent the defendants from filling in such land under water and shutting off access to such wharf by water.

In this respect the case here presented differs from that presented in *Langdon* v. *Mayor*, 93 N. Y. 129. The subject of that action was the right to collect the wharfage accruing at the exterior wharf or street which at that point was West Street. The exterior street in question was not only built upon land belonging to the City, but at the time of the grant the City owned the land under water for 200 feet in front of the wharf or street in question.

The land under water in this case belonged to the People of the State of New York, who were not parties to the grant, and were not therefore prohibited from filling it in, or from authorizing the defendants to do so as their agents, for public purposes.

Messrs. **Stewart & Boardman,** for respondent:

The corporation at the time of the delivery of the Williams and Towle deeds had full power to grant the right to construct a wharf on the line of solid filling known as the Harbor Commissioners' Line, and the right to collect the wharfage accruing therefrom in perpetuity, although the land under water on which the wharf was built, and the land under water exterior thereto, belonged to the State.

Crocker v. *Mayor*, 21 Blatch. 197; *Kingsland* v. *Mayor*, 35 Hun, 458.

The legal effect of the Williams and Towle deeds was to confer upon the grantees, their heirs and assigns, so long as they complied with the covenants and conditions therein contained, the permanent right and easement to collect wharfage, and all the benefits and advantages growing, accruing or arising by or from the wharf erected on the west line of the premises conveyed.

An easement for access to the plaintiff's wharf over the adjacent land under water of the State passed under the Williams and Towle deeds by necessary implication.

Langdon v. *Mayor*, 93 N. Y. 159.

Assuming, for the sake of the argument, that the Legislature could authorize the destruction of the plaintiff's wharf without compensation, we submit that by the Act of April 18, 1871, no such power was conferred upon the City.

By the construction of the plaintiff's wharf, on the harbor commissioners' line, under the authority of the Legislature and the Williams and Towle deeds, he acquired an absolute and indefeasible right to the wharfage; and it was beyond the power of the Legislature to authorize the Corporation to derogate from its own grant, by shutting off the wharf from the river and putting another wharf in front of it for its own use and profit. Any law purporting to give such authority to the City would be in violation of the State and Federal Constitutions.

State Const. art. 1, § 7; 14th Amend. U. S. Const.; *Buccleuch* v. *Metropolitan Board of Works*, 3 L. R. Ex. 306; *Moore* v. *Great So. R. Co.* 10 Irish Com. Law Cas. N. S. 46; *Beckett* v. *Midland R. Co.* L. R. 3 C. P. Div. 82.

The plaintiff is the owner in fee of the strip of land between his wharf and Thirteenth Avenue, which avenue has never been widened. The plaintiff's wharf is a private wharf. It is not built upon the outer line of a public street.

Finch, *J.*, delivered the opinion of the court:

Since the rights of the plaintiff depend upon deeds given by the City to his predecessors in 1858 and 1859, and which it is said purported to convey what the corporate grantor did not possess, and rights which remained vested in the State, it will be the most natural route to a conclusion if we start with the inquiry what rights the City possessed, derived from the State, at the instant of those conveyances.

Before 1857 the City owned the upland covered by these grants and which bordered on the river, to a line which is now the west line of Thirteenth Avenue. The process by which it became such owner is not immediately material, since its title and that of its grantees thus far is not here in dispute. The land had a water front, and the City was a riparian proprietor, but with much wider rights than simply attached to it in that character.

The State had granted to the City, by several earlier Acts but notably by the Act of 1813 (2 Rev. Laws, p. 431, §§ 220, 227, 228; Laws 1806, chap. 126, § 1), a general right to build and maintain wharves, piers and slips along the water front wherever the Municipality should choose. This general grant had at the time no limitation upon the original choice of location. It carried with it necessarily, and was surely intended so to do, at least two incidental and subsidiary rights, because inevitably involved in the terms and character of the grant. One of these was to occupy and possess the lands of the State under water, so far as needed for the construction and maintenance of the wharves which the City was at liberty to build. It needed no authority from the State to erect wharves on its own land. What it did need was a right to build them on land under water owned by the State, and safety and protection for them when built.

The Sovereign began by granting to the City belts of its lands along the water front. The Dongan Charter granted the strip between high and low water; the Montgomerie Charter one of 400 feet extending out beyond low water; and which in 1807 was extended northerly to accomodate the growth of the City in that direction. But at least as early as 1801, another process began by giving to the City the grant of a general power to build and maintain wharves. Laws 1801, chap. 129.

In 1806, chap. 126, the right was granted "to cause piers to be sunk in such places and manner as they shall think eligible between the Whitehall Slips and the east side of the Exchange Slips * * * and also at their own expense to cause such and so many other public basins to be formed and completed in said City as they may deem necessary for the trade thereof, and to take to their own use the shippage or wharfage arising from the same."

The Act of 1813 was broader and seems to have been a substantial reenactment of the Act of 1801. It provided "That it shall be lawful for the Mayor, Aldermen and Commonalty of the said City in common council convened to lay out wharves and slips in the said City whenever and *wherever* they shall deem it expedient."

I have no means at hand of ascertaining precisely at what date the western line of the

City's bulkheads passed the limit of the 400 feet and occupied the land of the State lying under water, although one of the maps used on the argument shows that the line at some points had already been passed when the revision of 1813 was made; but that event might easily occur, since the westerly bounds of the City ran to the west line of the State in the Hudson River. The authority thus given, being commensurate with the municipal limits, involved a grant of so much of the land of the State under water as those wharves would occupy if the City's choice of location required such appropriation.

This right was tantamount to an ownership. It embraced the entire beneficial interest and was inconsistent with any title remaining in the State. The wharf when built completely occupied the land under water, and might be built if need be of stone and earth. All use for the floating of vessels disappeared, so far as it occupied the water. The new and substituted use created by the City or its grantees belonged wholly to them, for the entire benefit in the form of shippage, wharfage and cranage was given to them. There was never any restraint put upon this general grant, and the ownership involved where the plans carried the wharves on to the State's land in the stream, except the limitation of exterior lines, beyond which the authority should not go, or that imposed by general plans agreed upon by both parties.

But this general grant of authority to build wharves and take their use and product involved another right. We decided in *Langdon* v. *Mayor*, 93 N. Y. 129, that a wharf right so implied a right of approach for vessels that its grant carried with it an easement for such approach over the grantor's land under water lying in front. The Act of 1813 fully recognized and protected that easement. It in terms forbade, after the City had located its dock, any filling or the erection of any structure in its front, and so by its own act incapacitated itself without the assent of its grantee from destroying or obstructing the easement given; so that when the State granted to the City wharf rights which might extend into the deep water covering its own land it granted two things: property in the land covered by the wharf and occupied by it, and an easement for approach of vessels in its front. That easement the State by its own sole action could not take away or destroy without awarding adequate compensation.

To say the contrary would be to declare that after the City under its authority from the State has completed its entire system of wharves and piers at a cost of millions, the State may yet destroy it all, in violation of its own self imposed prohibition, by building in front on its own land under water obstructing docks or walls.

But in 1857 a new agreement was made between the State and the City. I call it such because it was that both in fact and in legal effect. It was preceded by an Act of 1855, chap. 121, a preamble to which recited that it was represented that the harbor had become obstructed by the erection of piers, wharves and bulkheads, and that grants to occupy land under water had been made and "are liable to be made" without sufficient knowledge; and then appoints a commission to ascertain all the facts and advise as to a new exterior line and a plan of construction, and in the meantime to prevent further injury forbade any new grants of land under water either by the commissioners of the Land Office or the Common Council.

The ultimate result of that commission was the Act of 1857, which moved the wharf or bulkhead line at the locality here in question about eighty feet farther into the stream and located there the exterior wharf line fronting on the water. The City accepted this change. Practically this enactment operated upon the existing restrictions as to exterior lines and gave the City, under its general right of building wharves, authority to locate them upon the land of the State under water at the new line. The same consequences followed as it respected the City's right to the land under water occupied by the new wharves and piers and the new easement of approach in their front. But this change had another effect. There was left, in the execution of the plan agreed upon by the City and the State, open water and land under it in front of the former bulkhead and extending to the new wharf line known as the harbor commissioners' line. Upon that line and extending back from it, the Act of 1857 contemplated the building by the City of a new wharf under its general grant of power. What was to become of that intermediate space? One thing about it was certain. The grant of the new wharf upon the new exterior line carried with it a right of access and approach over the State's land under water, either by an adequate and sufficient bridge or by a filling with earth. Such filling, if permitted by the State, would necessarily give the new made land to the City. The learned counsel for the appellant himself says: "It may well enough be that a permission by the State to a riparian proprietor to fill up and occupy land under water in front of his premises would be equivalent to the grant of a fee." He insists, however, that no such permission was given. Of course he would not claim that no right of access was involved in the grant, and that the State authorized a wharf in the interest of the commerce of a great seaport, only to cut off all approaches to it from the land. Now the Act of 1857, as we read it, in the light of the situation and of prior legislation, fairly authorized the City to fill up and occupy the open space as a necessary incident to the use of and the access to the new wharf.

Its second section reads: "It shall not be lawful to fill in with earth or other solid material in the waters of said port *beyond* the bulkhead line or line of solid filling hereby established." The learned counsel for the appellant says, in his clear and terse way: "The purpose of these Acts was simply to *prevent* filling up beyond a certain line, not to *permit* it up to such line." But why prohibit at one point if no permission had been given at any? If no general permission had ever been given, why specially prohibit in part? In the appellant's view what was the need of this provision at all? Did anybody suppose that it ever was lawful, in the absence of permission or a grant, to fill up with earth the State's land under the water of a navigable stream? It is clear that the Act of 1857 proceeds upon an assumption. It assumes that the City and its grantees have a right of solid filling upon some of the State's lands under water, and proceeds upon that assumption not to deny but to limit and restrict that right; and so when it says that no filling shall be done "beyond" it strongly implies that it may be done "up to." Three times in the Act of 1857 the new bulkhead line is described as synonymous with the "line of solid filling."

If we go back a little along the current of legislation, we shall find in the Revised Laws of 1813 the reason and the basis for the assumption and the language of the Act of 1857. By the terms of the earlier Act, the City, already authorized to build wharves where it pleased within the corporate boundaries, was further and expressly authorized to compel the riparian owners to build such wharves at their own expense, and where there was open space between the land and the wharf to require such proprietors "to fill up and level at their own expense according to such plan and by the said days respectively the spaces lying and being between their said several lots and the said streets and wharves; and shall, upon so filling up and leveling the same, be respectively entitled to and become the owners of the said intermediate spaces of ground in fee simple."

Of course if the City was the upland owner with an open space between its land and the new wharf, it had the right to fill it in and thereby become its owner. By this Act the State granted to the City and to the upland owner the right to fill out to the permitted wharves and vested title to the new made land in the adjoining owners. The line of solid filling, therefore, permitted by the State was exactly synonymous with the bulkhead line. When the City was restricted in its general right of building wharves to limits within exterior lines it was natural equally to restrict the solid filling permitted within the same lines.

We do not think it alters the case that this grant by the State was to persons compelled to fill under the terms of the Act. Where the City itself was adjoining owner the compulsion became simply a privilege or right; and it is quite possible that as to the citizen a similar change occurred. We may infer from the constant repetition of grants that what at first was a burden, borne under compulsion, soon became a benefit and was sought as a privilege; and so instead of the compulsory direction of an ordinance the City gave the same direction and with the same results, by the terms and stipulations of a grant. And thus we discover the assumption upon which the Law of 1857 rested; and see in it a clear recognition by the State that its removal of the exterior bulkhead line further into the stream carried with it a surrender by the State to the City or its grantees or the upland owners, of its land under water behind the new wharves, whenever they should be constructed.

Why should the State have done otherwise? How could it have done otherwise, unless it meant not only to throw the necessities of an enormous commerce upon the City but to hamper and obstruct the bearing of that burden by withholding a right useless to itself? And so I reach the conclusion that the State did, by its earlier Acts, and their recognition in 1857, permit solid filling on its lands under water within the bulkhead lines, and by that process parted with its title and transferred it to him who lawfully made the new land as an approach to the docks. And this view is further strengthened by the two facts that the State has seen this process going on for about half a century without once interfering or asserting a hostile right, but on the contrary has given to the City, whenever requested, formal conveyances of its lands so occupied.

We are able now to see what the rights of the City were when it conveyed to Williams and Towle. The City owned the upland. In front of it the harbor commissioners' line had been established. The erection of a new wharf on that line was desired. Its construction would shut in and destroy the old wharf on the old west line of Thirteenth Avenue, and require a solid filling, which the City had a right to make and, having made, would own and possess. It had a further right as against the State: an easement for the approach of vessels over the lands of the State under water in front of the harbor commissioners' line, whenever a new wharf should be built upon that line. All these rights it conveyed to Williams and Towle and vested every one of them in them. It had the power to convey them. *Langdon* v. *Mayor*, 93 N. Y. 129.

It did convey them. Its deeds cover the open space between the avenue bulkhead and the harbor commissioners' line and make that the west or outer line of the grant. The deed was made and accepted upon an understanding of the City's rights, precisely as we have held them to exist. It described the property thus:

"All that certain water lot or vacant ground and soil under water *to be made land* and gained out of the Hudson or North River or Harbor of New York, and so much thereof as has already been made and gained," etc.

The municipal authorities either at that date understood their rights as we do, or else perpetrated a deliberate fraud upon an unsuspecting purchaser. The grantees in the two deeds were required to covenant and did covenant to build at their own expense, within three months, the new wharf and bulkhead along the west or river front; to build such streets as ran through the premises, grading and paving the same and laying the sidewalks thereof; to repair and maintain the whole of Twenty-Sixth Street lying west of Eleventh Avenue, and such other streets as should be laid out on the premises.

The City on its part, withholding covenants of seisin or warranty, did stipulate that the deeds should "pass the estate, right, title and interest they may have or may *lawfully claim* in the premises hereby conveyed by virtue of their several charters and the various Acts of the People of the State of New York;" and covenanted that the grantees should take and hold "all manner of wharfage, cranage, advantages or emoluments growing out or accruing by or from that part of the said exterior line of said City lying on the westerly side of the hereby granted premises fronting on the Hudson River."

We determined in the *Langdon Case* that such deeds granted a wharf right which lay in grant if not in covenant. The temporary prohibition contained in the Act of 1855, staying the City from conveying, pending the examinations of the commission, was repealed before these deeds were made, and for the obvious purpose of allowing the City to resume that system of grants which the Legislature in the preamble to the Act of 1855 had recited "were liable to be made."

The grantees in the present case performed their covenants. They constructed the wharf on the river line; filled in the space between; built the streets required; and went peaceably into the possession of their land and wharf rights. They became owners of the newly made land, as well as that already "gained" at the date of the deeds and owners of an easement for the approach of vessels in front of their wharf, both as against the City and against the State.

In this respect is developed the only serious difference between the *Langdon Case* and this. In that case the City owned the land under water in front of the dock; in this the State owns it; in that the grant of a wharf right by the City carried with it an easement in the City's land under water in front; in this the State's grant to the City carried the right to such easement over the State's land under water to the City; and the deeds of the latter carried it to the grantees.

We are not unmindful of the criticisms which have been made upon this view of the case, or the further grounds upon which the rights of the grantees are assailed.

It is suggested that if the effect of the Acts to which we have referred was to convey a title to the City to all land belonging to the State lying between the new bulkhead and the City's old wharf and land "it must also have been their effect to convey to private proprietors all land belonging to the State between the land of such proprietors and such bulkhead line," and that doctrine has been expressly denied. *Van Zandt* v. *Mayor*, 8 Bosw. 375.

But the alleged vicious conclusion does not follow, because the mere riparian proprietor has no right to the new outside wharf, or to use or approach the same, or take the wharfage therefrom, which is the right of the City. The private owner has no interest in the new bulkhead which can carry him over the intervening space, and the City has. The former has simply been deprived of his rights, and suffered a loss of his property, for which he is entitled to compensation.

It is said that by a law of the State (Laws 1887, chap. 182) Thirteenth Avenue has been laid out as an *exterior* public street; and the plaintiff is claiming by virtue of grants from the City alone to convert Thirteenth Avenue into an *inside* street contrary to the express law of the State. That is very far from a correct view of the situation. The change was made, as we have seen, by force of the law of the State which carried the west wharf line further into the stream and the line of solid filling to the same point. The process had been going on for years and outside transformed into inside streets continually. A glance at one of the maps used on this argument shows that original high water mark was but a little west of Tenth Avenue, and even the west line of the 400 feet beyond low water given by the Montgomerie Charter was east of Eleventh Avenue; and from that point on the City has been permitted to grow into the river over the lands of the State under water, not only by its consent but through its direct participation and agency.

It is argued that under his deeds plaintiff had no right of wharfage, except at the west line of Thirteenth Avenue; that he lost that by himself filling up in front of that bulkhead; and that such right of wharfage "has no immunity from destruction by a filling up in front either by the State or its grantee;" citing *Gould* v. *Hudson River R. R. Co.* 6 N. Y. 522.

It is not necessary to express either approval or disapproval of that authority. It is enough to say that it has no sort of application to the present case. There the plaintiff had no rights beyond those of a mere riparian proprietor. If he had possessed in addition a wharf right, derived from the State or its grantee, quite a different question would have been presented. But we have sought to show that plaintiff's wharf right was not at the old line but at the new one, and the filling was covenanted to be done as a necessary incident to the wharf right granted.

Much was said on the argument as to the rule of construction applicable to grants by the State. The subject was fully considered in the *Langdon Case* and need not here be resumed.

It seems only necessary to add that we do not view the grant by the State to the City as without consideration, and purely and simply a gift. The State owned but a single seaport, open to commerce and touched by tide-water, and that one a harbor of remarkable size and convenience. Its interest to concentrate there ships and cargoes from all parts of the world by protecting the harbor and lining it with docks and piers was very great, and took on the character of a duty due to the prosperity of the Commonwealth. It early imposed that duty upon the City and the citizens, by whom it has been steadily performed at very great cost, and one in the future to be largely increased. Every grant the State made was in aid of the expenditure involved in the performance by the City of that duty, and in consideration of that performance. Little enough of its own duty has been borne by the State, and to call that little a pure gratuity amounts almost to a sarcasm. We do not understand *Dermott* v. *State*, 99 N. Y. 101, to have limited the *Langdon Case*.

A point was made over the reservation in the deeds of "such streets as now are or hereafter may be laid out through the premises hereby granted;" and it was claimed that a new river street 250 feet wide and absorbing Thirteenth Avenue and all the land west of it to the river was laid out by the department of docks. We do not think the power to lay out streets was conferred upon that department. It belongs to the board of street opening and improvement, by whom no such action has been taken. It may be added that the plan for what is called a "river street" upon "sheet A" of the general plan did not have indorsed thereon a certificate of adoption by the commissioners of the sinking fund, and "sheets C & D" which were adopted and indorsed are utterly silent as to any river street.

It follows from what has been said that the plaintiff, whose land will be taken away and his wharf right destroyed by the new exterior line and structures of the dock department, is entitled to adequate compensation.

The Act organizing that department will and was intended to change utterly the water front system of the City. Upon the new line the municipality is to build all docks and wharves and piers and own them all and the old plan of wharves and piers owned by individuals is to be swept away. But by the Act the rights of private owners are respected and there is not in it a word or line of meditated spoliation. The wharf property of citizens may be taken but must be paid for fairly and in the ordinary manner.

The judgment should be affirmed, with costs.

All concur, except **Rapallo,** *J.*, not voting.

William HERRING, *Appt.*,
v.
NEW YORK, LAKE ERIE & WESTERN R. R. CO., Farmers Loan & Trust Co., and Hugh J. Jewett, Receiver of Erie Railway Co., *Respts.*

In May, 1875, the **attorney-general,** in the name of the People, **commenced an action in equity** under 2 R. S. p. 463, § 38, **against** the **Erie Railway Company, for its dissolution as an insolvent corporation,** and Hugh J. Jewett was appointed temporary receiver of the company therein. In June, 1875, and during the pendency of the People's action, the **Farmers Loan & Trust Company commenced an action for** the **foreclosure of** two **mortgages** executed by the Erie Company **upon its railway and appurtenances,** and Jewett was appointed receiver of the mortgaged property in this action. The Erie Company, at the time of the commencement of these actions, owned certain **bonds and stocks in other corporations,** and the judgment rendered in the foreclosure action in November, 1877, recited that such bonds and stocks were held by the receiver therein as **part** and parcel **of** the **mortgaged property** and premises, and authorized the referee appointed to sell the mortgaged premises, to sell such bonds and stocks as a portion of the mortgaged premises, which was done, and the sale confirmed, and said bonds and stocks passed, with the mortgaged premises, under such sale and subsequent proceedings, to the New York, Lake Erie & Western Railroad Company, a corporation formed on reorganization of the Erie Railway Company—the order for such transfer providing that it was subject to all the rights of the People in and to the premises or any part thereof, as the same might be ascertained in the People's action. Thereafter a reference as to the property subject to said mortgage was had in the People's action and a judgment entered therein upon the report of the referee to the effect that said stocks and bonds did come under the mortgage and were properly sold with the mortgaged premises, and adjudging the Erie Railway Company to be dissolved. **Thereafter this suit was commenced,** seeking **to subject said bonds and stocks to** the **payment of** certain **unsecured obligations held against** the **Erie Railway Co.,—on** the **ground** that said bonds and stocks were **not covered by** said **mortgages,** and that the court never acquired any jurisdiction over the same nor of the rights of the plaintiff and other unsecured creditors therein, they not having been made parties to said foreclosure suit nor to the People's action. The complaint set out the facts connected with said actions at length, but did not contain any allegations of fraud. *Held,* on demurrer to the complaint:

(*a*) But for the pendency of the People's action, it cannot be doubted that the determination and **judgment in** the **foreclosure action** would have been **conclusive** upon everyone:—it was within the province of the court to determine what **property** was **actually embraced within** or subject in express terms or by subrogation or any other equitable principle, to the **mortgages** foreclosed.

(*b*) The **unsecured creditors** were **not** necessary or **proper parties to** the **foreclosure action** and had no right to intervene therein, and any adjudication made against the mortgagor was binding upon them.

(*c*) The **pendency of** the **People's action,** in which a temporary receiver had been appointed, **did not prohibit** the commencement of the **foreclosure action;** and the court had power to permit the latter action to be commenced and to proceed, to appoint a receiver therein and to supersede the receiver appointed in the People's action, to transfer all the duties of the receiver in that action to the receiver in the foreclosure action, and to order all the property covered by the mortgages to be delivered to such receiver.

(*d*) The **judgment in** the **foreclosure action was not,** under the facts, **within 2 R. S. p. 462, § 71,** which declares that all judgments confessed by the insolvent corporation after the filing of the petition for its dissolution shall be absolutely **void as against** the **receiver** who may be appointed on such petition **and** as against **creditors** of the corporation.

(*e*) The **rights which** the **statutes secure to creditors in** the **case of a statutory final receiver of** an **insolvent corporation** are such only as pertain to the property which comes to the receiver to be administered by him and distributed to creditors; and there is no statute which entitles them to notice or gives them the right to a hearing before the receiver, except as to claims upon and their rights in such property.

(*f*) Under the statutes in force in 1875 in relation to actions by the People for the dissolution of corporations, there was **nothing which required a final receiver** in such actions **to consult** the **general creditors** of the insolvent corporation in the prosecution or defense of any action.

(*g*) There is **no provision of law which required that general creditors of the corporation should be made parties to** the **People's action** or have any notice thereof; they were represented therein by the People through the attorney-general, and by the receiver and by the defendant corporation; and while they could have been permitted to intervene or to appeal from the judgment or any of the orders therein, if any ground of appeal existed, they had no right to attack the same collaterally, unless for fraud.

(*h*) The **proceeding in equity under 2 R. S. p. 463, § 38,** for the dissolution of the corporation was **unaffected by** the **Code of Procedure;** and prior to the year 1880 (Code of Civil Procedure and Repealing Act) there was no statute regulating the powers and duties of receivers appointed in such equitable proceeding.

(*i*) The **complaint** does **not** allege facts **sufficient** to constitute a cause of action.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Special Term sustaining a demurrer to a complaint in an action to have certain securities applied in payment of claims of certain creditors. *Affirmed.*

Statement by **Earl,** *J.*:

The plaintiff commenced this action on behalf of himself and all other creditors of the Erie Railway Company similarly situated, and made parties defendants the New York, Lake Erie & Western Railroad Company, the Farmers' Loan & Trust Company and Hugh J. Jewett, Receiver of the Erie Railway Company.

In his complaint he alleges that prior to its dissolution the Erie Railway Company was a corporation organized under the laws of this State; that in the year 1870 (to secure the payment of its bonds, amounting to about $16,000,000) it executed and delivered to the Farmers' Loan & Trust Company, as trustee, a mortgage of its railway and certain property then owned by it, which railway and property were described in the mortgage in the following words, to wit:

"All and singular the Railway of the party of the first part, from and including Piermont on the Hudson River, to and including the final terminus of the said Railway on Lake Erie, and the railway known as the Newburgh Branch, from Newburgh to the main line, and also all that part of the Railway designated as the Buffalo Branch of the Erie Railway, extending from Hornellsville to Attica, in the State of New York, and also all other railways belonging to the party of the first part in the States of New York, Pennsylvania and New Jersey or any of them, together with all the lands, track, lines, rails, bridges, ways, buildings, piers, wharves, structures, erections, fences, walls, fixtures, franchises, privileges and rights of the said Company, and also all the locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured or unmanufactured materials, coal, wood and supplies of every kind, belonging or appertaining to the party of the first part, and all the tolls, income, issues and profits arising out of the said property, and all rights to receive or recover the same; also all the estate right, title and interest, terms and remainder of terms, franchises, privileges and rights of action, of whatsoever name or nature, in law or in equity, conveyed or assigned unto the New York & Erie Railroad Company, or unto the Erie Railway Company, by the Union Railroad Company, by the Buffalo, New York & Erie Railroad Company, by the Buffalo, Bradford & Pittsburgh Railroad Company, by the Rochester & Genesee Valley Railroad Company, and by the Long Dock Company."

That afterward, in 1874, to secure the payment of other bonds, amounting to about $24,000,000, it executed to the same trustee another mortgage upon its railway and property, by the same description contained in the prior mortgage.

That about the 25th day of May, 1875, an action was brought by the attorney-general, in the supreme court of this State, in the name of the People as plaintiffs, against the Erie Railway Company, its directors and certain trustees under various mortgages, including the Farmers' Loan & Trust Company, as defendants; that the relief prayed for in that action, among other things, was that the Corporation should be dissolved and be wound up, that the plaintiffs should have judgment accordingly, and that in the meantime, while the action was pending, Jewett, President of the Company, should be appointed Receiver to take, hold and possess, under the immediate authority and direction of the court, the franchises and property, with full power to operate the road and to preserve its franchises and corporate existence until final judgment, and with such other general powers as it is usual and in accordance with the rules and practice of the court to confer upon receivers in like cases; that on the 26th day of May, 1875, on the application of the attorney-general in that action, Jewett was appointed Receiver of the Company, in pursuance of the prayer of the complaint; that, by virtue of such appointment, Jewett undertook the duties of the receivership, and all the estate of the Erie Company and its franchises thereupon became vested in him as Receiver, to be administered and distributed by him in accordance with the statutes in such case provided.

That about the 15th day of June, 1875, the defendant, The Farmers' Loan & Trust Company, as trustee, commenced an action against the Erie Railway Company for the foreclosure of the two mortgages above mentioned; that in that action the Trust Company was sole plaintiff and the Erie Railway Company and the trustees under prior mortgages were the only defendants; that subsequently the summons and complaint in that action were amended so as to make certain creditors of the Erie Company codefendants therein; but Jewett, as Receiver in the Peoples' action, was at no time made a party to that action; that the complaint in that action alleged, among other things, the insolvency of the Erie Company; that it had made default in the payment of the interest falling due upon its bonds; that to the extent of the rightful interest in the mortgaged premises of the Trust Company as the mortgagee, its rights were in law and equity superior to the rights of the People of the State of New York; that the Trust Company was entitled to have the mortgaged premises foreclosed and sold for the payment and satisfaction of the respective debts to secure which premises were mortgaged to it; and that the prayer of the complaint demanded that an accounting should be had as to the bonds outstanding under the mortgages; that Jewett should be appointed Receiver of the mortgaged premises and property in that action, and that the mortgaged premises and property should be sold and the proceeds applied for the payment of the mortgage debts, and that the complaint further demanded in words following, to wit: "That an inquiry may be had and an account taken of and concerning all and singular the premises and property so mortgaged to this plaintiff as aforesaid, in order that it may be fully and at large ascertained whereof the said mortgaged premises consist;" that on the 15th day of June, 1875, Jewett was appointed Receiver in that action of all the property covered by the two mortgages.

That the estate of the Erie Railroad Company at the time Jewett was appointed Receiver in the People's action, consisted not only of the railway and the property described in the two mortgages, but also of a large amount of other property, such as bonds and stocks in other corporations, which property was not appurtenant to the mortgaged premises, not subject to the lien of the mortgages or either of them, and not in any manner necessary for the practical operation of the mortgaged premises, or to the use, management or maintenance thereof, amounting to many millions of dollars in value; that part of such property had been acquired by the Erie Company subsequently to February 4, 1874, the date of the second mortgage; that the property not subject to the lien of the mortgages constituted a large and valuable fund applicable to the payment of the general and unsecured creditors of the Erie Company; that the Farmers' Loan & Trust Company or its attorney admitted in the foreclosure action the existence of such fund and the necessity of an accounting with respect to the same, on a motion in that action in which it was made to appear to the court by the affidavit of such attorney, on or about the 6th day of April, 1876, that there were in the hands of Jewett, as Receiver, stocks and bonds as before mentioned representing interests in other corporations to the nominal amount of more than $22,000,000, which belonged to the estate of the Erie Company; that an unascertained portion of such securities was covered by the two mortgages; that another unascertained portion had been acquired with moneys supplied by the respective parties for whom the Farmers Loan & Trust Company, was trustee; that advances had been made upon or against a further portion thereof out of the income of the mortgaged property in the hands of the Receiver; that the Receiver had paid out of the income of the mortgaged premises in his hands certain debts of the Erie Railway Company, constructed prior to the appointment of the Receiver, for labor, salaries and supplies which ought of right to be reimbursed to the mortgage creditors out of the assets of the Erie Company not covered by the mortgages; that certain resulting trusts existed in favor of the mortgage creditors in such securities; and that such securities or the proceeds thereof, in case of their sale, should be dealt with by the Receiver as a part of the general funds in his hands under the several mortgages; and that it was alleged in the affidavit that it was impracticable at that time to take, state and adjust the accounts and to finally account in respect to the matters above referred to, and that such final accounting and adjustment could only be had with due regard to the rights and interests of the parties upon the accounting preliminary to the final decrees, and by the final decrees to be made upon the basis of such accounting; that an order was made on that motion in the foreclosure action, on or about the 6th day of April, 1876, authorizing the Receiver to treat the fund as a part of the general fund and estate embraced in the two mortgages, "without prejudice to any equitable rights and interests of the respective parties which may be established on final accounting."

That during the pendency of the foreclosure action, the holders of the bonds and stocks of the Erie Company formed a plan for the formation of a new corporation in which their interests were to be represented; but no provision whatever was made in the plan of reorganization, for the unsecured debts or obligations of the Erie Company; that the reorganization was consummated in pursuance of the plan and the sanction of the court and with the cooperation of Jewett, as Receiver, in the foreclosure action, and that the new organization thus formed is the defendant, the Lake Erie & Western Railroad Company.

That such proceedings were had in the foreclosure action that judgment of sale was rendered therein on or about the 7th day of November, 1877, and that the decree recited among other things as follows: "That the Receiver in the course of his receivership has lawfully acquired and become possessed of a large amount of stocks in other corporations, bonds and other obligations for the payment of money, a large part of which has been lawfully and properly pledged by him to secure the payment of money borrowed by him, which he was authorized to borrow for the general purposes of his receivership, and which will probably remain to a greater or less extent so pledged at the time of the sale of the mortgaged premises; that all or nearly all of such stock, bonds, obligations and securities are embraced and described in the inventory of the mortgaged premises and property made and filed in this case by the Receiver in pursuance of the order of this court; that the said stocks, bonds, securities and obligations are held by the Receiver as part and parcel of the property and premises mortgaged to the plaintiff, and as the product of the rents, profits and issues of the mortgaged premises during the said receivership, subject, however, to the liens existing thereon by reason of such pledge or pledges thereof as hereinbefore stated;" "that the referee appointed to sell the mortgaged premises should be authorized at the request of the plaintiff's attorney to expose for sale and sell, as part of the mortgaged premises, all and singular the said stocks, bonds, obligations, accounts and evidences of indebtedness and other choses in action of which the Receiver may have become lawfully possessed in any way or manner during his receivership; subject, however, to any lawful lien or liens existing thereon, whether created by the Receiver or otherwise."

That it was by the foreclosure judgment ordered, adjudged and decreed, among other things, that sale be made of "all and singular the mortgaged premises, franchises and property, both real, personal and mixed, mentioned in the complaint in this action and hereinafter mentioned;" being the same premises and property described in the two mortgages, with the following addition: "And this description is to be understood as embracing and including all and singular the choses in action, stocks, bonds, book accounts, bills receivable and other evidences of indebtedness, leasehold estates, contracts and other property hereinbefore mentioned;" that a sale was had under the judgment by a referee appointed for that purpose on the 24th day of April, 1878; that the terms of sale as announced by the referee described the property to be sold by the words of description contained in the mortgages with the addition of the following words, namely: "Embracing and including all and singular the choses in action, stocks, bonds, book accounts, bills receivable and other evidences of indebtedness, leasehold estates, contracts and other property mentioned and described in the lists and schedules to be exhibited at the sale and contained and described in the Receiver's inventory of the real and personal property of the Erie Railway Company, also to be exhibited at the sale, not consumed or disposed of by the Receiver in the discharge of his duty prior to the sale, and including all property of every kind and description acquired by the Receiver during his receivership, with the proceeds of the rents, profits and issues of the mortgaged premises since the making of the said inventory, and not embraced therein, and excepting therefrom such portions thereof as will be declared excepted at the time and place of the sale."

That the Receiver's inventory of the real and personal property of the Erie Railway Company referred to in the terms of sale was exhibited at the sale, and it contained all the mortgaged premises and also all the other assets, real and personal, above described, not covered by the mortgages and which were held by Jewett, as Receiver, in the People's action for the benefit of the unsecured creditors of the Company; that there were present, and exhibited at such sale, lists, including not only the mortgaged premises and property, but also other claimed estate and assets of the Company which were not covered by the mortgages; that the sale was made to certain trustees under the reorganization plan; that on or about the 25th day of April, 1878, an order was entered in the foreclosure action, confirming the sale and the report thereof by the referee, and it was thereby ordered "That the said referee be and he hereby is ordered and directed forthwith to execute and deliver a proper deed or deeds of conveyance of all and singular the said premises, franchises and property so as aforesaid sold or intended so to be, to the said purchasers or their assigns, on their complying with the conditions on which, by the terms of said sale and by said decree, such deed or deeds were to be delivered."

That on or about the 26th day of April, 1878, the referee executed and delivered to such trustees, a referee's deed of the property sold which described it in the words following, to wit: "All and singular the property, franchises and estate whether real, personal or mixed, and wherever situate and whether within or without this State, embraced and included in the said judgment, and authorized and directed to be sold therein and thereby, of which said property, franchises and estate, real, personal and mixed, the following is the general and the best practical description; that is to say"—then in addition to the description of the premises in the mortgages were the following words: "This description is to be understood as embracing and including all and singular the choses in action, stock, bonds, book accounts, bills receivable and other evidence of indebtedness, leasehold estates, contracts and other property in the said judgment mentioned or therein directed to be sold," with some exceptions not material now to be mentioned; that the Erie Railway Company also executed to the trustees a deed, of even date with the deed mentioned, of the same premises described as in the deed of the referee; that thereafter, on the 27th day of April, 1878, the defendant, The New York, Lake Erie & Western Railroad Company, was incorporated in pursuance of the reorganization plan, and thereupon the trustees executed and delivered to it a deed of the property held by them under the deeds of the referee and of the Erie Railway Company above mentioned, describing the same in the words used in those deeds.

That on or about the third day of May, 1878, Jewett, as Receiver, presented to the supreme court in the foreclosure action a petition for an order authorizing the delivery by him to the New York, Lake Erie & Western Railroad Company, of the property sold in the foreclosure action; and that thereupon on that day an order was made in the foreclosure action in which, among other things, it was ordered "That the said Receiver do transfer, deliver and surrender to the said New York, Lake Erie and Western Railroad Company all the property and franchises whereof he is now possessed as Receiver in this action, and which were embraced or intended to be embraced in the judgment of foreclosure herein, subject to the reservations and exceptions hereinafter specified, and subject to all and singular the rights of the People of this State in and to the premises, or any part thereof, as the same may be ascertained on due inquiry and examination by the attorney-general, in the action of the People of this State against the Erie Railway Company, now pending, to the end that such rights and interests may be as fully protected as if this transfer had not been ordered and directed; and that upon such transfer, delivery and surrender, the said Receiver be and he is hereby absolutely and forever discharged of and from any and all liability as Receiver in this action, for the property and franchises so delivered, transferred and surrendered."

That on or about the first day of June, 1878, Jewett, as Receiver, delivered to the New York, Lake Erie & Western Railroad Company all the property referred to in that order, or the greater portion thereof, subject, however, to the terms of the order, and took therefor a receipt from the New York, Lake Erie & Western Railroad Company containing a list of certain shares of stocks and bonds in other companies and other personal property; that none of the property specified in that list was as matter of fact or law embraced in or covered by any of the mortgages of the Erie Railway Company, or subject to the lien thereof, or appurtenant to the mortgaged premises; nor was any of the same necessary for the use, operation or maintenance of the Erie Railway, and a great portion of the property was not the property of the Erie Railway Company or in its possession at the date of the mortgage; that no accounting whatever was had in the foreclosure suit, by which it was or could be ascertained or determined what portion of the assets which came into the hands of the Receiver was subject to the mortgages and what portion thereof was not so subject; and judgment and sale "was had and said assets were disposed of, as herein above described, without any such determination in said suit; and the New York, Lake Erie & Western Railroad Company took over the assets formerly owned by the Erie Company, expressly subject to such examination and determination to be duly and properly made under the direction of the court in the aforesaid suit of the People of the State of New York against the Erie Railway Company, or otherwise, and to the results of such examination; and no such accounting or determination has yet been had in that suit or otherwise."

That on or about the 20th of May, 1878, on the petition of the attorney-general an order was made by the supreme court in the People's action, wherein it was ordered among other things as follows: "That James C. Spencer be and he is hereby appointed referee to examine, adjust and pass upon all the accounts, acts and doings of Hugh J. Jewett, Receiver in this action, for and during the entire period of his said receivership, and that for the purpose of such accounting the accounts heretofore rendered by the said Hugh J. Jewett, as Receiver in the action of the Farmers Loan & Trust Company, against the Erie Railway Company, and which had been examined and passed upon by the said James C. Spencer, as referee duly appointed in said action, and approved by this court, shall be deemed and taken as accounts rendered and filed in this action, but shall not preclude the attorney-general from making such further examination of said accounts, acts and doings as he may deem necessary, and such action thereon by the referee and by this court as may be just and proper, nor preclude the attorney-general nor this court from requiring additional or more specific accounts by said Receiver, and the said referee shall take testimony for the purpose of ascertaining what property or assets, if any, the said Hugh J. Jewett, as Receiver in this action, acquired, held or disposed of, not covered by or subject to the lien of the mortgage of the Erie Railway Company to the Farmers Loan & Trust Company, which has been foreclosed, and, if any such property has been disposed of by said Receiver, what disposition has been made thereof; and also what rights and equities, if any, the said Farmers Loan & Trust Company, the purchasers at the foreclosure sale of the mortgaged premises, or their assigns, had or have in or to such property or assets or any part or portion thereof; and that the said referee report to this court the testimony so taken by him, and the material facts which he shall deem established by such testimony, with his opinion thereon, for the further action of this court."

That subsequently to the entry of that order, in the month of March, 1879, the People's action was discontinued as to all parties defendant, except the Erie Railway Company and the Farmers Loan & Trust Company, without prejudice to proceedings already had; that supplemental pleadings were served therein, setting up the foreclosure sale, and the conveyance herein above described, including the conveyances to the New York, Lake Erie & Western Railroad Company, and that the attorney-general under date of the third day of April, 1879, in his reply to the answer theretofore served, of the Farmers Loan & Trust Company, made the following allegations, among others, to wit: "First alleges and shows that, at the time the Receiver heretofore appointed in this action entered upon the performance of his duties as such Receiver, he became seised and possessed of all the assets of the said Erie Railway then in possession of said Company, including a large amount of stocks and bonds of other corporations, real estate in the City of New York and elsewhere in the States of New York, New Jersey and Pennsylvania, and of certain property, choses in action and effects, which were not embraced in the mortgage known as the second consolidated mortgage of the Erie Railway Company, nor subject to the lien thereof. And that also during his said receivership the said Receiver has lawfully acquired for the benefit of the estate of the Erie Railway Company certain other property, including stocks and bonds of other corporations, which are not affected by said mortgage, nor subject to the lien thereof.

"Second. That said property was improperly, wrongfully and unlawfully included in the judgment entered in the action to foreclose the said second consolidated mortgage, and in the sale thereunder, and was improperly, wrongfully and unlawfully included in the deeds to the purchasers at such sale and in the deeds to the New York, Lake Erie & Western Railway Company from said purchasers, and in the mortgage by said New York, Lake Erie & Western Railroad Company to the said Farmers Loan & Trust Company, which deeds and mortgage are referred to in said answer of said Trust Company.

"Third. And the said plaintiffs deny that by reason of any proceedings had in said foreclosure action or by reason of any of said conveyances, or of said mortgages, the said Farmers Loan & Trust Company has been, or is now, invested with the title in trust or otherwise, to any of the aforesaid property, stocks, bonds, real estate and effects, or any part or portion thereof, or has any right or claim thereto."

That hearing upon these objections was had before Spencer, the referee in the People's suit, to which hearing the People of the State of New York, by the attorney-general, the Erie Railway Company, and the defendant the Farmers Loan & Trust Company, were the only parties, and of which hearing no notice was given to unsecured creditors; that such proceedings were thereupon had that on or about the 25th day of November, 1879, a final judgment was entered in the People's suit, in which a report theretofore made by the referee was confirmed, and it was adjudged among other things, as follows, to wit:

"That the Receiver in this action did not at any time acquire, hold or dispose of any property of any kind not covered by or subject to the lien of the mortgage of the said defendant the Erie Railway Company, to the said defendant the Farmers Loan & Trust Company, which mortgage has been foreclosed as fully and at large set forth in the said reports of the said referee; that the judgment of foreclosure in the action of the said Farmers Loan & Trust Company, and the sale under the said judgment, and the conveyance made by the referee in pursuance of such sale, the conveyances and assignments subsequently made to the purchasers at such sale and by such purchasers to the New York, Lake Erie & Western R. R. Co., did vest in the said * * * Company a good and valid title to all the property of every kind and description embraced and described in the said judgment and in the several said conveyances and assignments."

"That the said defendant corporation, the Erie Railway Company, be and the same is hereby adjudged to be dissolved."

"That whereas Hugh J. Jewett was heretofore, by an order of this court, duly appointed Receiver in this cause, and duly qualified as such Receiver, it is further ordered, adjudged and decreed that said Hugh J. Jewett be and he is hereby continued as Receiver of the Erie Railway Company, with all the power and authority conferred by law upon receivers of dissolved corporations in like cases."

That the Erie Railway Company was by that decree judicially dissolved; that during all this time the plaintiff and other persons referred to in the complaint similarly situated were unsecured creditors of the Erie Company, holding large obligations against it; that Jewett, as Receiver in the People's suit, never advertised any notice of his appointment, or any notice to persons holding "open or subsisting contracts of the Erie Railway Company, or other creditors to present their claims to said Receiver, nor did he call any general meeting or other meeting of the creditors of such Corporation within four months from the time of his appointment, or at any time, for the ascertainment and adjustment of open and subsisting contracts of said Corporation, or for any other purpose; and he did not, previous to rendering his account under the foregoing order of reference, or at any time, publish a notice of his intention to present an account, in the state paper, or in a newspaper published in the County of New York, which was the county in which was the principal place of conducting the business of said Erie Company, or in any county, specifying the time or place at which such accounts should be rendered; nor did he in anywise comply with any of the provisions of the statutes of the State in that behalf and hereinbefore recited; but on the contrary thereof he purposely, and without authority of law, and with the unlawful intent to prevent the general creditors of said Erie Company, including this plaintiff and those similarly situated, from being heard in said proceedings, abstained from complying and did not comply with any of the provisions of the said statute so as aforesaid recited, and which provisions encroached upon the rights of the said persons and creditors, and were to be strictly pursued; and there was no opportunity or notice given to all concerned in said accounting, or to this plaintiff or those similarly situated, or to anyone holding claims upon open or subsisting engagements of the Erie Company, to be heard by the court in said suit of the People on the accounting of said Receiver or otherwise; and the court did not hear the allegations of all concerned in said accounts; and the court did not at any time decree the said accounts to be final or conclusive upon all the creditors of such Corporation, or upon the persons who have claims against it upon open or subsisting engagements; and the said court did not have or acquire any jurisdiction in said suit, or otherwise, at any time or in any manner as against such persons or creditors as aforesaid, including this plaintiff, and those similarly situated, to make the said order of reference hereinbefore recited, or any order or decree which should or could deprive such persons and creditors of this plaintiff of their legal rights to the premises or estop or bar them from asserting the same in any court of competent jurisdiction, or from pursuing in such court their legal remedies against the property of said Company wherever found, or in whosesoever possession the same might be; and said accounting and decrees, and all the aforesaid proceedings, prior or subsequent, for the determination of the question whether any of the assets received by said Jewett, as Receiver, were held by him free from the lien of the mortgages of the Erie Company, and liable to be distributed among the unsecured creditors of the said Company, were and are wholly without jurisdiction and void, and are not binding upon or a bar to this plaintiff or those similarly situated with him, he and they having had no opportunity or notice to be heard in the above described actions on the determination of the said question, as by the statutes of this State they had a right to have; and that the same cannot, nor can either or any thereof, without the committing of a fraud in law upon the persons and creditors aforesaid, including this plaintiff and those similarly situated, be interposed as a bar or estoppel, upon their right to pursue the property of the said Erie Company, wherever the same may now be found; and this plaintiff insists, notwithstanding the said proceedings and decrees, that a very large amount of property, consisting of real estate, stocks and bonds of other corporations and other assets, did come into the hands of said Jewett, as Receiver, which were not affected by or subject to the lien of the aforesaid mortgages, and a portion of which, to an amount not known to this plaintiff, but believed by him to be of the value of many hundreds of thousands of dollars, have been transferred and delivered to said New York, Lake Erie & Western Railroad Company, which assets, comprising not only the property enumerated in the receipt set forth in this complaint but also other assets of large value, constitute a fund as herein above described, wherever they may be traced, for distribution among the unsecured creditors of the said Company, including this plaintiff and those similarly situated with him."

And the plaintiff prayed judgment that the estate, late of the Erie Railway Company and covered by the mortgages mentioned, be adjudged and "decreed a trust fund, to be applied as the court may direct to the payment and satisfaction of the interest accrued and yet to accrue upon said western extension bonds of the Atlantic & Great Western Railroad Company bearing the guaranty of the Erie Railway Company, according to the terms thereof, except so far as said interest has been paid by net proceeds of dividends upon the shares of the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company; that any and all orders, decrees, accountings or proceedings in suits hereinabove described, which may or which can be alleged or claimed to bar or estop the rights of this plaintiff and of other creditors of said Company similarly situated with him, to pursue, recover and enjoy the property of said Erie Company not embraced in and covered by the mortgages of the Erie Company herein above described, be adjudged and decreed, as to this plaintiff and the said creditors of the Erie Company, fraudulent in law and without jurisdiction on the part of the court purporting to have made the same, and void, and to constitute no bar or estoppel against this plaintiff or said other creditors from pursuing and recovering said property in whosesoever hands the same may be found, and that the said orders, decrees and proceedings, and each thereof may be, as to this plaintiff and said other creditors, vacated, annulled and set aside: that the sale of the property of the Erie Railway Company, now or formerly in the possession of the said Jewett, as such Receiver, to wit: all stocks, bonds and interests in other corporations, and patent-rights, licenses and other property, real or personal, not covered by the mortgage to the Farmers Loan & Trust Company or subject to the lien thereof, may be declared to be invalid and void, and that such sale may be annulled and set aside; that an accounting be had of such property," and for other relief. All the decrees, legal proceedings, orders and judgments referred to in the complaint are by reference made parts of the complaint.

To this complaint the defendants severally demurred, on the ground that certain parties named were necessary parties defendant to the action, and that the complaint did not state facts sufficient to constitute a cause of action.

Messrs. **Clarence A. Seward** and **J. Alfred Davenport,** for appellant:

I. The demurrer admits that while Jewett, the possessory Receiver, *pendente lite,* in the People's action on May 26, 1875, went into possession of all the assets and property of the Erie Company, he is found November 25, 1879, before the appointment of the final Receiver, stripped of all possession and asserting himself to be without claim of title and with nothing to deliver to the final Receiver; while all the assets are found with a new company, of which said Receiver is president, and from which the Erie Company's nonmortgage creditors are excluded.

II. To annihilate the title of the final Receiver in the property received by the Receiver, *pendente lite,* the following is relied upon:

1. The judgment of foreclosure made November 7, 1877, in the suit of the Farmers Loan & Trust Company, against the Erie Company, commenced June 15, 1875.

2. The conveyance executed by the Erie Company April, 1878, covering the alleged unmortgaged assets.

3. The final decree of November 25, 1879, in the People's action, appointing a final Receiver and declaring that the judgment of foreclosure has left nothing for him to receive.

The plaintiff claims that both of these decrees and the said conveyance were prohibited by statute, made without jurisdiction, and void; and that the obtaining of the said decrees in the manner pointed out in the complaint, and contrary to the provisions of law, and the acts and omissions of the Receiver with reference thereto, constitute a fraud in law as against the plaintiff; that the said decrees should be declared void as to the plaintiff and those similarly situated with him; and that the unmortgaged assets should be traced and recovered as a trust fund, under an express trust declared by statute, and applied under the statute, as the court shall direct, to the *pro rata* payment of the excluded creditors.

III. In actions by the People for the dissolution of railroad companies, the supreme court is a court of general jurisdiction acting in the exercise of special statutory powers.

Ferguson v. *Crawford,* 70 N. Y. 259.

The claims of creditors must be ascertained by article 3, title 4, chapter 8, part 3 of the Revised Statutes, providing the form of procedure in cases of voluntary dissolution.

The intent of the Legislature is conclusively shown to be, by the provisions of the above statute, that in proceedings for the dissolution of corporations, the claims of the creditors of the dissolved corporation, and their conflicting rights and interests in the assets, are to be ascertained and adjusted by the agency of the receiver appointed upon dissolution, on notice published in a specified way to all the creditors, and with opportunity to be heard; that mortgages, judgments and liens of all kinds are to be satisfied by or through him upon such notice, and that it is only after such notice is given that any decree can be made involving the adjustment of such rights which shall be binding upon the creditors of the company, even though their claims be "open;" and in case dissolution is decreed to transfer to a final receiver as trustee in liquidation, absolute title and possession of the corporation's assets and for sale and distribution of proceedings *pro rata* among creditors according to their respective rights.

Rinn v. *Astor Fire Ins. Co.* 59 N. Y. 143.

IV. Three important safeguards are given, protecting the title to be made by the people in their final receiver:

1. Section 71 (2 R. S. p. 469), making void all transfers or consent decrees by the Corporation after the commencement of the proceedings.

Re Waterbury, 8 Paige, 382; *Sands* v. *Hill*, 55 N. Y. 22; *Galwey* v. *U. S. Sugar Refining Co.* 13 Abb. Pr. 211, 215; *Hutchinson* v. *N. Y. Central Mills*, 2 Abb. Pr. 394, 401; *Clinch* v. *South Side R. R. Co.* 1 Hun, 636.

2. The appointment of a temporary receiver to hold and preserve the assets for the final receiver.

The object of an appointment of a temporary receiver is to preserve the property in such a position that the plaintiff, if, and when, he obtains judgment for the relief to which he may prove himself to be entitled, may procure the execution of that final judgment upon the property. It has often been described as an equitable attachment, to secure the execution of the decree when, and if, made.

The appointment of such a receiver, however, does not in any way affect the right to the property. The court, in an action for a receiver, deals with the possession only, until the right can be determined, if the right be the subject matter in dispute between the parties.

Kerr, Receivers, chap. VI.

The receivership of Jewett in the People's action, prior to the final decree of dissolution, and extending from May 26, 1875, to November 25, 1879, was necessarily of this temporary or possessory nature; for a final receiver in trust for liquidation could not be appointed prior to decree of dissolution. It would not be competent or constitutional for legislative authority to devest a title absolutely, before a hearing.

People v. *Washington Ice Co.* 18 Abb. Pr. 382; *Montgomery* v. *Merrill*, 18 Mich. 338.

3. Application of the doctrine that the title of the final receiver relates back to the commencement of the action. The difference between the temporary and final receiver is shown by the statute, which declares that the latter is vested with all the estate of the corporation (§ 67), and is trustee thereof for creditors and stockholders (§ 67), with power of sale (§ 68) and of distribution (§ 79), and with power to redeem all liens, satisfy judgments, and to settle all matters and accounts between the debtor and its creditors (§ 68); and it has been held that, after his appointment, the answer of the corporation, under seal, cannot affect the property in his hands, nor have any effect whatever in determining the right to the same.

Davenport v. *City Bank of Buffalo*, 9 Paige, 12; *Atlas Bank* v. *Nahant Bank*, 23 Pick. 480; *Rinn* v. *Astor Fire Ins. Co.* 59 N. Y. 143; *Re Berry*, 26 Barb. 55; *Montgomery* v. *Merrill*, 18 Mich. 338.

V. In the case at bar, all the foregoing principles are made applicable, by reason of the fact that the People's action, begun in accordance with the statute on May 26, 1875, actually resulted, November 25, 1879, in a decree of dissolution and in the appointment of a final receiver "with all the power and authority conferred by law upon receivers of dissolved corporations in like cases."

Mr. Jewett as such final receiver, therefore, was vested with all the estate of the Erie Company, and was trustee thereof for creditors (§ 67), by relation back as of the 26th day of May, 1875 (26 Barb. 55), and with an absolute title, against which all acts done by the Erie Company subsequent to May 26, 1875, were void by statute (§ 71), and for the protection and ultimate assertion of which, possession of all assets was asserted and taken by the court, by its possessory receiver *ad interim*.

VI. The foreclosure decree was void by statute as to creditors, by section 71, *supra*, because it was based upon the consent of the Erie Company, given after the commencement of the People's action, and when, therefore, the Erie Company was prohibited by statute from giving such consent.

1. The consent is in these words: "We consent to the entry of this judgment. Shipman, Barlow, Larocque & Macfarland, attorneys for the defendant, the Erie Railway Company. Dated New York, November 7, 1877."

2. The judgment consented to is a tranfer by the Company, so far as unmortgaged assets are concerned, and hence prohibited.

3. The consent was necessary to the decree. The plaintiff, on foreclosure, described the mortgaged property in the exact terms of the mortgage; and the decree, by its own declaration, was made upon bill and answer and supplemental bill. The answer is described in the decree merely as being one admitting the truth of the allegations made in the amended and supplementary complaint; and having been made after commencement of the action for dissolution it would have been powerless to enlarge the mortgage as against the title finally vested in the Receiver for dissolution, even if the complaint had gone beyond the words of the mortgage in describing the mortgaged property.

Davenport v. *City Bank of Buffalo*, 9 Paige, 12; § 71, *supra*.

4. The consent being void, the decree is without jurisdiction, and void as to creditors, and constitutes no bar to a determination by the creditors as to what was covered by the mortgage.

VII. The conveyance made by the Erie Company to the purchasers under foreclosure was clearly void by section 71, so far, at least, as it purports to affect unmortgaged assets. It was a transfer and assignment executed directly in the teeth of the statute, and contrary to its express terms. It derives no validity from having been made in pursuance of the consent decree, for that is equally defective. The deed cannot rise above its source.

VIII. The foreclosure decree was not in fact relied upon by the purchasers, as the assets were accepted by the purchasers subject to the rights of the People in their action, as stated in the order of April 6, 1876, which authorized the Receiver to treat the securities as part of the general estate embraced in the mortgage, expressly stating it to be "without prejudice to any equitable rights and interests of the respective parties, which may be established on final accounting."

The petition of May 3, 1878, by Mr. Jewett, as Receiver in the foreclosure suit, also states such a reservation. So, also, with the order of May 3, 1878, in the foreclosure suit which orders a transfer of such property to the New York, Lake Erie & Western Railroad Company, and the memorandum of receipt executed in pursuance of such transfer.

IX. Inasmuch as the decree of foreclosure was a consent decree, made after the Corporation was powerless to consent; and inasmuch as that decree, therefore, is void as to the Receiver, as finally appointed in the People's suit on November 25, 1879, and as to creditors; and inasmuch as the assets were accepted by the purchasers, expressly subject to an accounting in the People's action—it remains that the judgment in the People's suit, made November 25, 1879, adjudging that the temporary Receiver in that action received no unmortgaged assets, is the only remaining barrier between the final Receiver and the creditors, on the one hand, and the unmortgaged assets on the other. It all hangs, therefore, upon the jurisdiction of the court to enter that judgment, so far as it undertakes to make the adjudication above described, and upon the power of the attorney-general to represent the creditors upon such an application.

X. The judgment in the People's action, dated November 25, 1879, was not only unauthorized, but was prohibited by statute; was made without jurisdiction, as to either subject matter or parties; and was *coram non judice*, and void.

1. The claim of the respondents, that the attorney-general's action was brought under section 38, necessarily brings them under the old Code of Procedure, § 444, which provides that when a receiver upon the dissolution is appointed, the said receiver is to have the powers, and is to be subject to the obligations of article 3, title 4, chapter 8, of the third part of the Revised Statutes; that is to say: that the final receiver upon dissolution, where a surrender of franchises is ascertained under section 38 of the Revised Statutes, instead of being a common-law receiver, subject to the general powers of the court of equity, as to procedure, and as to mode of acquiring jurisdiction of parties and subject matter, is a statutory receiver, and a trustee, as in all other cases of dissolution of corporations, for whom a specific course of procedure, including specific provisions for notice to all creditors, and for appeal by them, is prescribed by statute; and that the jurisdiction of the court to deal with the assets in the People's action was limited and controlled by the statute.

Mickles v. *Rochester City Bank*, 11 Paige, 118.

By section 471 of the Code of Procedure, in force when the People's action was begun, it was enacted that when, in consequence of any proceeding provided for by chapter 8, part 3, of the Revised Statutes (except titles 2 and 12 thereof, which do not apply), a "civil action" shall be brought; "Such action shall be conducted in conformity with this Act;" and therefore, sections 430, 442 and 444 of "this Act," *i. e.*, of the Code of Procedure, in force in 1875, applied, and were controlling in the People's action now under consideration.

All possible doubt upon this point is removed by chapter 151, of the Laws of 1870, which provides that a receiver of the property of a corporation can be appointed "only in a civil action."

2. This was contemplated by the court in its order of November, 1879, which appointed Jewett Receiver, "with all the powers and authority conferred by him upon receivers of dissolved corporations in like cases."

3. Section 444 is mandatory, not only upon the attorney-general but also upon the court. As to the attorney-general it is mandatory in express terms; as to the court it is mandatory because it cannot be the intent of the statute to permit the court to refuse what it declares in the same sentence to be the duty of the attorney-general to apply for and obtain, and because the words "shall have the same power to appoint," etc., have a mandatory force on the well known principle of construction.

Maxwell, Statutes, §§ 218, 325, 330. See also *People, Otsego Co. Bank*, v. *Supervisors*, 51 N. Y. 401; *Phelps* v. *Hawley*, 3 Lans. 160; affirmed in 52 N. Y. 26; *Re Van Allen*, 37 Barb. 225, 228; *Judson* v. *Rossie Galena Co.* 9 Paige, 598, 601; *Rex* v. *Barlow*, 2 Salk. 609; *Ralston* v. *Crittenden*, 13 Fed. Rep. 508, 512; *Mason* v. *Fearson*, 9 How. 248, 259 (50 U. S. bk. 13, L. ed. 125, 130); *French* v. *Edwards*, 13 Wall. 506 (80 U. S. bk. 20, L. ed. 702); *Blake* v. *Portsmouth & Concord R. R.* 39 N. H. 435; *Re Estate of Ballentine*, 45 Cal. 696; *Steines* v. *Franklin Co.* 48 Mo. 167; *Low* v. *Dunham*, 61 Maine, 566.

4. Inasmuch as the court is compelled by the statute to create the office of receiver, upon dissolution of the corporation, who, upon such appointment, is immediately clothed by the statute with the same power to take an account and make distribution of the property of the corporation, among its creditors, as are given in article 3, title 4, chapter 8, of the third part of the Revised Statutes, the converse of the proposition is indisputable, viz.: that the court is prohibited by statute from doing any act which would defeat the exercise, by the receiver, of the title, power, control or jurisdiction conferred by the statute upon such receiver, and from depriving creditors of any of the rights, such as rights to notice, rights of contestation of claims or liens upon the fund through their trustee, rights of appeal, etc., expressly reserved to them by the statute.

5. Inasmuch, too, as the power conferred by chancery to sequestrate and distribute the assets of a corporation on the ground of insolvency is "a mere addition to the common law" (*Bradt* v. *Benedict*, 17 N. Y. 93), and "is to be regarded as creating a new equitable right" (*Bangs* v. *Duckinfield*, 18 N. Y. 596; *Pond* v. *Framingham etc. R. R. Co.* 130 Mass. 194; High, Receivers, § 288), the remedy given excludes all others.

Johnston v. *Louisville*, 11 Bush, 527; Dillon, Mun. Corp. § 653; 2 Burr. 1157; 6 Mass. 286; 11 Mass. 363; 12 Mass. 482; 36 Mo. 543; 4 Wend. 667; 4 Ind. 431; 1 Ind. 285; *Hardman* v. *Bowen*, 39 N. Y. 199; *Renwick* v. *Morris*[*], 7 Hill, 575; *Cook* v. *Kelley*, 12 Abb. Pr. 35; *Smith* v. *Lockwood*, 13 Barb. 209; *Dewey* v. *Goodenough*, 56 Barb. 55; *Sprague* v. *Birdsall*, 2 Cow. 419; *Almy* v. *Harris*, 5 Johns. 175; *Banks* v. *Darden*, 18 Ga. 842; *Laverty* v. *Chamberlain*, 7 Blackf. 556; *Ham* v. *Steamboat Hamburg*, 2

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[*] See digested citations at end of case, Lawyers' edition. [ED.]

Iowa, 460; *Andover etc. Turnpike Corp.* v. *Gould*, 6 Mass. 40; *Riddick* v. *Governor*, 1 Mo. 147; *Journey* v. *State*, 1 Mo. 428.

While it is conceded that these new rights and this new jurisdiction were conferred upon the court of chancery as part of the general authority of the court as a court of general and not of special statutory jurisdiction, and that the rule will apply that jurisdiction is presumed in courts of general jurisdiction until the contrary is shown, while the facts necessary to establish the jurisdiction of an inferior court must be alleged and proved (*Bangs* v. *Duckinfield*, 18 N. Y. 592; *Chemung Canal Bank* v. *Judson*, 8 N. Y. 254, 260), yet it is abundantly established that the above distinction is of no materiality or importance, except as a rule of evidence; and that the presumption in favor of the jurisdiction of the court and the evidence afforded by the recitals in its decrees are only *prima facie* and can be overthrown by proper allegation and proof, or by positive evidence on the face of the record itself showing want of jurisdiction.

Ferguson v. *Crawford*, 70 N. Y. 253; *Sibley* v. *Waffle*, 16 N. Y. 180; *Potter* v. *Merchants Bank*, 28 N. Y. 641; *Freemans Nat. Bank of Boston* v. *Smith*, 13 Blatchf. 220; *Wright* v. *Douglass*, 10 Barb. 97; *Bloom* v. *Burdick*, 1 Hill, 130; *Cook* v. *Farmer*, 11 Abb. Pr. 40.

6. The rule goes to the jurisdiction.

High, Receivers, § 289; *Bangs* v. *McIntosh*, 23 Barb. 591; *Oakley* v. *Paterson Bank*, 1 Green, Ch. 173.

7. The power of the court and attorney-general over assets prior to the decree of dissolution was therefore limited by the statute.

8. The accounting and reference in the People's action was essentially different in the mode of procedure, which was made by the statute exclusive of all others:

a. In the absence of the final trustee from the reference, such absence being fatal to the jurisdiction. The final receiver is absolutely vested with the right to be heard as to creditors' liens. The extent of the liens was admitted by the mortgagee to be undetermined, and said question was left undetermined in the foreclosure suit. This right to be heard was a live asset of the final trustee, and the court had no jurisdiction to confiscate it without notice to him; and the attorney-general had no power to represent him.

b. The absence of notice to creditors was fatal to the jurisdiction. The inquiry whether the property in question was or was not embraced in the mortgage was a question of the construction of the instrument after the facts in relation to the property had been ascertained; and the facts bearing upon this inquiry in possession of creditors as well as of their trustee, and their views of the law upon the proper construction of the mortgage have never been called for or heard by any court, and the determination contemplated by suit has not been made.

Austin v. *Rawdon*, 42 N. Y. 155; *Rinn* v. *Astor Fire Ins. Co.* 59 N. Y. 143; *Loan Asso.* v. *Topeka*, 20 Wall. 655, 664 (87 U. S. bk. 22, L. ed. 455, 461).

The right to be heard, being a right of property, could not be confiscated without due process of law, which requires notice.

People, Witherbee, v. *Board of Supervisors*, 70 N. Y. 228, 234; *Stuart* v. *Palmer*, 74 N. Y. 188, 195; *County of San Mateo* v. *So. Pacific R. Co.* 13 Fed. Rep. 723; *Wilkinson* v. *Leland*, 2 Pet. 658 (27 U. S. bk. 7, L. ed. 553); *Cooper* v. *Board of Works*, 14 C. B. N. S. 190.

The attorney-general had no representative power as between contending creditors.

Atty Gen. v. *Bishop of Worcester*, 16 Jur. 3; *Rex* v. *Wilkes*, 4 Burr. 2527; *Ware* v. *Regent's Canal Co.* 3 Jur. N. S. 25; *People* v. *Brooklyn etc. R. Co.* 89 N. Y. 75; *People* v. *Booth*, 32 N. Y. 397; *Davis* v. *Mayor*, 14 N. Y. 528.

The temporary receiver did not represent contending creditors, nor did his appointment affect the right or enlarge the jurisdiction of the court.

Hubbard v. *Eames*, 22 Barb. 597; *People* v. *Security Life Ins. Co.* 71 N. Y. 227; *Keeney* v. *Home Ins. Co.* 71 N. Y. 401; *New York etc. R. R. Co.* v. *Manhattan R. Co.* 63 How. Pr. 26; *Negus* v. *Brooklyn*, 62 How. Pr. 298; *Curtis* v. *Leavitt*, 15 N. Y. 9; *Hubbard* v. *Guild*, 2 Duer, 685; *Brashear* v. *West*, 7 Pet. 608 (32 U. S. bk. 8, L. ed. 801); *Davenport* v. *Lacon*, 17 Conn. 278; *Atty-Gen.* v. *Guardian Mut. L. Ins. Co.* 77 N. Y. 272, 277; *Harris* v. *Thompson*, 15 Barb. 65; *Atty-Gen.* v. *Life & Fire Co.* 4 Paige, 226; *McCracken* v. *Hayward*, 2 How. 612 (43 U. S. bk. 11, L. ed. 399); *Bronson* v. *Kinzie*, 1 How. 311 (42 U. S. bk. 11, L. ed. 143); *Gunn* v. *Barry*, 115 Wall. 610, 623 (82 U. S. bk. 21, L. ed. 212, 215); *Antoni* v. *Greenhow*, 107 U. S. 769 (Bk. 27, L. ed. 468); *Chicago* v. *Seldon*, 9 Wall. 50 (76 U. S. bk. 19, L. ed. 594); *Curran* v. *Ark.* 15 How. 304 (56 U. S. bk. 14, L. ed. 705); *Gordon* v. *South Fork Canal Co.* 1 McAll. 513.

c. The contract of plaintiff is impaired by the judgment in the People's action, which is therefore unconstitutional and void.

The foregoing views are affirmed by the declaration of this court in *Rinn* v. *Astor Fire Ins. Co.* 59 N. Y. 143, 147, as follows:

"Before distribution is made opportunity is to be given to creditors, not parties to the action in the first instance, to come in and make themselves parties to it by the exhibition of their claims. * * * Each creditor has the right to be heard in respect to his own demand and to contest the demands of others (9 Paige, 600; 2 Barb. Ch. 35). * * * If the receiver can be called upon to account by any creditor in any district of the State and to litigate with him in a distinct proceeding, the question of his right to payment out of the fund, and that too, as in this case, without notice to other creditors, it would be likely * * * in many cases to prejudice other claimants."

XI. The statutory mode of acquiring jurisdiction over subject matter and parties having been departed from, the result is a nullity and may be collaterally attacked on proper evidence.

Ferguson v. *Crawford*, 70 N. Y. 253, 259; *Craig* v. *Andes*, 93 N. Y. 405; *Elliott* v. *Peirsol*, 1 Pet. 328 (26 U. S. bk. 7, L. ed. 164); *Chemung Canal Bank* v. *Judson*, 8 N. Y. 254; *Davidsburgh* v. *Knickerbocker Life Ins. Co.* 90 N. Y. 526; *People, Tweed*, v. *Liscomb*, 60 N. Y. 568; *People, Rogers*, v. *Spencer*, 55 N. Y. 1; *Davis* v. *Packard*, 6 Wend. 327; *Bloom* v. *Bur-*

*dick**, 1 Hill, 130; *People* v. *Cassel*, 5 Hill, 164; *Hard* v. *Shipman*, 6 Barb. 621; *Metropolitan Nat. Bank* v. *Loyd*, 90 N. Y. 530; *Risley* v. *Phenix Bank*, 83 N. Y. 318; *Hoag* v. *Lamont*, 60 N. Y. 96.

XII. The final receiver colluded with the purchasing Company, which claimed all the assets with his acquiescence and under his protection and presidency.

Jewett's position when appointed final receiver was that of trustee, vested with all the estate formerly of the Erie Company, including the right to be heard as to the extent of the mortgage lien and to have the same ascertained in a proceeding to which he as final receiver should be a party, and after notice to creditors; but he has admittedly wholly failed to exercise the right, or any right as receiver, or to notify any creditor, and has acquiesced in the title of the new company under the alleged decree, which was void as to him and was in fact no bar to his exercise of the right to be heard, and which in contemplation of law he knew to be void. His said acquiescence was in the direction of his own personal interest, as he was president of the new company, one of its incorporators, and identified with the reorganization scheme of which it was the result. His two positions were absolutely hostile, one to the other, and irreconcilable; and his acquiescence was (as charged in the complaint) collusive and fraudulent.

A chronological review of Jewett's positions shows collusion and constructive fraud.

Jewett is in the position of a trustee who has failed and refused to perform the trust and duty imposed upon him by statute, in that he failed to give any notice to creditors or to take the steps required by statute to ascertain and adjust the conflicting interests of the creditors upon notice to them; and he to whom the creditors had a right to look for notice suffered a judgment to be procured without notice to them, by which the mortgages swept away the entire estate and thus rendered any further performance of his trust of no avail. This amounts to collusion and fraud.

XIII. The plaintiff is entitled to equitable relief. The action is brought by him on his own behalf and on behalf of all others similarly situated, as the beneficiary of an express trust, against a delinquent trustee hostile in personal interest, and to bring back into court a trust fund 'allowed by the said trustee to be alienated in the direction of his own personal interest, against the terms of the trust and without authority of law, and by collusion and at least constructive fraud.

The plaintiff is entitled to equitable relief; and it was not necessary, in order to maintain this action, that the plaintiff should have recovered judgment and caused execution to be returned unsatisfied; or that he should have proved his claim before the delinquent and hostile trustee.

1. The plaintiff sues as the beneficiary of an express trust.

2. The corporation having been dissolved, relief against it is impossible. This is not a creditor's bill under section 36, nor a bill for sequestration. This has been effected by the attorney-general.

3. The plaintiff insists that there is a well defined trust, as distinguished from a mere resulting trust.

Farmers L. & T. Co. v. *Missouri etc. R. Co.* 21 Fed. Rep. 264; *Re Howard*, 9 Wall. 174 (76 U. S. bk. 19, L. ed. 684); *Williams* v. *Gibbs*, 17 How. 257 (58 U. S. bk. 15, L. ed. 135); *Gillespie* v. *Alexander*, 3 Russ. 130.

4. This action is brought to remove an obstruction to plaintiff's remedy, to wit.: to ascertain the fact that the determination extending the lien of the mortgage in the People's action, as well as the consent decree in the foreclosure suit, so far as it may purport to enlarge the mortgage, are without jurisdiction and void. It therefore falls within the rule in *Fogg* v. *St. Louis etc. R. Co.* 17 Fed. Rep. 872; *Cent. Nat. Bank* v. *Conn. etc. Ins. Co.* 104 U. S. 54, 70, 71 (Bk. 26, L. ed. 693, 700); *Duncan* v. *Jaudon*, 15 Wall. 165 (82 U. S. bk. 21, L. ed. 142); and *Goodin* v. *Cincinnati etc. Canal Co.* 18 Ohio, 169.

5. This action can be maintained because it is brought to redress a wrong committed by the administrator of a fund of which the plaintiff is a beneficiary, on the principle of *Everingham* v. *Vanderbilt*, 51 How. Pr. 177; affirmed in 12 Hun, 75; *Crouse* v. *Frothingham*, 97 N. Y. 105; *Miller* v. *Davidson*, 8 Ill. 518, 522; *Alsager* v. *Rowley*, 6 Ves. Jr. 748; *Holland* v. *Prior*, 1 Myl. & K. 237.

6. The fact that the right of action against the New York, Lake Erie & Western Railroad Company was vested in the final Receiver in trust for the plaintiff did not make it necessary for plaintiff to intervene in the People's action, and there compel the Receiver to contest the title which had been made in his personal interest and through his collusion, and which he had so long fraudulently acquiesced in and sought to maintain. In all the cases to which we have referred the cause of action was vested in the trustee. It is the existence of the cause of action in the trustee, combined with his conduct amounting to a refusal to assert it, which gives the plaintiff his standing in equity.

Laws 1858, chap. 314; *Ft. Stanwix Bank* v. *Leggett*, 51 N. Y. 552; *Southard* v. *Benner*, 72 N. Y. 424, 427.

7. Acquiescence and silent connivance by the trustee in the alienation of the fund will be sufficient to give the beneficiary his cause of action. No active refusal by the trustee is necessary; but in this case Jewett was personally in the alienation.

Weetjen v. *Vibbard*, 5 Hun, 265, 267; *Hagan* v. *Walker*, 14 How. 29 (55 U. S. bk. 14, L. ed. 312); *Weetjen* v. *St. Paul & Pac. R. R. Co.* 4 Hun, 529; *Bate* v. *Graham*, 11 N. Y. 237; *Campbell* v. *R. R. Co.* 1 Woods, C. C. 368.

8. Even in the case of a creditor's bill, proof of its being impossible to obtain a judgment or to have execution issue will enable the creditor to obtain equitable relief.

Kincaid v. *Dwinelle*, 59 N. Y. 548; *Shellington* v. *Howland*, 53 N. Y. 372, 375; *Hetzel* v. *Tannehill Co.* 4 Abb. N. C. 42; *Curran* v. *Ark.* 15 How. 304 (56 U. S. bk. 14, L. ed. 705); *Stewart* v. *Beale*, 7 Hun, 405; *Adsit* v. *Sanford*, 23 Hun, 49; *Case* v. *Beauregard*, 101 U. S. 690 (Bk.

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*See note to this case and digested citations at end, Lawyers' edition. [Ed.]

25, L. ed. 1004); *Pendleton* v. *Perkins*, 49 Mo. 565; *Merchants Nat. Bank* v. *Paine*, 13 R. I. 592; *Farrar* v. *Haselden*, 9 Rich. Eq. (S. C.) 331, 336; *Kinloch* v. *Meyer*, 1 Speer, Eq. 427; *Peay* v. *Morrison*, 10 Gratt. 149; *Burroughs* v. *Elton*, 11 Ves. 29, 36; *McCulloch* v. *Norwood*, 58 N. Y. 566; *Mumma* v. *Potomac Co.* 8 Pet. 281 (33 U. S. bk. 8, L. ed. 945); *Vose* v. *Grant*, 15 Mass. 505; *Spear* v. *Grant*, 16 Mass. 9.

XIV. When the fund is brought back, it can be administered as prescribed in article 3, title 4, chapter 8 of the third part of the Revised Statutes; *i. e.*, in accordance with the trust as expressed by the statute, on the principle laid down in the above decisions.

XV. The unmortgaged assets can and should be followed into the hands of the New York, Lake Erie & Western Railroad Company, and applied in satisfaction of plaintiff's claims.

1. The trust fund existing for the benefit of the creditors of the Erie Company, by reason of its insolvency and of the appointment of a Receiver, and of the decree of dissolution, may be followed by creditors of the Erie Company into hands of any persons or corporations having notice of the trust attached to it, and not having a superior lien or equity as to the fund in question.

Adair v. *Shaw*, 1 Sch. & Lef. 262; *Wood* v. *Dummer*, 3 Mason, 308 and cases cited; *Scammon* v. *Kimball*, 13 Nat. Bank. Reg. 445; *Curran* v. *Ark. supra; Re Le Blanc*, 14 Hun, 8; affirmed in 75 N. Y. 598.

2. A decree is no protection against persons of whom the purchaser has actual notice that they ought to have been, but are not, made parties to the suit.

Kerr, Fraud & Mistake, p. 317, citing: *Colclough* v. *Sterum*, 3 Bligh, 181-186; *Piers* v. *Piers*, 1 Drury & W. 215; *Rolleston* v. *Morton*, 1 Drury & W. 177.

3. Purchasers under a decree of the court take with notice of fraud apparent on the face of the decree.

Kerr, Fraud & Mistake, p. 317; *Toulmin* v. *Steere*, 3 Meriv. 210; *Gore* v. *Stacpoole*, 1 Dow. Parl. Cas. 30; 1 J. & L. 257.

4. The trustee of the mortgage was agent of the bondholders, with respect to the title acquired by such trustee for them; and notice to the trustee was notice to them.

Miller v. *Rutland etc. R. R. Co.* 36 Vt. 452.

5. The New York, Lake Erie & Western Railroad Company is a trustee for the plaintiff, and those similarly situated, as to all assets received by said Company, which were not covered by the mortgage.

Pickett v. *Loggon*, 14 Ves. 238; *Warner* v. *Blakeman*, 4 Keyes, 487; *Duncan* v. *Jaudon*, 15 Wall. 165 (82 U. S. bk. 21, L. ed. 142); *Oliver* v. *Piatt*, 3 How. 401 (44 U. S. bk. 11, L. ed. 652).

XVI. The descriptive clause of the mortgage was not sufficient to cover the property which the plaintiff seeks to have brought back into court for distribution.

The respondents in the court below seemed to rest this part of their case on the proposition that the word "rights" would cover all the property of the Company not included within the remaining words of the descriptive clause; and that the words "tolls, income, issue and profits of the entire estate," would supply the omission in the mortgage of all mention of property to be acquired after date of the mortgage. We do not so understand the decision.

1. The words "franchises, privileges and rights," in the descriptive clause, refer to the franchises, privileges and rights which were conferred upon the Corporation by its charter, and do not extend the lien of the mortgage to rights of property acquired by the Company, and not covered by the other words of the description.

Smith v. *McCullough*, 104 U. S. 25 (Bk. 26, L. ed. 637); *Parish* v. *Wheeler*, 22 N. Y. 494; *Seymour* v. *Canandaigua etc. R. R. Co.* 25 Barb. 285; *Milwaukee & Minn. R. R. Co.* v. *Milwaukee & Western R. R. Co.* 20 Wis. 174.

2. The property sought to be applied to the plaintiff's claim was not described by the words "And all the tolls, income, issues and profits arising out of the said property, and all rights to receive or recover the same," it appearing by reference to the mortgage, that the mortgagor was, by the mortgage, entitled to retain possession of the mortgaged premises and receive the earnings, until the mortgagee should take possession after default.

In such a case the common-law rule applies that the mortgagor is not required to account to the mortgagee for rents and profits, while the property remains in his possession, but can dispose of them at will; that they remain subject to the claims of other creditors, free from the lien of the mortgage; and that the mortgagee acquires no lien upon lands or other property into which income may have been converted.

A mortgagee cannot follow the proceeds of his mortgage. He has no claim or lien in law or in equity, outside of the provisions of the mortgage. He has limited his lien by language chosen or adopted by himself, and he is bound by the language of the mortgage. He has no equity superior to that of general creditors. In fact, as he has some security and they none, the equities would be in their favor rather than in his.

Jones, Mort. § 670; *Argall* v. *Pitts*, 78 N. Y. 239; *Rider* v. *Bagley*, 84 N. Y. 461; *Galveston R. R. Co.* v. *Cowdrey*, 11 Wall. 459, 482 (78 U. S. bk. 20, L. ed. 199, 206); *Gilman* v. *Ill. & Miss. Tel. Co.* 91 U. S. 603 (Bk. 23, L. ed. 405); *Noyes* v. *Rich*, 52 Maine, 115.

3. The mortgage does not affect property acquired by the Erie Company after the date of the mortgage and not appurtenant to the railroad.

Re New Clydach Sheet & Bar Iron Co. L. R. 6 Eq. 514; *Calhoun* v. *Memphis etc. R. R. Co.* 2 Flip. C. C. 442; *Dinsmore* v. *Racine etc. R. R. Co.* 12 Wis. 649; *Shamokin Valley R. R. Co.* v. *Livermore*, 47 Pa. 465.

As the mortgage specifically enumerates certain personal property, as embraced in the mortgage, all other kinds of personal property are excluded.

Brainerd v. *Peck*, 34 Vt. 496; *Smith* v. *McCullough*, 104 U. S. 25 (Bk. 26, L. ed. 637); *Morgan* v. *Donover*, 58 Ala. 241.

XVII. The plaintiff is not guilty of laches.

1. The general creditors cannot be charged with laches in not presenting their claims, when they were entitled by law to notice from the Receiver, and received none.

Fort v. *Gooding*, 9 Barb. 388; *Hardy* v. *Ames*, 47 Barb. 413; *Clayton* v. *Wardell*, 2 Bradf. 1–7.

2. Nor has sufficient time elapsed since the entry of the judgment of November 25, 1879, to make plaintiff chargeable with laches, the complaint herein being verified August 22, 1881.

Williams v. *Gibbs*, 17 How. 257 (58 U. S. bk. 15, L. ed. 135); *Hagan* v. *Walker*, 14 How. 29 (55 U. S. bk. 14, L. ed. 312).

3. There has been no active acquiescence.

4. Laches cannot be set up by parties taking with notice of the wrong.

Mr. **Herbert B. Turner**, for Farmers Loan and Trust Co., respondent.

Messrs. **W. W. Macfarland** and **George F. Comstock**, with *Messrs.* **Shipman, Barlow, Larocque & Choate**, for other respondents:

I. The People's action, in which Jewett was appointed Receiver, was not governed by the provisions of the Revised Statutes in relation to insolvent moneyed corporations and insurance companies.

Part III, chap. 8 title 4, art. 2, §§ 39–42, R. S.

Mann v. *Pentz*, 3 N.Y. 415, was founded upon section 38, which embraces all corporations except those above mentioned, and provides for their dissolution on the ground of insolvency. Receiverships, under that section (and under section 36, before it was amended), were common-law receiverships, for care and custody only. They were wholly unregulated by statute, and left to the general powers of the court, as a court of equity.

II. But suppose that the Receiver took the title to the equity of redemption in the property mortgaged, and to all other property in trust for creditors, and that so far as that title has not been effectually devested, it is still in him. Whatever ground of complaint a creditor at large may have against a trustee charged by law with the administration of assets, for a neglect of duty, and whatever the remedy may be, it certainly does not change his status nor give any right to the creditor to usurp the title and function of the trustee, and, by an independent action, to attack the title of strangers, which the trustee alone, if anyone, could challenge.

Olney v. *Tanner*, 10 Fed. Rep. 101.

III. The plaintiff exhibits no right to sue, except such as, on general principles, appertains to a mere creditor at large. That such a creditor cannot maintain a suit in equity to subject property held adversely by a stranger, to the payment of his debt, has always been a settled rule of law.

Bacon v. *Robertson*, 18 How. 480 (59 U. S. bk. 15, L. ed. 499); *Judson* v. *Rossie Galena Co.* 9 Paige, 598; *Schuehle* v. *Reiman*, 86 N. Y. 270; *Blossom* v. *Milwaukee etc. R. R. Co.* 1 Wall. 656 (68 U. S. bk. 17, L. ed. 673).

The jurisdiction is thus defined by the chancellor in *Beck* v. *Burdett*, 1 Paige, 307:

"There are two classes of cases where a plaintiff is permitted to come into this court for relief after he has prosecuted to judgment and execution at law without obtaining satisfaction of his debt. In one case the issuing of the execution gives to the plaintiff a lien upon the property, but he is compelled to come here for the purpose of removing some obstruction fraudulently or inequitably interposed to prevent a sale on the execution; in the other, the plaintiff comes here to obtain satisfaction of his debt out of property of the defendant which cannot be reached by execution at law."

This has always been the limit of equitable jurisdiction. Special circumstances have often been relied upon to take the particular case out of the rule; but in every instance it has been held that the court was absolutely without jurisdiction to assist a creditor at large to obtain satisfaction of his debt by the processes and methods of equity.

Brinkerhoff v. *Brown*, 4 Johns. Ch. 671; *Dunlevy* v. *Tallmadge*, 32 N. Y. 457; *Greenwood* v. *Brodhead*, 8 Barb. 593; *Wiggins* v. *Armstrong*, 2 Johns. Ch. 144; *Durant* v. *Supervisors*, 26 Wend. 103; *Hadden* v. *Spader*, 20 Johns. 554; *Ocean Nat. Bank* v. *Olcott*, 46 N. Y. 17; *Allyn* v. *Thurston*, 53 N. Y. 622; *Geery* v. *Geery*, 63 N. Y. 252; *Produce Bank* v. *Morton*, 67 N. Y. 199.

And, since jurisdiction is limited to judgment creditors, the impossibility of obtaining a judgment in consequence of death, the absence of assets, the insolvency and dissolution of a corporation, or any other event will not enable the court to entertain the action.

Estes v. *Wilcox*, 67 N. Y. 265; *Sturges* v. *Vanderbilt*, 73 N.Y. 384, 885; *Lawrence* v. *Bank of the Repbulic*, 35 N. Y. 320; *Jones* v. *Green*, 1 Wall. 330 (68 U. S. bk. 17, L. ed. 553); *Bd. of Public Works* v. *Columbia College*, 17 Wall. 529 (84 U. S. bk. 21, L. ed. 691); *Smith* v. *Ft. Scott etc. R. R. Co.* 99 U. S. 398 (Bk. 25. L. ed. 437).

IV. In the action for a foreclosure, the court expressly found and adjudged that all the property demanded by the plaintiff was included in the mortgage, and ordered it to be sold. It was sold, and it was bought for the defendant railroad company and paid for. This judgment and the proceedings in execution thereof (to say nothing here about the judgment in the People's action), are conclusive as against the plaintiff. The plaintiff alleges that the finding rests upon insufficient evidence, but that cannot be inquired into here.

Grignon v. *Astor*, 2 How. 319 (43 U. S. bk. 11, L. ed. 283).

The plaintiff then, as now, was a creditor at large, with no right to interfere in the contest between his debtor and third parties.

Bronson v. *La Crosse etc. R. R. Co.* 2 Black, 524 (67 U. S. bk. 17, L. ed. 359); *Stout* v. *Lye*, 103 U. S. 66 (Bk. 26, L. ed. 428).

Nevertheless, the judgment was as conclusive against the creditor as against his debtor.

Candee v. *Lord*, 2 N. Y. 269; *Bangs* v. *Duckinfield*, 18 N. Y. 592; *Grignon* v. *Astor, supra; Cooper* v. *Reynolds*, 10 Wall 316 (77 U. S. bk. 19, L. ed. 932).

V. During the pendency of the People's action and the appointment of the Receiver, the Corporation was not dissolved, and there was nothing to prevent the commencement and prosecution of an action, and a recovery of a judgment against the Corporation exactly as if no action for a dissolution were pending.

Kincaid v. *Dwinelle*, 59 N. Y. 548; *Re Waterbury*, 8 Paige, 380; *Knauer* v. *Globe Mut. L. Ins. Co.* 14 Jones & S. 370.

Earl, *J.*, delivered the opinion of the court:

The plaintiff alleges that at the time of the commencement of the actions by the People against the Erie Railway Company for its dissolution, and by the Farmers Loan & Trust Company for the foreclosure of the mortgages upon its property, it owned a large amount of stock and bonds in other corporations which were not covered by or subject to the mortgages; and he seeks now to reach that property and to subject it to the payment of certain unsecured obligations which he and other creditors similarly situated then held and still hold against the Erie Railway Company. He finds in his pathway the orders and decrees made in the actions mentioned, which must be brushed aside or disregarded before he can succeed.

He does not allege in his complaint that any fraud was practiced upon the court or any party to the action, and he does not assail those orders and decrees as in fact fraudulent, and seek to have them vacated or annulled on that account. He does not claim that if the court had jurisdiction, as against him and the other general creditors, to make them that he can attack them collaterally or maintain this action. What he claims is that those orders and decrees, so far as they assume to adjudicate upon or dispose of the property in question, were made without any jurisdiction and may therefore be disregarded, and that they furnish no obstacle to the maintenance of this action. Hence, the general inquiry upon which we are to enter is whether the supreme court had jurisdiction to adjudicate upon and dispose of the property by the orders and decrees made in those actions.

About the 25th day of May, 1875, the People's action was commenced for the dissolution of the Erie Railway Company, upon the ground, among other things, that it was insolvent and had been for one whole year; and the complaint in that action, besides other relief, prayed that Hugh J. Jewett, who was then President of the Company, might be appointed Receiver during the pendency of the action. On the 26th day of May he was so appointed, with power, as provided in the order appointing him, among other things, to prosecute and defend actions for or against the Company, either in the name of the Company or in his own name as Receiver, and to maintain and preserve the corporate organization and franchises of the Company until final judgment in the action.

Thereafter application was made in that action on behalf of the Farmers Loan & Trust Company for leave to commence an action against the Erie Railway Company to foreclose the mortgages held by it. Such leave was granted, and on the 14th day of June, 1875, the foreclosure action was commenced in the supreme court. In the prayer for judgment in that action the plaintiff, besides other relief, prayed that an inquiry might be had and an account taken of and concerning the premises and property mortgaged to the plaintiff, in order that it might be fully and at large ascertained whereof the mortgaged premises consisted; and that Jewett might be appointed Receiver in the action.

On the 15th day of June, by an order duly granted, Jewett was appointed Receiver of the mortgaged property in that action; and he was specially authorized to receive and enforce possession of whatever he was bound, to receive, to run and operate the railway, to institute, as he might deem needful, whatever suits or proceedings he, by counsel, might be advised to be necessary and proper in the appropriate discharge of his duty as receiver, and to defend and resist any suit or proceedings which he should be so advised and should believe would otherwise be prejudicial to the property, interests or franchises committed to his charge, and generally to do and cause to be done in a lawful manner, as receiver, what might be reasonable and needful in and about the care and preservation of the rights, interests and franchises on which the mortgages were a lien, or the discharge of his duty as receiver might render needful. These orders appointing Jewett Receiver, and all the other orders in the two actions were made in the same court, the same judge presiding; and thereafter Jewett must be deemed to have taken and held, as receiver in the foreclosure action, all the property covered by and subject to the mortgages, and as receiver in the People's action all the other property of the Company.

On the 6th day of April, 1876, upon affidavit and notice of motion, an order was made by the court in the foreclosure action that the Receiver should hold and deal with the stocks and bonds in question in all respects as a part of the general fund of the estate embraced in the mortgages, among other things for the reimbursement to the plaintiff in that action of all sums paid under the orders of the court out of the proceeds of the mortgaged premises for the discharge of debts due from the Erie Railway Company, at the date of the Receiver's appointment, for labor and supplies, "without prejudice to any equitable rights and interests of the respective parties which may be established on final accounting." And he was also authorized to sell any part of the stocks or bonds at public or private sale, and to use and apply the proceeds for the purposes of the trust.

The foreclosure action proceeded to judgment on the 7th day of November, 1877, which judgment recited that the bonds and stocks lawfully came into the possession of the Receiver, and that they were held by him as part and parcel of the property and premises mortgaged to the plaintiff; and it authorized the referee appointed to sell the mortgaged premises, to expose for sale and to sell as part thereof the stocks and bonds mentioned which were described in the decree as a portion of the mortgaged premises; and they were sold by the referee. The sale was aftewards confirmed and the referee was authorized to convey the stocks and bonds with the other property, and he made such conveyance; and the Erie Railway Company executed a similar conveyance of the same property.

Afterward, upon the petition of Jewett in the foreclosure action, an order was made by the court on the third day of May, 1878, by which it was ordered that the Receiver deliver to the New York, Lake Erie & Western Railroad Company, "all the property and franchises whereof he is now possessed, as receiver in this action, and which were embraced or intended to be embraced in the judgment of foreclosure herein, subject to the reservations and exceptions hereinafter specified, and subject to all and singular the rights of the People of this State in and to the premises, or any part thereof, as the same may be ascertained on due inquiry and examination by the attorney-general, in the action of the People of this State against the Erie Railway Company now pending, to the end that such rights and interests may be as fully protected as if this transfer had not been ordered and directed."

In pursuance of that order, and upon the terms thereof, he did make the delivery, and that substantially terminated the proceedings in the foreclosure action. But for the pendency of the People's action, it cannot be doubted that the determination and judgment in the foreclosure action would have been conclusive upon everyone. It was within the province of the court to determine what property was actually embraced within or subject in express terms or by subrogation or any other equitable principles, to the mortgages foreclosed.

The unsecured creditors were not necessary or proper parties to that action and had no right to intervene therein, and any adjudication made against the mortgagor was binding upon them. *Bronson* v. *La Crosse etc. R. R. Co.* 2 Black, 524 [67 U. S. bk. 17, L. ed. 359]; *Stout* v. *Lye*, 103 U. S. 66 [Bk. 26, L. ed. 428]; *Candee* v. *Lord*, 2 N. Y. 269.

Jewett, as receiver in the People's action, was not a necessary party to that action. As temporary receiver he was not vested with the title to the property of the Corporation; it was not devested of its property until final judgment of dissolution and the appointment of the final Receiver. The temporary Receiver was not a trustee for the creditors of the Corporation, but he was a mere care taker, custodian and manager of its property and franchises, under the direction of the court, during the pendency of the action, having lawful possession of the property; and if a trustee in any sense he was a trustee for the Corporation.

Nor were the People in any sense a proper party to that action. They had no lien upon or interest in the property. The main purpose of their action was to procure a judgment dissolving the Corporation; and any other relief they could obtain was incidental to that. The court could have permitted the People or the Receiver in their action to intervene in the foreclosure action, if application had been made for that purpose; but whether it would or not rested in its discretion.

The foreclosure judgment absolutely determined that these stocks and bonds were subject to the mortgages, and liable to be sold with the mortgaged premises. They were so sold, absolutely; the sale was confirmed, and the referee was ordered to make the conveyance, including these stocks and bonds to the purchasers; and all this was done without any violation of the rights of the general creditors. The title of the purchasers under the foreclosure sale was in no way made subject to the rights of the People in their action, until an order was made, subsequently to the conveyances by the referee and Railway Company, to the purchasers for a delivery of the property by the Receiver; and in that order it was for the first time provided that the delivery should be subject to all the rights of the People as they might be ascertained by the attorney-general in the People's action; and the delivery was so made.

The adjudications made in the foreclosure action absolutely bound all the parties thereto, and none of them could thereafter be heard to say that they were not founded upon sufficient evidence. The supreme court, having general jurisdiction of the parties and the subject matter, is conclusively presumed to have had sufficient facts before it to authorize the judgment and the orders which were made; and neither the Erie Company nor any of its general creditors can now be heard to say that the judgment was not pronounced after full examination and investigation of all the facts upon which it was based. It imports absolute verity, and it must be presumed that these stocks and bonds were properly subject to the mortgages and were properly sold in connection with and as a part of the mortgaged property. *Grignon* v. *Astor*, 2 How. 319 [43 U. S. bk. 11, L. ed. 283].

Where a court, having jurisdiction of the subject matter and the parties, pronounces judgment upon insufficient or illegal evidence, or mistakes the evidence or the law, the only remedy of any person aggrieved by the judgment is by an appeal therefrom, or a motion in the action in which it was rendered; but it cannot be assailed collaterally. Therefore whatever rights the plaintiff has in this action grow out of the commencement and pendency of the People's action against the Erie Company; and such, indeed, is the contention of his learned counsel.

It cannot be claimed that the pendency of the People's action, in which a temporary receiver had been appointed, absolutely prohibited the commencement of the foreclosure action. That action was commenced after leave was regularly obtained by an order of the court made in the People's action. In the action for the dissolution of the Corporation, the court was not bound to appoint a temporary receiver. It could have permitted the action to proceed to judgment and then appointed a final receiver, to be vested with the title of the corporate property, and to administer and distribute such property under the direction of the court. The temporary receiver was entirely under the control of the court.

There was no statute regulating or prescribing his duties. He was what was called in the argument a common-law receiver, with such powers and duties as, in the exercise of its equitable jurisdiction, the court might devolve upon him. His duties were in the main to manage, protect and preserve the property and franchises of the Company during the pendency of the action. The People's action could have been discontinued at any time, by the order of the court, and the receivership vacated and set aside, and the property restored to the Corporation, and thus fully subjected to the action of the court in the foreclosure action.

The whole matter was constantly under the control of the court until final judgment. Therefore the court had the power to permit the foreclosure action to be commenced, and proceed to appoint a receiver therein, and to supersede the receiver appointed in the People's action, to transfer all the duties of the Receiver in that action to the Receiver appointed in the foreclosure action and to order all the property covered by the mortgages to be delivered to such Receiver.

The judgment in the foreclosure action appears to have been regularly obtained. There was service of process, upon an appearance by the Erie Company, and an answer admitting the allegations of the complaint. The answer entitled the plaintiff to judgment against it.

But it appears in the record that the attorneys for the Erie Company, more than two years after the commencement of the foreclosure action, consented to the entry of the judgment therein; and this, it is claimed, rendered the judgment absolutely void against the final Receiver in the People's action and the creditors of the corporation under section 71, of 2 R. S. 469, which provides as follows:

"All sales, assignments, transfers, mortgages and conveyances of any part of the estate, real or personal, including things in action, of every such corporation, made after the filing of the petition for a dissolution thereof, in payment of, or as a security for any existing or prior debt, or for any other consideration, and all judgments confessed by such corporation after that time, shall be absolutely void as against the receivers who may be appointed on such petition, and as against the creditors of such corporation."

That section was aimed, not at the disposition of the corporate property made under the order of the court by its receiver, or even by the corporation, but at the voluntary disposition of its property by the insolvent corporation; and the confession of judgment prohibited was one made by the corporation as its voluntary act without the interference of the court, and not a judgment like this which rests upon no confession, nor even consent, but upon the action and order of the court at a regular term and session thereof. Such a judgment is in no sense a judgment by confession. If, therefore, it be assumed that section 71 was applicable, it was not violated.

The People's action was one in equity, under the Revised Statutes (2 R. S. 463, § 38) which provide as follows: "Whenever any incorporated company shall have remained insolvent for one whole year, or for one year shall have neglected or refused to pay and discharge its notes or other evidences of debt, or for one year shall have suspended the ordinary and lawful business of such corporation, it shall be deemed to have surrendered the rights, privileges and franchises granted by an Act of incorporation, or acquired under the laws of this State, and shall be adjudged to be dissolved."

That section was unrepealed in 1875, and it is conceded that under it, as originally enacted, an action could be brought in equity for the dissolution of a corporation in the cases mentioned; that in such an action both a temporary and final receiver could be appointed who would be common-law receivers, possessing the powers and charged with the duties devolved upon them by the orders of the court in the exercise of its equity jurisdiction; that they would not be controlled by the provisions of law which regulate the appointment of receivers in the case of the voluntary dissolution of corporations under part 3, chapter 8, title 4, article 3, of the Revised Statutes, and that if the Code which was in force in 1875 did not operate upon receivers appointed in actions commenced under that section, then all of the proceedings in the People's action and the foreclosure action were so far regularly conducted within the jurisdiction of the court that the plaintiff is in no position to assail them. But his contention is that while the temporary Receiver appointed in the People's action was a common-law receiver, whose powers and duties were not regulated by statute, yet that when Jewett became a final Receiver in that action, his powers and duties then became subject, under the Code, to the statutory provisions referred to; and for the present we will proceed upon that assumption.

Upon that assumption then, what could be done under the authority and direction of the court by Jewett as temporary receiver in both actions before judgment and his appointment as final receiver in the People's action? He had such powers and duties as temporary Receiver as the court conferred upon him. He could manage, control and care for the property of the Corporation; and until final judgment in the People's action the general creditors of the Corporation had no right to notice and no absolute right to intervene or to a hearing. The Receiver could reduce the property to possession without consulting them; he could manage the railways under the order of the court and incur and discharge debts, sell and buy property in the ordinary business of the Company; and he could bring and defend actions without any notice to or right of interference by the general creditors. If after his appointment as Receiver in the People's action he had found a large amount of the assets of the Company in the possession of adverse claimants, he could have commenced suit therefor, either in his own name or that of the Company; and if he had failed in the suit, and judgment had gone against him, the adjudications would have bound the creditors of the Erie Company. If he or the Erie Company had been sued for a debt a judgment in the suit would have bound the creditors of the Company.

Here, before final judgment, there was a claim on the one side by the holders of the mortgages that these stocks and bonds belonged to it under the mortgages and that they were in equity part of the mortgaged estate. On the other hand, the People claimed that they were not covered by the mortgages and could not properly be sold under the foreclosure judgment or transferred to the purchasers on the foreclosure sale; and the People claimed that the purchasers under that sale did not get good title, and thus there was a controversy as to this property. That was a controversy which the court had a right to determine before judgment, like any other controversy respecting the property in the hands of its receivers. It appointed a referee to investigate the facts and to report thereon. An apparently thorough and exhaustive investigation was made in which the People, through their attorney-general, participated; and as a result of it the court determined that these stocks and bonds did come under the mortgages; that they were properly sold with the mortgaged premises; that the purchasers at the foreclosure sale obtained a good title to them; and that they never in fact came to the possession of the Receiver appointed in the People's action.

So far no statute was violated and no statutory right of the general creditors was disregarded. They were represented in the litigation by the People and by their debtor; and any judgment rendered or decision made was binding upon them, as it was binding upon the actual parties to the litigation. The court was not bound to defer that litigation until a final receiver was appointed, but has the right to permit it to proceed to a conclusion before final judgment in the People's action. The fact that Jewett was Receiver in both actions makes no difference. We may assume for the purpose of testing the matter that there was a different receiver in each action, and that they both claimed this property, and that there was thus a controversy to be settled. It cannot be doubted, if such had been the case, that the court would have had jurisdiction to permit one receiver to sue the other for the purpose of settling the controversy, and that a decision made in such a litigation would be binding upon everybody.

It matters not that this controversy and litigation involved all the assets of the Corporation which were not plainly covered by the mortgages. The same principles must rule, whether the amount involved was large or small. If the Receiver could, under the direction of the court, engage in a litigation over a single steam engine, or over a debt of $100,000, for or against the Corporation, and bind the Corporation and its creditors by the result, upon precisely the same principles he could engage in this litigation, to which the People and the Corporation were also parties, and bind the Corporation and its creditors by the result.

There was no distribution of the assets of the Corporation in violation of the rights of the final Receiver, or of its general creditors. It was judicially determined that these assets were subject to the mortgages; and that was a determination, as we have seen, which the court could make without the presence of the general creditors, except as they were represented by the People. The final Receiver, when appointed, was vested with all the estate which the Corporation had at the time of its dissolution; and these stocks and bonds which had been swept away by the mortgage foreclosure and sale were no part of that estate. The rights which the statutes secure to creditors, in the case of the statutory final receiver of an insolvent corporation, are such only as pertain to the property which comes to the receiver to be administered by him and distributed to creditors; and there is no statute which entitles them to notice or gives them the right to a hearing before the receiver, except as to claims upon and their rights in such property.

There never was a time when the general creditors of the Corporation had any vested right in these stocks and bonds, or to be paid out of them; and the disposition made of them did not impair the obligation of their contracts with the Erie Company or deprive them of due process of law.

It is claimed on behalf of the plaintiff that the title of the final Receiver related back to the commencement of the People's action, and that therefore it overrode the disposition made of these stocks and bonds. But the equitable rule which gives a receiver title to the debtor's property by relation, as of the commencement of the action, is one adopted to defeat fraudulent, unwarranted and unjust dispositions of the debtor's property, and to accomplish just and equitable ends; but it is not applicable to a case where property has been legally disposed of under the direction of the court, and certainly has no application to a case like this, where the property claimed for a final Receiver was subject to a lien in favor of mortgaged creditors, and has been sold and disposed of by virtue of that lien during the pendency of the action.

There is a feature of this case which must be here more particularly noticed. After the termination of the foreclosure suit and the sale and the transfer of the mortgaged premises to the new corporation, the New York, Lake Erie & Western Railroad Co., the latter Company executed a new mortgage to the Farmers Loan & Trust Company, to secure a large amount of its bonds. After the final order of reference, among other things, to ascertain whether these stocks and bonds were covered by or subject to the lien of the mortgages, in March, 1879, the People's action was discontinued as to all parties defendant, except the Erie Railway Company, and the Farmers Loan & Trust Company; and by leave of the court obtained in that action a supplemental complaint was served, alleging the foreclosure proceedings and the sale and transfer under the foreclosure judgment, and other matters. To that complaint the Farmers Loan & Trust Company, in its answer thereto, alleged the foreclosure proceedings, insisting upon the validity of the sale therein made and its title to the stocks and bonds under its mortgage. To this answer the attorney-general, on the third day of April, 1879, served a reply in which he denied that these stocks and bonds were embraced within the mortgage, and alleged that they were improperly, wrongfully and unlawfully included in the foreclosed judgment, in the sale thereunder, and in the deeds to the purchasers at such sale, and denied that they or the Farmers Loan & Trust Company acquired any title thereto. Thus an issue was framed by the parties to that action, to be tried and disposed of before the referee appointed for that purpose.

Even if final judgment could have been entered in the action before the trial and disposition of that issue, how can it be said that the parties and the court could not delay the entry of final judgment until after the trial of that issue? It was an issue framed before judgment, which it was quite proper to try before judgment; and the decision of that issue embodied in the final judgment upon the report of the referee; that the bonds and stocks were covered by and subject to the mortgages and were legally transferred under the foreclosure sale, bound all the parties to that action and the persons who were represented by them. The People and the Railway Company represented the general creditors of the Railway Company; and the Farmers Loan & Trust Company represented the bondholders, whose trustee it was. Hence, upon the assumption that the final Receiver appointed in the People's action was clothed with the powers and subject to the duties of receivers in the case of the voluntary dissolution of corporations, precisely as claimed by the learned counsel for the plaintiff, yet we reach the conclusion that during the pendency of that action and of the temporary receivership, the court had jurisdiction to make the orders and decrees complained of, and to authorize the disposition which was made of this property.

But we need not stop here. Even if the reference to, hearing before, and decision by, the referee, Spencer, had been after final judgment in the People's action, and the appointment of Jewett as final Receiver with all the powers of a receiver in the case of the voluntary dissolution of a corporation, still our conclusion would be the same. Prior to the Code of Procedure, final receivers appointed in equitable actions under section 38 were common-law receivers, whose powers and duties were not regulated by statute; *Mann* v. *Pentz,* 3 N. Y. 415; and this is conceded by the learned counsel for the plaintiff.

But he claims that the law was changed by that Code, and that in consequence of the provision thereof the powers and duties of final receivers under section 38 were the same as were devolved upon a final receiver appointed in the case of the voluntary dissolution of a corporation. The Code, as originally reported and enacted in 1848, contained no provisions in reference to the winding up or dissolution of corporations and section 38 remained unaffected. But in 1849, section 430 of the Code was added, which provided as follows: "An action may be brought by the attorney-general, in the name of the People of this State, on leave granted by the Supreme Court, or a judge thereof, for the purpose of vacating the charter or annulling the existence of a corporation, other than municipal, whenever such corporations shall,

"1. Offend against any of the provisions of the Act or Acts creating, altering or renewing such corporation; or,

"2. Violate the provisions of any law, by which such corporation shall have forfeited its charter, by abuse of its powers; or,

"3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; or,

"4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises, or,

"5. Whenever it shall exercise a franchise or privilege not conferred upon it by law.

"And it shall be the duty of the attorney-general, whenever he shall have reason to believe that any of these acts or omissions can be established by proof, to apply for leave, and upon leave granted, to bring the action in every case of public interest, and also in every other case in which satisfactory security shall be given, to indemnify the People of this State against the costs and expenses to be incurred thereby."

And then by section 444 it was provided that when judgment should be rendered against a corporation, the court should have the same power to restrain the corporation, to appoint a receiver of its property and to take an account and make distribution thereof among its creditors as were given in article 8, title 4, chapter 8 of the third part of the Revised Statutes, and that it should be duty of the attorney-general immediately after the rendition of such judgment to institute proceedings for that purpose.

By section 68 of the Revised Statutes referred to, it is provided that such receivers shall have the power and authority conferred by law upon trustees to whom an assignment of the estate of insolvent debtors may be made pursuant to the provisions of the 5th chapter of the second part of the Revised Statutes.

Section 70 provides that the receivers, immediately on their appointment, shall give notice thereof, which shall contain the same matters required by law in notices of trustees of insolvent debtors; and in addition thereto shall require all persons holding any open or subsisting contract of such corporation, to present the same in writing and in detail to such receivers at the time and place in such notice specified, which shall be published for three weeks in the state paper and in a newspaper printed in the county where the principal place of conducting the business of such corporation shall have been situated.

In section 72 it is provided that after the first publication of the notice of appointment of receivers, every person having possession of any property belonging to such corporation, and every person indebted to such corporation, shall account and answer for the amount of such debt and for the value of such property to the receivers; and all the provisions of law in respect to trustees of insolvent debtors, the collection and preservation of the property of such debtors, the concealment and discovery thereof, and the means of enforcing such discovery, shall be applicable to the receivers so appointed, and to the property of such corporation.

Section 73 provides that such receivers shall have the same power to settle any controversy that shall arise between them and any debtors or creditors of such corporation by a reference, as is given by law to trustees of insolvent debtors; that the same proceedings for that purpose shall be had, and with like effect; that application for the appointment of referees may be made to any officer authorized to appoint such referees on the application of trustees of insolvent debtors, who shall proceed therein in the same manner; and that the referees shall proceed in like manner and file their report with the like effect in all respects.

Section 74 provides that the receivers shall be subject to all duties and obligations by law imposed upon trustees of insolvent debtors, so far as they may be applicable, except where other provisions shall be made; that they shall call a general meeting of the creditors of such corporation, within four months from the time of their appointment, when all accounts and demands for and against such corporation, and all its open and subsisting contracts shall be ascertained and adjusted as far as may be, and the amount of moneys in the hands of the receiver declared.

Section 79 provides how the receivers shall distribute the residue of the moneys in their hands among those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained.

Section 85 provides that the receivers shall be subject to the control of the court of chancery, and may be compelled to account at any time, and may be removed by the court.

Section 90 provides that any decree or order of the court of chancery, made upon any petition presented pursuant to the provisions of that article, or in the course of any proceedings therein, shall be subject to an appeal.

By looking at the fifth chapter of the second part of the Revised Statutes (2 R. S. p. 41), we find that in section 7 it is provided that the trustees shall have power to sue in their own names, or otherwise, and to recover all the estate, debts and things in action belonging or due to the debtor, in the same manner and with the like effect as such debtor could or might have done if no attachment had been issued, or trustee appointed, or an assignment had not been made; and, among other things, to settle all matters and accounts between such debtor and his debtors or creditors, and to examine any person touching such matters and accounts on oath, and to compound with any person indebted to such debtor, and discharge all demands against such person.

Section 8 provided that the trustees, immediately upon their appointment, shall give notice thereof, and therein shall require: 1, all persons indebted to such debtor, by a day and at a place therein to be specified, to render an account of all debts and sums of money owing by them respectively, to such trustees, and to pay the same; 2, all persons having in their possession any property or effects of such debtor, to deliver the same to the trustees by the day so appointed; 3, all the creditors of such debtors to deliver their respective accounts and demands to the trustees or one of them by a day to be therein specified, not less than forty days from the first publication of the notice.

Section 19 provides that if any controversy shall arise between the trustees and any other person, in the settlement of any demands against such debtor, or of debts due to his estate, the same may be referred to three indifferent persons, who may be agreed upon by the trustees, and the party with whom such controversy shall exist by a writing to that effect signed by them.

Section 26 provided that the trustees shall, as speedily as possible, convert the estate real and personal, of such debtor into money; and section 27 provides that the trustees within fifteen months from the time of their appointment shall call a general meeting of the creditors of such debtors, by a notice to be published in the same manner as before directed respecting the publication of the notice of their appointment, in which notice they shall specify the time and place of such meeting, which time shall not be more than three months, nor less than two months after the first publication of such notice; and every such notice shall be published at least once in each week, until the time of such meeting.

Section 28 provides that at such meeting, or other adjourned meeting thereafter, all accounts and demands, for and against the estate of such debtor, shall be fairly adjusted, so far as the same can be ascertained, and the amount of moneys in the hands of the trustees declared, and further sections provide for the distribution of moneys in their hands.

Section 46 provides that such trustees shall be subject to the orders of the supreme court, and of the court of common pleas of the county in which they were appointed, upon the application of any creditor, or of any debtor in respect to whom they were appointed, in relation to the execution of any of the powers and duties confided to them; and they may be removed by the supreme court for cause shown.

From this careful reference to the statutes, upon the assumption that they are applicable, it will be seen that there is nothing in them which requires a final receiver to consult the general creditors of the insolvent corporation in the prosecution or defense of any action. He is required to publish certain notices and to call a meeting of the creditors, that their claims may be adjusted and that the balance of the property in his hands after the adjustment of the claims may be determined. But it is still his duty to take into his possession the insolvent estate and to use the legal means for that purpose; and he may commence and settle suits, and, under the direction of the court, compromise claims: and he is subject at all times to the order of the court.

In this case there was a controversy as to the ownership of this property, and as to whether it came to Jewett as receiver in the People's action or as receiver in the foreclosure action, and that was a controversy to be settled under the direction of the court; and by a reference and investigation and an orderly, legal proceeding, it was determined that the property did not come to him as receiver in the People's action, but that it came to him as receiver in the foreclosure action, and that as receiver in the People's action he had no title or claim thereto, and that the same was properly sold and disposed of in the foreclosure action.

There is no provision of law which required that the general creditors should be made parties to that litigation, or have any notice thereof; and none of their legal rights were violated by carrying the same on without any notice to them. They were represented therein by the People, through the attorney-general, and by the Receiver, and by the defendant, the Erie Railway Company. They could undoubtedly have been permitted to intervene or to appeal from the judgment or any of the orders, if any ground of appeal existed. But they had no right to attack the same collaterally, unless for fraud sufficient within the rules applicable to such cases to sustain an action to set aside a fraudulent judgment.

These provisions as to notice by the receiver were mostly directory, and were not essential to the jurisdiction of the court. Their omission would constitute an irregularity against which any party aggrieved could have relief by application to the court in the proceeding or in the action. They had reference to the settlement of the claims against the debtor, and the distribution of the debtor's property among creditors. But they had no pertinency whatever, until the estate should come into the hands of the Receiver for distribution by him among those entitled to share therein.

Therefore, standing upon the very ground taken by the plaintiff, assuming the fundamental law to be precisely as he claims, yet we are unable to perceive how it can be said that the court did not have jurisdiction to make the final adjudication which was entered in the final judgment in the People's action. And if we are right in this conclusion, then there is no ground for the maintenance of this action. But the magnitude of the interests involved in this action is such as to justify us in fortifying our conclusions by still further prolonging this discussion; for if the court had no right in the foreclosure action, in consequence of the pendency of the People's action and the temporary receivership therein, to determine whether these stocks and bonds were covered by or subject to the mortgages, then for precisely the same reasons it had no right to determine what property was covered by the mortgages or how much was due thereon; and all the foreclosure proceedings are open to the collateral assaults of this plaintiff and other creditors.

We are of opinion that the learned counsel for the defendants are right in their claim that the proceedings in equity under section 38 for the dissolution of a corporation for the reasons therein stated were unaffected by the Code of Procedure. It was provided in section 13 of title 2 of chapter 13, part 3 of the Revised Statutes (2 R. S. 579) that a writ of *scire facias* might be issued out of the supreme court upon the relation of the attorney-general against any corporation created or renewed by any Act of the Legislature, for the purpose of vacating or annulling such Act, on the ground that the same was passed upon some fraudulent suggestion or concealment of a material fact made by the persons incorporated by such Act, or made with their consent or knowledge. That was contained in the article entitled "*Of Scire Facias.*"

Section 27 provided that whenever any judgment should be rendered for the vacating and annulling of any Act of incorporation pursuant to the provisions of that article, the court of chancery should have the same powers to restrain the corporation created by such Act; to appoint a receiver of its property and effects and to take account and make distribution thereof among its creditors, as were given in the third article of the fourth title of the eighth chapter of that Act, relating to the voluntary dissolution of corporations; and that it should be the duty of the attorney-general immediately after the rendering of any judgment vacating and annulling any such Act of incorporation, to institute proceedings for that purpose.

Article 2 of the same title is entitled "*Of Information in the Nature of Quo Warranto, and in Certain Other Cases,*" and section 39 provided as follows:

"An information in the nature of a *quo warranto* may also be filed by the attorney-general, upon his own relation, on leave granted, against any corporate body whenever such corporation shall: 1, offend against any of the provisions of the Act or Acts creating, altering or renewing such corporation; or 2, violate the provisions of any law by which such corporation shall have forfeited its charter by misuser; or 3, whenever it shall have forfeited its privileges and franchises by nonuser; or 4, whenever it shall have done or omitted any acts which amount to a surrender of its corporate rights, privileges and franchises; or 5, whenever it shall exercise any franchise or privilege not conferred upon it by law. And it shall be the duty of the attorney-general to file such information, in every instance in which he shall have good reason to believe that the same can be established by proof."

Section 49 provided that whenever it should be found or adjudged that any corporation against which an information in the nature of a *quo warranto* should have been filed, had by any misuser, nonuser or surrender forfeited its corporate rights, privileges and franchises, judgment should be rendered that such corporation be ousted, and altogether excluded from such corporate rights, privileges and franchises, and that the corporation be dissolved.

And section 51 provided that whenever any such judgment should be rendered, the court of chancery should have the same powers to restrain the corporation created by such Act; to appoint a receiver of its property and effects, and to take an account and make distribution thereof among its creditors, as were given in the third article of the fourth title of the eighth chapter of that Act; and that it should be the duty of the attorney-general, immediately after the rendering of any such judgment, to institute proceedings for that purpose.

It is thus seen that there were two systems of procedure which might be carried on against insolvent corporations, or corporations which have done or omitted any act which amounted to a surrender of their corporate rights, privileges or franchises; one was a suit in equity by the attorney-general, of his own motion, without leave of any court, under section 38 above referred to, in which a temporary receiver, and after final judgment, a final receiver, could be appointed, each of whom would possess such powers and duties as might be devolved upon him by the court, uncontrolled by any statutory regulations; the other was a proceeding instituted by writ of *quo warranto* by the attorney-general, after leave obtained of the court, which was a proceeding at law in which the corporation was entitled to a jury trial; and in that proceeding judgment could be rendered dissolving the corporation, but the supreme court had no right to appoint a receiver. But after final judgment annulling and dissolving the corporation, the attorney-general was required to apply to the court of chancery for the appointment of a final receiver; and his powers and duties were regulated by the provisions contained in article 3, above referred to, in reference to the voluntary dissolution of corporations.

These two systems of procedure against corporations went along, side by side, one in chancery, the other at law. Now what change did the Code of Procedure work? Section 38 was not repealed by that Code, but was expressly saved by section 471 thereof, and remained in force in 1875, when the People's action was commenced. The chapter of the Code which embraced section 430 was entitled "*Actions in Place of Scire Facias, Quo Warranto, and of Information in the Nature of Quo Warranto,*" and the title is quite a clear indication that that chapter was not intended to take the place of article 2, title 4, chapter 8, part 3 of the Revised Statutes which contained section 38, and which was entitled "*Of Proceedings Against Corporations in Equity.*"

Section 428, the first section of the Code and chapter, provides that the writs of *scire facias* and of *quo warranto* are abolished, and that "The remedies heretofore obtainable in those forms may be obtained by civil action under the provisions of this chapter."

And section 429 provided in substance the same as was provided in section 13 of chapter 9 of the Revised Statutes, above mentioned, simply substituting an action in the place of the writ of *scire facias*.

Section 430 of the Code above set out is substantially the same as section 39 of the same chapter of the Revised Statutes, and was evidently intended to take its place; and section 431 provides that leave to bring the action mentioned in the preceding sections may be granted upon the application of the attorney-general.

Section 432 is a substantial re-enactment of section 28, of chapter 91, and section 442 of the Code is substantially like section 49 of chapter 9; and section 444 is a substitute for sections 27 and 51 of the same chapter.

It is, therefore, we think, quite clear that the chapter of the Code was simply intended to substitute actions in the form prescribed by the Code, in the place of writs of *scire facias* and *quo warranto*, and to regulate the proceedings in such actions. But there was nothing in that chapter which took away from the court of equity the general power which it had always possessed, and which it had previously exercised under section 38, in actions for the dissolution of corporations, for the reasons stated in that section, or which subjected the receivers appointed in such an action to the provisions of section 444 of the Code.

The actions commenced under section 430 of the Code, like those commenced by writ of *quo warranto* under section 39 of the Revised Statutes, for which it was a substitute, continued to be strictly legal actions in which the defendants had the constitutional right of jury trial, and neither a temporary injunction could be granted nor a temporary receiver appointed.

Section 444 made special provision for injunctions and receivers after judgment, and thus forbade them by implication at an earlier stage of the action. The maxim, *Expressio unius, exclusio alterius*, applies.

But this construction of the Code of Procedure is made still clearer by a reference to the present Code. By the repealing Act (chapter 245 of the Laws of 1880), section 38 of the Revised Statutes was for the first time repealed, and section 1785 of the Code was substituted in its place.

Section 1786 provides that the actions specified in the last section may be maintained by the attorney-general in the name of, and in behalf of the People.

Section 1788 provides for the appointment of a temporary and permanent receiver, in such an action; and by that section and the repealing Act of 1880, the duties and powers of a permanent receiver so appointed were made the same as those of receivers in the case of the voluntary dissolution of corporations under the Revised Statutes.

The sections to which we have referred, sections 1785, 1786 and 1788, are contained in article 3 of title 2, chapter 15 of the Code; and actions under that article could be commenced without leave of the court. Then in article 4 provisions are made for the commencement of actions by leave of the court, and those provisions are substantially like those contained in the Code of Procedure, and which before that Code were contained in that part of the Revised Statutes which related to writs of *scire facias* and *quo warranto* against corporations. When judgment has been rendered in an action provided for in that article, the final receiver is subject to the powers and duties which devolve upon receivers of corporations voluntarily dissolved, and all the actions under that article are triable by jury.

So it appears that the two systems of procedure against corporations which were provided in the Revised Statutes have been continued since the enactment of the Codes. Under the one system the actions may be commenced without leave of the court, and they must be tried as equitable actions; under the other system the actions can be commenced only by leave of the court, and the parties are entitled to jury trial as matter of right. Under the present Code, for the first time under both systems, by special provisions a temporary injunction may be issued and a temporary receiver may be appointed during the pendency of an action, and the final receivers are subject to the provisions of law applicable to receivers in the case of the voluntary dissolution of corporations, whose powers and duties are regulated by law.

Under the Revised Statutes when equitable and legal remedies were administered in different courts, there was reason for the existence of the two systems. But now, when all the remedies may be administered in the same court, it is difficult to perceive any reason for the continued existence of the two systems; but they do exist, and each must have its proper significance and operation.

We think, therefore, that it is clear that prior to 1880 there was no statute regulating the powers and duties of receivers appointed in the equitable actions commenced under section 38 of the Revised Statutes above referred to.

We have taken no notice of the Act, chapter 151 of the Laws of 1870, to which our attention has been called, for the reason that that Act has no pertinency to any questions involved in this case. It did not extend injunctions and receiverships to new cases. It simply provided that they should be issued and granted in actions, and regulated the practice so as to prevent abuses which had previously been just cause for complaint.

There are other topics brought to our notice in the learned briefs submitted to us. They have not been overlooked; but the necessities of time and space forbid any attention to them here. We have written enough to show that the plaintiff does not, by the facts alleged in his complaint, show a cause of action against the defendants; and that

The judgment should, therefore, be affirmed.

All concur, except **Finch** and **Peckham**, *JJ.*, dissenting.

Elizabeth R. COGSWELL, *Respt.*,
v.
NEW YORK, NEW HAVEN & HARTFORD R. R. CO., *Appt.*

1. Where a plaintiff brings an **action for both legal and equitable relief** in respect to the same cause of action, the case presented is not one of right triable by jury under the Constitution, and the

plaintiff by electing such form of action submits to have the **issues tried by** the **court,** or by the court with the aid of a jury, as the court in its discretion may determine, according to the practice in equity cases.

2. An **equitable action to restrain** the continuance of a **nuisance,** or an action for a nuisance in which equitable relief is also demanded, **is not** an action for nuisance **within section 968 of** the **Code of Civil Procedure,** which provides that an action for a nuisance must be tried by a jury.

(Decided April 19, 1887.)

APPEAL from an order of the General Term of the Superior Court of New York City, affirming an order of the Special Term awarding issues to be tried by a jury in an action for the abatement of a nuisance and to recover damages and for a perpetual injunction. *Reversed.*

This action was commenced in September, 1876. The nuisance complained of was the keeping of a "roundhouse" joining plaintiff's premises on East 46th Street in New York City. The action was tried at special term, before a justice without a jury, and judgment entered therein May 24, 1880, dismissing the complaint on the merits.

Plaintiff appealed from this judgment to the general term, which affirmed the judgment, and plaintiff appealed to this court, which reversed the judgment and ordered a new trial—the court holding that the facts showed that the plaintiff had sustained a substantial and unauthorized injury.

See 4 Cent. Rep. 225.

Thereafter, on motion of plaintiff's attorney, the court at special term awarded issues to be tried by a jury. On appeal to the general term, this order was affirmed and defendant appealed to this court.

Mr. **Henry H. Anderson,** for appellant: The cause has been once tried before the court without a jury. Having once moved the trial of the action without a jury, or having once failed to claim a jury trial, before the production of evidence, the right of the plaintiff is waived.

Code Civ. Proc. § 1009.

Section 968 of the Code of Civil Procedure provides that "In each of the following actions an issue of fact must be tried by a jury, unless the jury trial is waived by a reference directed."

Subdivision 1. "An action * * * for a nuisance."

Section 969 provides that "An issue of law, and an issue of fact, in an action not specified in the last section, or wherein provision for a trial by jury is not expressly made by law, must be tried by the court unless a reference or a jury trial is directed."

Section 970 provides that "Where a party is entitled by the Constitution or by express provision of law to a trial by jury of one or more issues of fact in an action, not specified in section 968 of this Act, he may apply, upon notice to the court for an order directing all the questions arising upon those issues to be distinctly and plainly stated for trial accordingly."

There is no necessity now to blend law and equity jurisdiction, nor to inject into an equity case common-law practice, except when the court of equity may ask for information on a doubtful fact or to aid its conscience. The practice of trying these cases in the equity suit is one not to be discouraged.

It is submitted that the better practice is to go to trial at special term in the first instance, and that such is the intention of the Code of Procedure; and if the issues to be tried prove such as require a trial by jury, the court then will determine the questions of fact or the issues to be sent for trial. Such order of proceeding seems to have met the approval of the court of appeals.

Wheelock v. *Lee,* 74 N. Y. 495; *Hammond* v. *Morgan,* 1 Cent. Rep. 816, 101 N. Y. 179.

Mr. **Lewis Johnston,** for respondent: Section 968 of the Code of Civil Procedure provides that in an action for a nuisance a jury trial must be had, unless waived.

Section 3339 provides that "The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished."

This action is of the nature of a suit in equity, because of the relief by injunction prayed for. Hence, the necessity of applying to the court, under section 970, Code Civil Procedure, that issues be framed.

The waiver referred to in section 1009 applies only to the first, not to the new trial.

The nature of the action is such that either party has the constitutional right to have the question of whether or not the grievance complained of is a private nuisance, and the damage sustained thereby, decided by a jury.

Hudson v. *Caryl,* 44 N. Y. 553; *People* v. *Metropolitan Tel. Co.* 31 Hun, 597–600.

In *Davison* v. *Associates of Jersey Co.* 71 N. Y. 333, the plaintiff had brought an action for specific performance; at the trial plaintiff demanded a jury, on the ground that defendant had conveyed, and his relief could only be damages for a breach of agreement; held, that he had elected to bring an equitable action and elected the forum, and that by not amending his complaint he had waived a jury trial.

The judge at special term has made the order appealed from recite that trial by jury is a matter of right, and the order must stand or fall upon that theory, and not as of discretion.

Dorr v. *Dansville Gaslight Co.* 18 Hun, 274; *Brady* v. *Cochran,* 23 Hun, 274; *Ward* v. *Plato,* 23 Hun, 402; *Davis* v. *Morris,* 36 N. Y. 569–572.

Andrews, *J.*, delivered the opinion of the court:

This complaint demands both legal and equitable relief. It prays judgment for damages and an abatement of the nuisance, and also for an injunction restraining the defendant from continuing the nuisance and from permitting its lands to be used for the purpose of carrying on any operation thereon which shall injure the plaintiff in the enjoyment of her property.

The remedy for damages and for the abatement of a private nuisance could at common law be obtained in a legal action, technically known as an "assise of nuisance." It was a part of the judgment that the nuisance be abated. 3 Bl. Com. 220; *Wagyoner* v. *Jermaine*, 3 Denio, 306.

The legal remedy by writ of nuisance for the recovery of damages and an abatement of the nuisance, was retained by the Revised Statutes, 2 R. S. 332; and although the proceeding by writ of nuisance has been abolished, the same relief may be now had in an ordinary civil action under the Code. Code Proc. § 454; Code Civ. Proc. § 1662.

It was held in *Hudson* v. *Caryl*, 44 N.Y. 554, that as by the common law an action for damages and for the abatement of a nuisance was triable by jury, the defendant could not be deprived of the right to a jury trial upon these issues, although the plaintiff in his complaint also demanded equitable relief.

In the present case the plaintiff is the party insisting upon the right to a jury trial, notwithstanding the fact that she framed her action asking, not simply the relief which could be obtained by a writ of nuisance at common-law, but also relief by injunction, which a court of law was not competent to grant.

The Constitution (§ 2, art. 1) secures to a party the right to a jury trial, in all cases where before its adoption this mode of trial was used.

This is not a case, which as a whole, and in both aspects, was triable by jury at the adoption of the Constitution; nor is it one where under the present system the plaintiff is compelled to unite her claims for both equitable and legal relief in the same action. Rights may be waived, or a party may by his own act preclude himself from asserting them. We think it is a reasonable rule, and one in consonance with the authorities, that where a plaintiff brings an action for both legal and equitable relief in respect to the same cause of action, the case presented is not one of right triable by jury under the Constitution; and that the plaintiff by such election submits to have the issues tried by the court, or by the court with the aid of a jury, as the court in its discretion may determine, according to the practice in equity cases. See *Davison* v. *Associates of Jersey Co.* 71 N. Y. 333; *N. Y. etc. R. R. Co.* v. *Schuyler*, 34 N. Y. 46; *Baird* v. *Mayor*, 74 N. Y. 382.

This is not we think an action for a nuisance within section 968 of the Code of Civil Procedure. The action of nuisance is mentioned in the section, together with other common-law actions, all of which must, the section declares, be tried by jury, unless a jury is waived, or a reference is directed. Reading the section in connection with section 1660, it is clear, we think, that an equitable action to restrain the continuance of a nuisance, or an action for a nuisance in which equitable relief is also demanded, is not an action for nuisance within section 968.

This leads to a reversal of the orders of the Special and General Terms; but as the courts below decided the motion on the question of power solely the case should be remitted to the Special Term, for the exercise of its discretion.

All concur.

HEACOCK & BERRY, *Appts.*,
v.
STATE of New York, *Respt.*

1. Until the passage of chapter 321 of the Laws of 1870, the **canal appraisers** had no **jurisdiction**, either under the Revised Statutes or the Act of 1830, **over injuries** resulting **from neglect, or** which were **temporary** and occasional in their character and involved no permanent or continuous damage. Hence it was error in the **state board of claims** to determine that a claim of that character was barred and lost by reason of omission to present it under the Act of 1830.
2. Where, in raising the **banks** and **water** level **of a state canal** the banks are **built of loose earth** and not puddled or made tight, so that leakage occasioning injury results, this is on its face **a negligent act.**
3. A **coffer dam**, built by the State for the purpose of restraining the waters of a river while enlarging a canal, a portion of which was permitted to remain in the shape of an island, after its purpose was accomplished, is **a temporary** and occasional **obstruction** merely, with which the Act of 1830 had nothing to do.

(Decided April 19, 1887.)

APPEAL from an order of the Board of Claims, in affirmance of an award of "nothing," made by the Board of Canal Appraisers on a claim for damages to a salt field by flooding. *Reversed.*

The case is stated in the opinion.

Mr. **C. L. Stone**, for appellants:

The evidence returned indisputably proves the State guilty of culpable negligence, such as would render an individual liable, under similar circumstances:

1. In the loose construction of the raised banks of the canal, which permitted the water to freely percolate through upon claimants' premises.

2. In the construction and retention of a culvert palpably inadequate to meet the ordinary requirements of the situation, including times of ordinary high water.

3. In carelessly permitting the culverts to become obstructed with sediment and rubbish, and to so continue from season to season; and this notwithstanding frequent notice of the fact and request to clear the same.

4. For the obstruction made by the raised canal bank, which in times of high water threw back the swollen streams upon the field and works of the claimant.

Pixley v. *Clark*, 35 N. Y. 520–524; *Bellinger* v. *N. Y. Cent. R. R.* 23 N. Y. 42; *Cott* v. *Lewiston R. R. Co.* 36 N. Y. 214.

There was no Act prior to chapter 321 of the Laws of 1870 which empowered the appraisers, or any other tribunal, to hear and adjudicate this claim. It comes clearly within the scope of that Act.

The laws conferring jurisdiction prior to 1870 were: as to damages for permanent appropriation, 1 R. S. p. 225, § 46; as to damages for temporary occupation, Laws 1836, chap. 287, § 10; as to damages caused by erection of dam, Laws 1830, chap. 293. See also Laws 1866, chap. 836, § 35.

This jurisdiction should be strictly construed.

69 N. Y. 247.

Numerous private acts were passed in 1862 and 1864 conferring jurisdiction to hear specific claims, of a nature similar to this.

Hawley, Waldron & Co.	Laws	1862,	page	746.
Levi Bennett,	“	“	“	455.
James O'Brien,	“	“	“	458.
Ebenezer Murdock,	“	“	“	468.
John Copeland,	“	“	“	518.
Anne L. Hobby,	“	“	“	520.
Richard Claxton,	“	“	“	537.
James Hyde,	“	“	“	629.
Amos Mason,	“	1864,	“	1121.
Richard Sanger,	“	“	“	1122.
John Paddock,	“	“	“	1334.

If, under any general law, the appraisers were already empowered to hear these claims, is it not altogether probable that the fact would have been discovered?

But this special legislation was continued until upon recommendation of the governor the Act of 1870 was passed for the very purpose, among others, of covering all such cases.

People, Jermain, v. *Thayer*, 63 N. Y. 350. See also opinion in same case, by Learned, *P. J.*, in court below; Ops. atty-gen. as to claims of Eliza Birdsall, and of Jacob Adle, canal board proceedings, July 28, 1880.

Mr. **D. O'Brien,** *Atty-Gen.*, for respondent.

Finch, *J.*, delivered the opinion of the court:

In all our review of canal legislation we have invariably recognized the broad distinction between the claims referred to and provided for in the Revised Statutes (part I, title 9, chap. 9, §§ 46, 48) and those covered by the Act of 1870, chap. 321.

The former related to a permanent appropriation to the use of the State in the process of construction or improvement, and which would presumably continue while the canals existed. The latter embraced injuries resulting from the canals or their use or management or the negligence of the officers in charge. *Mark* v. *State*, 97 N.Y. 572; *People, Jermain*, v. *Thayer*, 63 N. Y. 350.

These are mainly temporary injuries, and may, for convenience, be described as such, although it is possible that there may be included among them some injuries of a permanent character which had not been covered and provided for by the previous legislation. The Act was intended to supplement and extend the existing jurisdiction by adding authority over new cases for which no remedy had been earlier enacted. Under the Revised Statutes it was provided that the State should take a fee, and unless the land owner applied for compensation within one year his rights should be deemed extinguished.

Under the Act of 1870 no land is taken or appropriated, and the title and the right remain in the owner; and an injury to that right, and damages resulting, are all that are contemplated. In the one case there was jurisdiction in the canal appraisers to hear the claim; in the other they had no such jurisdiction until 1870. The Revised Statutes did provide for one class, and one only, of temporary injuries. Sec. 58.

Where lands had been occupied by the canal commissioners for a temporary purpose, or to take therefrom material for repairs, the damages were to be adjusted by arbitration, and no limitation was prescribed, since if the claimant failed to name an arbitrator the county judge was authorized to name one in his behalf.

But in 1830 an Act was passed, evidently intended to reach a case not contemplated by either provision of the Revised Statutes. The canal commissioners were originally the officers charged with the construction of the canals, and with any extraordinary repairs or improvements on any completed canal; and for these two purposes, and these only, they were authorized to take lands, streams and waters, and build dams and aqueducts and construct feeders. R. S. *supra*, §§ 16, 17.

These were permanent purposes and contemplated works, essential to the construction, improvement and maintenance of the waterway, and such as would become necessary and integral parts of the canal system, and so required an ownership in fee. For such acquisitions a mode of compensation existed. But there were cases where by reason of permanent dams, necessary to the operation of feeders, lands which the State had not taken or appropriated, had been subjected to overflow where it neither needed nor asserted a title in fee, but where it took only an easement in the land of the owner in the form of a right to set the water back upon him as a consequence of the constructed dam. For such cases, prior to 1830, there was no remedy provided, unless by insisting that the State should and did take a fee when only an easement was required. The overflow could not be deemed a temporary occupation of land to be adjusted by arbitration, for it was permanent and continuous, essential to the operation of the feeder and the supply of the canals, and if the fee was not taken the appraisers had no jurisdiction. To meet such cases the Act of 1830 was passed. Chap. 293.

It authorized an appraisal "when any lands are overflowed by the erection of any dam by the canal commissioners on any river or stream connected with the public works." As we have seen, the authority of these officers in taking waters was for the permanent use and supply of the canals, so that the dam and overflow referred to were those of a permanent and continuous character. The damages sustained by the land owner were to be appraised, and the injury contemplated was one to the realty. Since the dam and the overflow were thus continuous and permanent, the mode of appraisal for the easement taken was made the same as where the fee was taken; sec. 2; but the only limitation expressly provided was as to lands which had previously been overflowed. Sec. 3.

The reference of section 2 to the then existing laws is very general in its terms; and both the appraisers and the board of claims have held that the clause of the Revised Statutes which extinguishes claims not filed within the prescribed period of limitation is by that reference imported into the Act of 1830. We do not consider that nor the effect upon the clause of a later Act of 1866; but if the view be correct, it shows yet more clearly that the Act of 1830 referred to a permanent easement, so taken that the right to it could be extinguished and bar a claim of future trespasses. Even a temporary taking of waters and a temporary flooding of land, in order to supply an occasional deficiency of water in the canals, was not deemed within the purview of the Act of 1830; for three years later it was provided that such damages should be settled by arbitration as in case of the temporary occupation of land. Laws 1833, chap. 196.

And thus we obtain a view of the general scheme intended by the Legislature. For a permanent taking, either of a fee or an easement, either in lands or waters, the appraisers had jurisdiction to settle the damages; and for temporary occupation of lands or waters to provide for repairs or incidental deficiencies the remedy was, by the statute, arbitration. This view is in accord with an early decision of this court. *People, Merriam*, v. *Schoonmaker*, 13 N. Y. 238.

But in all this there was plainly no provision for occasional and temporary damages flowing from the negligence of the canal officers, or for needless injuries resulting from the manner of their work, and which should have been prevented. Numerous special Acts were passed to meet such supposed omissions. Land overflowed by reason of the embankment across the Montezuma Marshes was neither taken nor appropriated, and neither permanently nor temporarily; but the damages involved the sufficiency of the water way under the aqueduct and so were specially provided for. Laws 1862, chap. 310.

In like manner claims were ordered heard arising from the overflow of the Champlain Canal; Laws 1862, chap. 262; from flooding by Oil Creek reservoir; Laws 1862, chap. 257; from waste weirs and the Erie Canal; Laws 1862, chap. 377; from damming up by obstruction of culvert; Laws 1862, chap. 259; from neglect in construction of Oswego Canal enlargement; Laws 1864, chap. 480; and from overflow as a consequence of that construction. Laws 1864, chap. 580.

These special Acts imply that no remedy existed under the general laws in force, and they were followed by the Act of 1870, which ended the special legislation by providing for all such cases. Until that Act was passed, neither the Revised Statutes nor the Law of 1830 gave to the canal appraisers jurisdiction over injuries resulting from neglect or which were temporary and occasional in their character, and involved no permanent or continuous damage.

The claim of the present plaintiffs is of the latter character, and the board of claims erred in determining that it might have been presented under the Act of 1830, and was barred and lost by reason of that omission. The claimants owned salt works lying along the Liverpool levee of the Oswego Canal. That levee runs nearly parallel with the east shore of Onondaga Lake, the waters of which, through a northern outlet, discharge into the Oswego River, which empties into Lake Ontario. That river is further fed by the Oneida River on the east, and the Seneca River on the west, which latter carries the waters of the Cayuga and Seneca Lakes and of the Clyde River and passing around a sharp curve over Jack's Reefs forms a juncture with the Oswego River as a final outlet.

The claimants allege three sources of injury: first, an insufficient culvert to carry under the canal the waters of Beartrap and Mud Creeks; second, obstructions placed in the Oswego River at Gaskin's Reefs and at Phœnix, and the lowering of Jack's Reefs; and third, raising the water of the canal, without retaining it within suitable banks, so that it soaked through and destroyed the claimant's salt works. As to the first and third of these claims there can be no reasonable pretense that a remedy existed before the Act of 1870; and we do not understand that they were rejected for any such reason. In so far as the determination of the first rests purely upon a question of fact and upon some evidence, the result is not subject to our review, and the merits of the claim in these respects may be left to the final adjudication to be made.

The third cause of injury was quite strongly proved. In the process of the canal enlargement its depth was increased by raising its banks, and correspondingly the level of its water, but the banks were built of loose earth and not puddled or made tight as is usually and may easily be done, so that leakage resulted, occasioning injury. On the face of it this was a negligent act. The object of a canal is to hold and retain water for the purpose of navigation; and banks which permit it to escape both waste the water supplied and injure the adjoining owners. The answer made to this element of the claim is neither a denial of the facts nor an assertion that it does not amount to negligence. If it was a question between individuals, and the canal had been built by a private corporation, the percolation resulting from leaking and illy constructed banks would easily be deemed negligence; and to such a standard the Act of 1870 itself appeals. This cause of injury seems to have been rejected solely because not sufficiently pleaded.

We are not satisfied with that answer. These proceedings have always been quite informal and no rigid or technical rules of pleading have been established. The criticism is that negligence in constructing the bank was not explicitly and in terms alleged. But no such objection was taken on the hearing, so far as we are able to ascertain, until the evidence had all been admitted; and while we do not think the State was at all misled, the pleading should be deemed amended or may be on the new hearing which must be ordered.

There remains the second asserted ground of liability: that the State obstructed the Oswego River, and by lessening the natural drainage to the north and increasing the water supply by lowering Jack's Reefs raised the level of Onondaga Lake and flooded the claimant's land. The proof showed that during the process of enlarging the Oswego Canal the State erected two coffer dams to exclude the water temporarily while sinking the bed of the river. These ran lengthwise of the river for quite a distance, utilizing two islands lying in the stream, and while the improvement was going on were closed at each end, the river thereby running in a narrow channel. When the work was done the ends or wings running to the bank were removed, but the structure in mid-stream was suffered to remain, assuming the character of an island.

The board of claims held these to be dams within the meaning of the Act of 1830 and provable as a cause of damages before the appraisers under that Act, and because not so presented lost if not extinguished. The question was not determined upon the merits. If we have correctly interpreted the Act of 1830, it had nothing to do with such a temporary and occasional structure as is denominated a coffer dam. Those here complained of did not extend across the river and were merely temporary obstructions. They remained only until the work was done, and then existed as an island and in no just sense a dam. Their consequences were brief while serving as a coffer dam, and involved no permanent easement necessary to be acquired by the State. It was, therefore, error to reject the claim for the reasons assigned, and the case must go back for a rehearing.

Nothing that we have said must be construed into an opinion on the merits, or as to the ultimate results. The facts are to be considered unaffected by any supposed judgment of ours as to their force or weight. We have sought to pass only upon the questions of law involved.

The judgment should be reversed, and a new hearing ordered.

All concur.

NATHANIEL STEWART, *Appt.*,
v.
STATE of New York, *Respt.*

1. **The Act of 1870** does not relate to or **confer a new jurisdiction to hear claims for** the taking of land in fee or **for** the **appropriation of** a continuous and permanent **easement by** the **State.**
2. For a **claim for** a permanent **easement taken** by the State **for** the **use of** the **canals** and corresponding damages, where there was neither assertion of nor offer to prove negligence, the claimant **had a remedy** before the Act of 1870 and not under that Act. Such **claim** must **be presented in one year.**

(Decided April 19, 1887.)

APPEAL from an award of the Board of Claims, dismissing a claim for damages for the destruction of property by the rebuilding of a dam across the Oswego River and Canal. *Affirmed.*

This claim was filed February 7, 1871, with the canal appraisers by Nathaniel Stewart, who claimed the sum of $1,500 for damages alleged to have been sustained by the rebuilding, by the State of New York in 1866, of a dam across the Oswego River and Canal at Oswego Falls. The claim was pending and undetermined before the appraisers on May 21, 1883, and was transferred to the board of claims under the Act of 1883, chap. 205.

When the claim came on for hearing before the board of claims, March 23, 1886, counsel for the State moved to dismiss upon the ground that the same was not filed with the canal appraisers within the time prescribed by statute and that the appraisers had not and the board of claims had not jurisdiction to hear and determine it. This motion was granted in the following order:

"*Ordered,* That the said claim herein be and the same hereby is dismissed, upon the ground solely that said claim is barred by the Statute of Limitations, and this board has not jurisdiction to hear and determine the same."

From this order claimant appealed to this court.

Mr. **William C. Stephens,** for appellant:

The statute which is claimed to create the bar is chapter 293 of the Laws of 1830, which reads as follows:

"Sec. 1. When any lands are overflowed by the erection of any dam by the canal commissioners on any river or stream connected with the public works, it shall be the duty of the canal appraisers to make a just and equitable appraisement of the damages sustained by the owners of such lands.

"Sec. 2. The existing laws in relation to the appraisement and payment of damages, when lands are appropriated by the canal commissioners to the use of the public, shall apply to the appraisal of damages sustained by the owners of lands mentioned in the foregoing section.

"Sec. 3. No claim for lands that shall have been overflowed by the erection of any dam by the canal commissioners at any time before this Act shall be in force shall be received by the appraisers, unless it shall be exhibited within one year after the Act shall become a law."

It is not admitted that the Act of 1830 does or was intended to create any limitation as to claims for damages for overflow, except such as had been caused at the date of the statute by the building of dams by the canal commissioners.

Section 3 of the Act of 1830 confers no jurisdiction upon the appraisers, and entitles no person to damages, but prescribes a limitation of time within which to exhibit claims for damages for overflow occurring before the enactment.

Jurisdiction to appraise damages is provided for solely by section 1 of the Act. It is by virtue of the same language contained in section 1, viz.: "When any lands are overflowed by the erection of any dam by the canal commissioners" etc., that the appraisers have jurisdiction to appraise damages in any case of overflow, that is, as to lands theretofore or thereafter overflowed.

The lands mentioned in section 2 are lands which have been "at any time before the Act shall be in force," or may at any time thereafter be, overflowed; and the existing laws made applicable are those only which apply equally to the appraisal of damages for overflow in the past and in the future. This cannot refer to or include any statute of limitation, for as to past overflow, the Act itself (§ 3) prescribes a limitation.

The claim at bar is not a case arising under the Law of 1830, providing that "When lands are overflowed by the erection of any dam by the *canal commissioners* on any water or stream," etc., and therefore that Act has no application. The dam causing the damage alleged in the claim now being considered was not built by the canal commissioners nor the changes which created its necessity anticipated by the Legislature of 1830. It was built under other legislative Acts directing improvements which canal commissioners had no authority to undertake.

The distinction which the claimant asserts between dams built by the canal commissioners and those built under other laws, and which distinction, it is claimed, avoids the alleged limitation claimed to apply to dams built by canal commissioners, is recognized and affirmed by the court of appeals in *Coster* v. *Mayor of Albany*, 43 N. Y. 399.

Other legislative enactments confirm the claim that the Act of 1830 was intended to apply solely to dams built by the canal commissioners.

By section 2, article 1, title 9, chapter 9, part 1 of the Revised Statutes, it is enacted that "The Erie and Champlain Canals are hereby declared to be completed; and all the powers and authority heretofore given by law to the canal commissioners in relation to the construction of those shall be deemed to have been executed.

"Sec. 3. Whenever any canal now in progress of construction, or that shall hereafter be constructed, shall be completed the canal board shall by an order declare the fact of such completion; and from that time all the powers and authority in relation to the construction of such canals shall cease."

But assume that all claims for overflow after the Act of 1830 to 1866, except those exhibited within one year after overflow, were barred by the limitation prescribed for permanent appropriation of lands; the claim at bar is yet a valid claim to be heard by the board of claims, and is unaffected by any legislation prior to the Acts of 1866 and 1870.

April 27, 1866, the Legislature passed an Act, chapter 836, section 5, of which reads as follows:

"Sec. 5. Section 84 of article 3, chapter 9, title 9, part 1 of the Revised Statutes is hereby amended so as to read as follows:

"'Sec. 84. Every person interested in premises so appropriated, and every person who shall claim to have sustained damages by reason of the temporary appropriation of his lands or waters, or any injury caused by the canals of this State or the works connected therewith, if he intend to claim such damages, shall within one year after such premises, lands, or waters have been taken permanently, appropriated or temporarily occupied, and within one year after jurisdiction shall be conferred upon the canal appraisers by the Legislature to hear such other injury, file in the office of the canal appraisers a detailed statement of his claim in writing.'"

It is suggested that this amendment just quoted was an amendment of section 48 of article 3, chapter 9, part 1 of the Revised Statutes and not of section 84. There was no section 84 in article 3; and section 48 was the only one referring to the subject of the amendment, which commences with the identical language of section 48.

The dam which occasioned the injury claimed in this case was built after the Act of 1866, and the damages occurred thereafter; and the question is: What was the effect of the Act of 1866 amending section 48 of article 3, chapter 9, title 9 of the Revised Statutes?

The Act of 1866 (whatever the rule had been as to claims of like character arising before that Act) created a new statute of limitation as to injuries occasioned by dams thereafter built or for injuries thereafter resulting from dams whenever built.

People, Jermain, v. *Thayer*, 63 N. Y. 348.

As to the case of *Mark* v. *State*, 97 N. Y. 578, it was a claim for lands appropriated by the State in 1854 for canal purposes and for injuries for certain ferry rights belonging to the claimants, caused by such appropriation, and is inapplicable.

It will be seen that the discussion of the court in the *Mark Case* related wholly to section 46 of the Revised Statutes, providing for appraisals for lands taken; and the court decided that section, and the limitation created by section 48 had been the law since then, and of course a bar to the claim arising in 1854, because the claim was not filed within one year thereafter, and the same limitation barred the claim for injury to the ferry rights: for they were incident to the taking and ownership of the land and "could not be divided so as to present separate and distinct claim for each." p. 580.

The decision in the *Mark Case* does not criticise the *Jermain Case* but distinguished it (page 580), as not involving the question presented in the *Mark Case*, and not an authority which upheld the position contended for by the claimant's counsel in that case.

Mr. **D. O'Brien,** *Atty-Gen.*, for respondent:

The causes of claimant's damages accrued in the year 1866. His right of action therefore became fixed at the time of the completion of the dam. At any time within one year thereafter claimant could have presented his claim; and any award thereon would have embraced not only existing but also future damage.

Uline v. *N. Y. Cent. etc. R. R. Co.* 2 Cent. Rep. 116, 101 N. Y. 107.

It is submitted that this claim is governed by the Statute of 1830, and is barred by the Statute of Limitations.

The Act of 1870, chap. 321, has no application, and the case of *Mark* v. *State*, 97 N. Y. 580, is decisive of this case.

There is no allegation in the claim that the State was guilty of any negligence in the construction of the work in question, and no facts are stated therein which would create a legal liability against the State, were the same established in a court of justice against an individual or a corporation, as required by the Act of 1870. It is quite evident that the claim is not included within chapter 321, Laws 1870.

Moyer v. *N. Y. Cent. etc. R. R. Co.* 88 N. Y. 351; *Uline* v. *N. Y. Cent. etc. R. R. Co. supra; Lewis* v. *State*, 96 N. Y. 71; *Sheridan* v. *Jackson*, 72 N. Y. 173.

There is nothing in the point made on the trial of this claim that the Act of 1830 was not prospective, but only had reference to lands overflowed at the time of the passage of that Act.

Kehn v. *State*, 93 N. Y. 291; *Goillotel* v. *Mayor*, 87 N. Y. 443.

Finch, *J.*, delivered the opinion of the court:

Our decisions in the case of *Mark* v. *State*, 97 N. Y. 580 and in *Heacock & Berry* v. *State*, just rendered [*ante*, 330], establish that the Act of 1870, whatever may prove to be its entire scope, does not relate to or confer a new jurisdiction to hear claims for the taking of a fee or for the appropriation of a continuous and permanent easement by the State. The injury to this claimant was wholly of the latter character.

He alleges that the State "for the purposes of canal navigation rebuilt the dam at Oswego Falls on the Oswego River and Canal; that by reason of such rebuilding the waters of said Ox Creek were set back upon the lands of claimant, and the said stream became sluggish and the current almost wholly destroyed; that the channel of said stream became filled with growing flags and grass, and by the accumulation of earth and other material, whereby the waters thereof do not pass off but remain the entire year on said lands, rendering them valueless for any purpose, whatever, and destroyed the timber thereon; that the damage to said claimant by reason of the acts and facts stated is from $150 to $200 per acre."

The dam referred to was a permanent structure necessary for the canal navigation; and its effect in setting back the water was so evidently permanent and lasting as to show that if the State did not formally take a fee it at least took a continuous and lasting easement which was almost, in its consequences, equivalent to an entire appropriation of the land. There was neither assertion of negligence, nor proof or offer to prove the same; and so the claim was not provable under the Act of 1870, because already provided for under the Act of 1830 or the amendatory Act of 1866. Whatever doubt there may be as to the character and scope of the limitation in the Act of 1830 there is none as to that in the amendment of 1866. The claim was required to be presented in one year. The only question here is whether the claim was for a permanent appropriation of the appellant's lands to the use of the State. He himself so declares. He alleges a permanent easement taken by the State for the use of the canals, and corresponding damages. He therefore had a remedy before the Act of 1870 and not under that Act.

The award should be affirmed.

All concur.

John D. McINTYRE *et al.*, *Appts.*,

v.

McINTYRE COAL CO., *Respt.*

1. **A lease of coal lands,** in which the lessee agrees that he will mine not less than 75,000 tons per year for five years and not less than 100,000 tons per year for the next fifteen years and will pay as rent a royalty of thirty cents per ton, quarter yearly, and in case the quantity mined falls short of the said minimum quantity in any year he will pay the same rent as if he had mined such quantity, provided that if he in any year mined more than such quantity, such excess, or so much thereof as may be necessary, may be set off against the deficiency of any other year,—permits mining in excess of that quantity in any year, and an application of that excess to the rent otherwise unearned but still due in subsequent years when there happens to be a deficiency in production.
2. The deficiency need not have occurred before the excess is produced; the **lessee may apply** the **excess upon** the **deficiency of any** other **years.**
3. A **covenant to work** the **mine continuously** can **not** be **inferred** from an agreement to carry on the mining operations in a safe, skillful and workmanlike manner, the lease providing a penalty for omitting to do so.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Third Department, affirming a judgment of the Albany Special Term, dismissing the complaint in an action upon a lease to recover for rent. *Affirmed.*

The case was first argued in this court December 14, 1886, and a reargument was ordered by the court for reasons stated in the opinion of Rapallo, *J.*, handed down with such order and given below.*

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*Rapallo, *J.*: The construction of the lease contended for on the part of the defendant is that, in effect it imposes upon the lessee an obligation merely to mine or pay for an average of 100,000 tons of coal per annum during the last division of the term of his lease, and that whenever he had mined more than at that rate he had the right to suspend mining, or paying, until the average quantity of coal mined during the preceding year was reduced below 100,000 tons per annum; so that if, during the first five years of the second division of the term, he should have mined 1,500,000 tons in the aggregate the lessee would be entitled to hold the demised premises during the remaining ten years without mining any more coal unless he chose, or paying any rent or royalty.

The mines and the costly improvements there erected, at the expense of the lessors, might remain idle and unproductive, no one but the lessee having the right to operate them.

On the other hand, the plaintiffs claim that the lessee, according to the true intent and proper construction of the lease, was to pay thirty cents per ton for all the coal he should mine, even though it should exceed 100,000 tons per annum, and at the same time was bound to pay as a minimum rent during each and every year thirty cents per ton on at least 100,000 tons, even though he should, in fact, mine less than that quantity during the year, and that the intention of the contract was to secure to the plaintiffs a rental, in any event, of at least $30,000 in each and every year of the term, and at the same time to procure secure compensation at the rate of thirty cents per ton for all the coal the lessee should remove from the mines, if he should remove more than the minimum quantity.

The lease, read without the proviso which gives rise to the dispute, clearly expresses the intent claimed by the plaintiffs. The lessee covenants that during the second division of the term, viz.: fifteen years after the expiration of the first five years, he will mine and carry away from the demised coal lands not less than 100,000 tons of coal

The facts and questions raised appear from the opinion.

Messrs. **John E. Parsons** and **George L. Stedman,** for appellants:

Judgment should be rendered against the respondent.

The rule laid down by this court is that final judgment will be rendered where it appears that the respondent cannot succeed upon a new trial upon the issues joined.

Guernsey v. *Miller*, 80 N. Y. 181; *Ehrichs* v. *DeMill*, 75 N. Y. 370, 374; Code Civ. Proc. § 1317.

Mr. **E. Countryman,** for respondent:

The language of the provisio is explicit that the *excess* of any year may be set off against the *deficiency* of any other year, within the same division of the term of fifteen years; but the learned judge, in the opinion ordering a reargument, interpolates a peremptory limitation, to the effect that the *excess* shall only be set off against a *deficiency* of any priór year to that in which such *excess* accrued.

The language of the explanatory clause of the proviso is equally explicit, that such excess (having been paid for) shall not be paid for again whenever a deficiency occurs; but the learned judge transposes the clause so as to declare that a deficiency having been paid for shall not be paid for again when a subsequent excess has been obtained.

An express provision in a lease will not be enlarged by construction.

Witty v. *Matthews*, 52 N. Y. 516; *Aspdin* v. *Austin*, 5 Q. B. 671, 684; *Standen* v. *Chrismas*, 10 Q. B. 135; *Lewis* v. *Fothergill*, L. R. 5 Ch. App. 103; *Mallory* v. *N. Y. West Shore & Hudson R. R. R. Co.* 3 Jones & S. 175, 181; *Burr* v. *Stenton*, 43 N. Y. 462.

There is no covenant on the part of the lessee

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per annum, and that he will pay to the lessors rent or royalty of thirty cents per ton for every ton of coal mined and carried away during the full term of the lease, and that the payment of this rent or royalty shall be made quarterly on the first days of October, January, April and July in each year from the commencement of the term.

And he further covenants that in case the quantity of coal mined by the lessee, in any year of the said term, shall fall short of the proper minimum quantity above named, the lessee will pay to the lessors as rent for such year, a sum of money equal to the amount he would have been required to pay if he had mined the full minimum quantity.

Thus far the lease is free from any ambiguity, and its construction admits of no doubt. The lessee covenants to pay thirty cents for every ton he shall mine, whatever the number of tons may be, and further that the number shall not be less than 100,000 tons in each year, and if in any year it should be less than the prescribed minimum then that he will pay as rent for such year a sum of money equal to thirty cents per ton on 100,000 tons, viz.: $30,000, payable quarterly.

Under this covenant he clearly bound himself to pay this minimum rent in any year during which he mined less than 100,000 tons, whatever amount he might have mined and paid for during the preceding year. But there was still a contingency unprovided for. There might be a deficiency during some year of the term, of say 50,000 tons in the number of tons mined; but under this covenant the lessee would have been obliged to pay for 100,000 tons. The lessee would, therefore, have paid a royalty upon 50,000 tons deficiency, although he never had the coal, and the lessors would have received a royalty upon 50,000 tons which still remained in their mines. The depletion of the mines was an injury for which the lessors were compensated by the royalty reserved in the lease. The value of the coal lands demised was permanently diminished in proportion to the amount of coal removed. But at the same time the tract was large, nearly 2,500 acres. Upwards of $236,000 had been expended out of the funds of the lessors in machinery and improvements.

The lessee obtained the possession of the coal lands and mines and improvements for a long term of years, and the owmers naturally desired to secure to themselves an adequate rental during each year of the term. This they did by requiring that the lessee should mine at least 100,000 tons each year. If he mined only 50,000 tons, he covenanted to pay, in the shape of rent, a royalty upon the deficiency of 50,000 tons which he had never removed from the mines. But in case he should in any other subsequent year, mine and remove say 50,000 tons in excess of the stipulated 100,000, he might still, under the terms of the lease, be deemed bound to pay the royalty of thirty cents on every ton of coal mined during that year, which would have been unjust, because he had already paid a royalty upon a deficiency of 50,000 tons of coal which still remained in the mines, and when he should take them out he ought to have credit for the deficiency which had thus been paid for.

Some further clause was therefore necessary to protect him against a double payment of royalty upon the same amount of coal, viz.: first as a deficiency, and again as a royalty for taking out the coal. The question now is whether the proviso, out of which the present controversy has arisen, was not intended to meet the difficulty and supply the omission above suggested, and whether, if it is fairly capable of that construction, it should not be preferred to one which would be a material departure from the scheme indicated by the preceding part of the lease, and repugnant to the language of the preceding covenants. The language of the proviso is somewhat obscure, but light is thrown upon it by the explanatory sentence with which it concludes. The language of the proviso is:

"Provided, that if in any year the party of the second part shall mine and carry away more than the proper minimum quantity for such year such excess, or so much thereof as may be necessary, may be set off against the deficiency of any other year or years, within the same division of the term hereby demised. So much of said excess as is applied to make up such deficiency having been paid for shall not be paid for again."

I think it plain that the excess here spoken of is an excess arising after the deficiency has occurred, and has been paid for. This excess in such a case, instead of being paid for shall be set off against the previous deficiency, which has been paid for. This is plain from the concluding paragraph:

"So much of said excess as is applied to make up such deficiency having been paid for (*i. e.*, having been paid for in pursuance of the covenant to pay for deficiencies), shall not be paid for again." How could it possibly be ascertained how much of the excess in any year was necessary to make up the deficiency in any other year? And how could the necessary amount be so applied, and thus have been paid for, unless the deficiency had occurred before the excess was produced? It must be that in referring to the deficiency "in any other year," the parties meant the deficiency in any other preceding year.

This construction harmonizes all parts of the agreement. It requires the lessee to pay thirty cents per ton on all the coal he takes out in every year; and it secures to the lessors a minimum rental of thirty cents on 100,000 tons for each year: but if the lessee has to pay for any deficiencies as rent, the amounts so paid are to be regarded as royalties paid, and are to be set off against royalties, on any subsequent excess over the 100,000 tons so that the lessee shall not be compelled to pay again a royalty which has once been paid. When he has paid for a deficiency he becomes entitled to take out an equal amount of excess without paying, but there is nothing in the clause which purports to excuse him from paying for a deficiency in any year. There is no provision for reducing payments for deficiencies by off-set, but only for, reducing payments for excess by so much of the excess in any year as shall be applied to make up deficiencies which have been paid for.

These views would lead to a reversal of the judgment of the general term and a new trial, but as the view here taken was not presented by the appellants on the argument, and the respondent has had no opportunity to answer it, there should be a reargument.

to work the mines continuously. Such a covenant is necessary, and must be explicit in terms, before the lessee can be held liable for not working the mines.

Jegon v. *Vivian*, L. R. 6 Ch. App. Cas. 742, 757; *Wheatley* v. *Westminster Coal Co.* L. R. 9 Eq. 538; *James* v. *Cochrane*, 7 Wels. Hurlst & G. 170.

As there is no confusion in arrangement nor uncertainty in the use of terms, the question is merely one of interpretation of the language of the lease. The court cannot, by construction, defeat the express stipulations of the parties; and it ought not to endeavor to make a different contract than the parties have made for themselves.

Jegon v. *Vivian*, L. R. 6 Ch. App. Cas. 754–758; *Bowes* v. *Shand*, L. R. 2 App. Cas. 455.

Danforth, *J.*, delivered the opinion of the court:

This case has been twice argued; the second time at the request of the court in order that a conjecture, not presented by counsel, but prompted by an examination of the lease, and creating some doubt as to the rights of the parties, might be called to their attention. The appellants have, however, given the suggestion very little support. They have indeed failed to show that if adopted it would express the intention of the parties; and we find nothing in the points of the plaintiffs which indicates error in the conclusion reached by the trial judge, as to the true construction of the covenant for alleged breach of which the action was brought. That was the only question before him, and is the one to which the appeal is directed.

It appears that on the first day of October, 1869, the plaintiffs demised to Jervis Langdon certain coal lands for the term of twenty years from July 1, 1870; that the defendant acquired his rights and took his place. The complaint states that on the first of January, 1885, $7,500 rent for the quarter ending on that day became due, and this action was brought for its recovery. The answer admits the demise, but alleges payment according to the covenant of the lessee.

So far as now material, the lease contains a grant and demise of the premises to the lessee, in consideration of which, as therein expressed, he covenants and agrees that he will mine and carry away from the coal lands not less than 75,000 tons of coal per annum for the first five years of the term, beginning on the first day of July, 1870, and will mine and carry away not less than 100,000 tons of coal per annum for the next fifteen years, and will pay a rent or royalty of thirty cents per ton for every ton of coal mined and carried away during the full term.

"The payment of the rent or royalty to be made quarter-yearly on the first days of October, January, April and July, in each year, from the commencement of the term." Then follow these words; "In case the quantity of coal mined and taken away in any year of the said term shall fall short of the proper minimum quantity above named, will pay as rent for such year, a sum of money equal to the amount he would have been required to pay under this covenant, if he had mined the full proper minimum quantity; provided, that if in any year the party of the second part shall mine and carry away more than the proper minimum quantity for such year, such excess, or so much thereof as may be necessary, may be set off against the deficiency of any other year or years, within the same division of the term hereby demised. So much of said excess as is applied to make up such deficiency, having been paid for, shall not be paid for again."

The defendant alleges that during the first period or division of the term, viz.: five years from July 1, 1870, to July 1, 1875, it took away from the demised premises an excess of 322,058 tons above the 375,000 tons required by the lease, and paid the full royalty; that thus far during the second period it has mined 220,679 tons over the full amount required for the whole of the second period or division of fifteen years mentioned in the lease, and paid the full royalties thereon, and has thus paid all the rents and royalties for the whole remaining period of the lease.

Upon trial before the court the facts alleged by the defendant were in substance found to be true, and the learned trial judge held "That, under the terms of the lease, the defendant has the right to set apart from the excess of coal mined during any one year of said second period of said lease sufficient to make good any deficiency in any subsequent year of said second period, and having elected so to do, has the right to set apart from the excess of the first year of said second period, to wit: the year ending July 1, 1876, the amount of 25,000 tons to make good a like deficiency in the amount mined during the period from October 1, 1884, to January 1, 1885, the period to recover rent for which this action is brought," and dismissed the complaint.

It was his opinion that the provision for an annual mining of "not less than 100,000 tons of coal per annum" for fifteen years, taken separately, was not satisfied unless that amount was annually produced; but he held that the other provision permitted mining in excess of that amount in any year, and an application of that excess to the royalties otherwise unearned, but still due in subsequent years when there happened to be a deficiency in production. It is evident that under this construction the lessee might go on and mine during the first year of each division the whole amount required for that period.

On the other hand the claim is made in behalf of the lessors, and this is their principal contention, that the mining must be continuous during each year of each division of the term and if there should be an excess it could be applied upon the deficiency occurring in some other preceding year; in other words, that the lessee, whether it mines or not, must pay in each year thirty cents per ton on at least 100,000 tons, or $30,000 annually; "but if (as was suggested in the opinion which led to the reargument) it has to pay for any deficiency as rent, the amounts so paid are to be regarded as royalties paid, and are to be set off against royalties on any subsequent excess over the 100,000 tons, so that the lessee shall not be compelled to pay again a royalty which has once been paid."

Again, it is said in support of this view: "When it has paid for a deficiency, it becomes entitled to take out an equal amount of excess without paying." In other words, as the case is put in argument, the deficiency must have occurred before the excess is produced. It is argued that the provision means a past deficiency and a future excess. I cannot reach that conclusion, and am constrained to agree with the defendant's view.

First, it accords with the literal reading of the provision. If in *any* year of the terms you carry away *more* than the 100,000 tons, such excess, or so much "of such excess" as may be necessary, may be set off against the deficiency of any other year, or years within the same division. These permissive words, "If in *any* year of the term," of course must apply as well to the first year of each division as to the other years, or as to the last year. It is conceivable that there might be produced 150,000 tons, an excess of 50,000 tons, in the first year of the second term; and in the second year of that period there might be produced only 50,000 tons, leaving a deficiency in the second year of 50,000 tons. By the terms of the lease the excess of the first year must be paid for at the time the royalties for the minimum of 100,000 tons are paid; that is the whole quantity mined, 150,000 tons, must be paid for within the year. During the second year, notwithstanding the deficiency, the royalties for 100,000 tons must be paid, as according to the appellants' contention the excess of the first year cannot be set off against the deficiency of the second year. Yet the excess has been paid for, and as the condition runs shall not be paid for again.

Second, the parties having restricted the general language of "any year," by applying it to any other year or years "within the same division," appear to have had the question of limitation in mind, and no further restriction should be implied. Yet the appellants' contention would reduce the years of grace in one division to four years, and in the other to nine years, and make it read as if it said: "If in any year except the first year of each division, the lessee shall mine and carry away an excess," then, etc.

Third, the object of the provision was to provide for anticipated or possible "excess." That is the dominant word. It must be paid for because the covenant of payment requires each ton mined and carried away, no matter how great the production, to be paid for quarterly from the commencement of the term. But it was also in the minds of the parties that a deficiency might occur. This might arise from various causes, voluntary and involuntary, and so that was provided for. The lessee may apply the excess, say the parties, not only upon the deficiency of any other, that is any other "one year," but of any other "years," no matter how many, so they all come within one division.

Again; I think the contention of the appellants requires us to change the words used by the parties in another respect. The lessee is to pay "the rent or royalty of thirty cents per ton for every ton of coal mined and carried away; but in case the quantity mined and carried away in *any year* of the *term*, shall fall short of the proper minimum quantity, the lessee shall"—do what? Why, "pay to the lessors a *sum of money* equal to the amount he would have been required to pay if he had mined the full proper minimum quantity."

Then comes the proviso as to the excess, and then the words, "so much of said excess having been paid for, shall not be paid for again." The appellants read it as if it said: "The previous deficiency" which has been paid for "in pursuance of the covenant to pay for deficiencies." I do not see how this can be allowable when the express language of the covenant is, "so much of said *excess* having been paid for, shall not be paid for again."

It should be observed that nowhere in the lease do the parties provide for rent, payable as such in money and at a fixed sum, except upon default of the lessee in mining and taking away the quantity of coal provided for, and then the sum to be paid is measured by the tax or royalty which would, except for that default, have been paid to the lessors upon the produce of the mine. This is opposed to the controlling idea of the appellants, which seems to be that the lease imposed an obligation upon the lessee to produce continually in working the mine, and this is presented in various forms. Thus it is said by their counsel: 1, "that the lease nowhere provides that the lessee may in any year altogether cease to mine;" 2, that the lease provided "that the lessee shall and will prosecute and carry on the said mining operations in a skillful and workmanlike manner;" 3, "that the lessee binds himself absolutely to mine at least 100,000 tons during each of the fifteen years."

The learned counsel nowhere finds in the lease an express covenant to work the mine continuously, but seeks from these provisions to imply one. I can find no authority for such implication, nor power on the part of the court to interpolate such a covenant into the contract which the parties deliberately made, and in regard to which no omission or mistake is pretended.

Certain things the lessee must do; certain other things the lessee must not do. The lease contains injunctions and prohibitions, agreements to do and agreements not to do; but the lessee is neither required to work the mine continuously, nor does he agree to do so. Such an obligation cannot in support of an action like this be inferred from the agreement to carry on the mining operations, "in a safe, skillful and workmanlike manner," for the lease provides the penalty for omitting to do so, viz.: accountability to the lessors for any loss or damage which they may sustain in these respects, and declares that it shall be ascertained by arbitration or action for damages or termination of the lease.

As to the other provisions referred to, the deduction sought to be drawn from them is repelled by an express provision for what is called in the English cases (*Jegon* v. *Vivian*, L. R. 6 Ch. App. 742; *Wheatley* v. *Coal Co.* L. R. 9 Eq. 538) a dead or sleeping rent, that is a rent which must be paid whether the mine is worked or not. This is found in the clause already quoted, but which may be repeated in this connection to show that the parties contemplated not a continuous working of the mine, but a possible discontinuous working of it, viz.: "In case the quantity of coal mined and taken away by the party of the second part, in any year of the said term, shall fall short of the proper minimum quantity above named, the party of the second part shall and will pay to the parties of the first part, their heirs, executors, administrators or assigns, as rent for such year, a sum of money equal to the amount he would have been required to pay under this covenant, if he had mined the full minimum quantity."

Let us suppose that, at the very moment after the execution of the lease, the lessee had seen fit to let the land lie idle, preferring to pay the lessors in money a sum equal to the aggregate amount he would have been required to pay if he had, for each one of twenty years, mined the full minimum quantity of coal, can it be thought that at any time thereafter he could be called upon for royalty or rent? Certainly not. The lease secures payment by royalty as rent, and then, in default of royalty measured by production, stipulates for rent in money.

The whole intention of the parties was to provide for a certain amount of rent, and when that is paid, no matter when it is paid, the obligation of the lessee ceases. The remaining sentence of the same provision gives equal latitude and relief to the lessee when he has paid so much royalty upon coal mined as will cover the rent called for, whether the royalty is paid in one year, or in different years, having regard only to that division into periods which the parties themselves arranged for. This construction works no injustice to the lessors. They have received the rent, which was made payable whether the coal was mined or not; it has been paid in one of the two ways bargained for; if more was expected, other provisions should have been inserted in the lease. So far as that instrument discloses the intention of the parties, it has been fully carried out, and the plaintiffs properly held to have no cause of action. A different result would lead to a double payment.

The complaint, therefore, was necessarily dismissed; and the judgment appealed from should be affirmed.

Andrews, Earl and **Finch,** *JJ.*, concur.

Ruger, *Ch. J.*, and **Rapallo,** *J.*, dissent.

Peckham, *J.*, takes no part.

Henry TOZER, *Respt.*,
v.
NEW YORK CENTRAL & HUDSON RIVER R. R. Co., *Appt.*

A **general objection to evidence** is sufficient where the evidence is inadmissible in its nature, and where it appears that the ground of the objection could not have been misunderstood, and if it had been specified the objection could not have been obviated.*

(Decided April 26, 1887.)

MOTION for reargument of case reported in 6 Central Reporter, 814. *Denied.*

The facts appear from the opinion.

Mr. **George C. Greene,** for appellant.
Mr. **Myron H. Peck, Jr.,** for respondent.

Per Curiam:

In deciding upon the appeal in this case it did not escape our attention that the objections to the admission of the evidence, which we held to be incompetent, were general. That point was discussed in consultation, but we considered that the evidence was, in its nature, inadmissible, as it related to speculative and conjectural possible future consequences which might be apprehended from the injury, and how long after the injury such consequences might be developed. The course of the examination shows that the ground of the objections could not have been misunderstood; and if it had been specified, the objection could not have been obviated.

Motion denied, with costs.

DECISIONS IN WHICH NO OPINIONS WERE WRITTEN.

(March 1, 1887.)

Re General ASSIGNMENT OF James N. TOWNSEND and Samuel Baker.

Mr. **N. C. Moak,** for appellant.
Mr. **L. A. Gould,** for respondent.
Appeal dismissed, with costs.

Truman SYMSON, *Appt.*,
v.
Hannibal T. SELHEIMER *et al.*, *Respts.*

Mr. **Nathaniel Foote,** for appellant.
Mr. **John H. White,** for respondents.

Order of general term modified by providing that plaintiff's motion to amend is granted upon his consenting to postpone the lien of his judgment to those existing on the 5th of October, 1885, as to all real estate embraced in the assignment of the judgment debtors, dated December 15, 1884; otherwise denied; *no costs to either party on this appeal.*

Frederick BODE, *Respt.*,
v.
Henry MAIBERGER, *Deft.*, Murphy & Maiberger, Sureties, *Appts.*, Moies Seismoran, Purchaser, *Respt.*

Mr. **Edgar A. Turrell,** for appellants.
Mr. **James C. De La Mare,** for respondent.
Appeal dismissed, with costs.

Caroline M. MITTNACHT, *Appt.*,
v.
John KELLERMANN, Impleaded, etc., *Respt.*

Mr. **Christopher Fine,** for appellant.
Mr. **Jacob L. Hanes,** for respondent.
Motion to dismiss appeal denied, with costs.

PEOPLE, *ex rel.* DEVERELL,
v.
MUSICAL UNION.

Motion to dismiss appeal denied, with costs.

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*See Holcombe v. Munson, 5 Cent. Rep. 398.

(March 15, 1887.)

George LAHR, *Respt.*,
v.
METROPOLITAN ELEVATED R. R. CO., *Appt.*

WAGNER *v.* SAME.

Messrs. **Julian T. Davies, Edward S. Rapallo** and **David Dudley Field,** for appellant.

Messrs. **Inglis Stuart** and **G. Willett Van Nest,** for respondent.

Motion for reargument denied, with costs. See 6 Cent. Rep. 371, 377.

(March 22, 1887.)

William P. BROOKS, *Appt.*,
v.
STATE of NEW YORK, *Respt.*

Mr. **E. E. Harding,** for appellant.

Mr. **D. O'Brien,** *Atty-Gen.*, for respondent.

Judgment and award affirmed, with costs.

W. S. CLEMENTS, *Respt.*,
v.
STATE of NEW YORK, *Appt.*

Mr. **D. O'Brien,** *Atty-Gen.*, for appellant.

Mr. **D. S. Potter,** for respondent.

Judgment and award affirmed, with costs.

Davis COSSITT, Sheriff, *Appt.*,
v.
Henry WINCHELL, *Respt.*

Mr. **M. M. Waters,** for appellant.

Mr. **Louis Marshall,** for respondent.

Judgment affirmed, with costs.

(March 25, 1887.)

Mary Moffat FIELD *et al.*, *Respts.*,
v.
MAYOR etc. of NEW YORK CITY, *Appt.*

Mr. **F. A. Irish,** for appellant.

Mr. **Frank E. Blackwell,** for respondents.

Judgment affirmed, with costs.

William H. BROCKWAY *et al.*, *Appts.*,
v.
John FLEMING *et al.*, *Respts.*

Mr. **Oswald Prentiss Backus,** for appellants.

Mr. **Leonard Bonner,** for respondents.

Judgment affirmed, with costs.

Henry DAY, *Appt.*,
v.
Sarah HILL, *Respt.*

SAME *v.* Francis C. HILL.

Mr. **George A. Strong,** for appellant.

Mr. **Thomas Young,** for respondent.

Judgment affirmed, with costs.

Olney L. CARPENTER, *Respt.*,
v.
BOSTON & ALBANY R. R. CO., *Appt.*

Mr. **John Cadman,** for appellant.

Messrs. **Charles L. Beale** and **R. E. Andrews,** for respondent.

Judgment affirmed, on authority of *Carpenter* v. *Boston & Albany R. R Co.* 97 N. Y. 497, *with costs.*

Josephine CORNELL, *Admrx.*, etc., *Respt.*,
v.
Francis R. CORNELL, *Appt.*

Mr. **Gabriel L. Smith,** for appellant.

Mr. **J. A. Reynolds,** for respondent.

Judgment affirmed, with costs.

Gottleib WEBER, *Respt.*,
v.
Nathan MANNE, Assignee, Impleaded etc., *Appt.*

Mr. **Richard M. Henry,** for appellant.

Mr. **Abram Kling,** for respondent.

Order of General Term reversed and that of Special Term affirmed, with costs.

Re ESTATE OF Susan A. PLACE, Deceased.

Mr. **Charles F. Wells,** for appellant.

Mr. **Thomas Parish Sherman,** for respondent.

Order affirmed, with costs.

PEOPLE, *ex rel.* Jose M. FERRER, Ancillary Exr., etc., *Respt.*,
v.
Michael COLEMAN *et al.*, Comrs. of Taxes etc., *Appts.*

Mr. **D. J. Dean,** for appellants.

Mr. **A. B. Cruikshank,** for respondent.

Order of General Term affirmed, with costs.

DISTRICT OF COLUMBIA.

SUPREME COURT.

The UNITED STATES, *ex rel.* Stephen V. WHITE,
v.
Thomas F. BAYARD, Secretary of State.

1. **Where** an **Act of Congress imposes** upon an officer of the Government a purely **ministerial duty,** upon the performance of which depend the rights of individuals, it is **no** sufficient **answer,** on a *mandamus* proceeding against him, to set up a **contrary direction by** the **President.**
2. The decision in *Angarica de la Rua* v. *Bayard* (1 Cent. Rep. 826, 4 Mackey, 310), is to be understood as relating solely to the facts of that case.
3. When **money** is **in** the **custody of** the **Department of State** to which the petitioner has a clear legal right, and by an Act of Congress the Secretary is directed to pay it over to him, **mandamus will lie to compel** its **payment.**
4. The return by a defendant in **mandamus** must deny with distinctness and certainty the material averments of the petition; otherwise, they will be taken as true.
5. Except as to the Weil and La Abra claims, the **distribution** in ratable proportions **of** the **money due** to **claimants** or their assignees **under** the awards of the **Joint Mexican and American Commission** is, by the Act of June 18, 1878, made **a purely ministerial duty** on the part of the Secretary of State, and such as this court will enforce by *mandamus.*

(Decided February 23, 1887.)

PETITION for *mandamus* certified to be heard in the General Term in the first instance. *Granted.*

The facts are stated in the opinion.

Mr. **Stephen V. White,** *pro per.*, for relator.

Mr. **Wm. A. Maury,** *Asst. Atty-Gen.*, for respondent.

Mr. Justice **Hagner** delivered the opinion of the court:

The petitioner asks that a *mandamus* may issue directing Mr. Bayard, the Secretary of State, to pay over to him a sum of money which he alleges he is entitled to receive as assignee of certain claims adjudicated and allowed under the Joint Mexican and American Commission.

1st. The principal defense made to this application by the Secretary, is one which, if allowed, would not only be decisive of this case, but would be fatal to any claim of authority in this court hereafter to issue a *mandamus* against the Secretary of State in his official capacity in any matter whatever, without respect to the question whether the duty sought to be enforced is merely ministerial, or one discretionary in its nature. The Secretary presents this defense in the following language:

"And this respondent, further answering, saith that the several sums of money mentioned in the said petition, and claimed to be due and payable to the relator, are held by him subject to the order and control of the President of the United States, and are disposable by this respondent at the discretion of the President only; and that, as this respondent is advised and believes, there is no law, as hath been mistakenly supposed by the said relator, by which this respondent is invested with authority over the said sums of money independent of the President of the United States; and it being the opinion of the President that the public interests forbid the making of payments to the said relator, in the present condition of things as herein before set forth, this respondent submits that he is not subject to the process of *mandamus* in the premises; and he therefore prays that he may be discharged from the said rule, with proper costs in his behalf sustained."

But for the earnestness with which this defense has been urged by the assistant attorney-general in behalf of one of the highest officers of the Government, and especially of his further contention that his position is supported by a decision of this court recently rendered in a case in which the same official was the defendant, we should have contented ourselves with a simple reference to the decision of the Supreme Court of the United States, announced eighty-four years ago in the case of *Marbury* v. *Madison,* 1 Cranch, 163 [5 U. S. bk. 2, L. ed. 69], as a sufficient refutation of the contention.

But, under the conditions to which I have adverted, it is perhaps proper and respectful that something more should be said to show that we have no alternative but to adhere to the position which we conceive has been thus so long settled.

The facts of that case, which is as familiar to the Bar as any in the whole range of jurisprudence, were these: Shortly before Mr. Adams retired from the office of President he had signed a number of commissions for justices of the peace within this District, some of which had not been received by the persons for whom they were intended; but after Mr. Jefferson was inaugurated, they were found by Mr. Madison in the office of the Secretary of State. The President ordered the Secretary not to surrender them, and thereupon Marbury, whose commission was withheld under this order, filed a petition for a *mandamus* in the Supreme Court of the United States, alleging his demand and the refusal by the Secretary under the President's orders to perform what he averred to be a mere ministerial duty, and insisting that he had a right to have its performance enforced by *mandamus* from that court.

The case was elaborately argued and considered in all its relations, and the writ was refused, upon the ground that the supreme court possessed no original jurisdiction in the case. But the court entered upon an elaborate discussion of all the points raised, and (among others) of this very question whether, in the case of a plain ministerial duty, the Secretary of State was amenable to the process of *manda-*

mus; and they decided unequivocally that he was.

I shall read a few sentences from the opinion for the reasons I have stated.

Much stress had been laid, in the argument, in that case upon the peculiar language of the section of the Act of 1789 establishing the Department of State, which, as was also urged in the argument before us, committed no authority to the Secretary of State, except in subordination to the orders of the President.

The Chief Justice, in reply to this argument, says: "By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

"In such cases their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the Nation, not individual rights, and being intrusted to the Executive, the decision of the Executive is conclusive. The application of this remark will be perceived by adverting to the Act of Congress for establishing the Department of Foreign Affairs. This officer, as his duties were prescribed by that Act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

"But when the Legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts, he is so far the officer of the law—is amenable to the laws for his conduct, and cannot at his discretion sport away the vested right of others.

"The conclusion from this reasoning is that where the heads of departments are the political or confidential agents of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."

And again; "But, if this * * * be no intermeddling with a subject over which the Executive can be considered as having exercised any control, what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a *mandamus* directing the performance of a duty, not depending on executive discretion, but on particular Acts of Congress, and the general principles of law?" 170 [71].

"If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceedings, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such as would, were any other individual the party complained of, authorize the process? It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined. Where the head of a department * * * is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden; * * * in such cases, it is not perceived on what grounds the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department."

The language of the statutes creating others of the Executive Departments, and apparently subordinating their actions to the will of the President, does not differ substantially from that used with respect to the Department of State. Such is the case with reference to the Department of War, of the Navy, and of the Treasury; but the writ has repeatedly been issued from this court, against those officials, in matters ministerial, without a word from the supreme court, in disapproval of a jurisdiction which since the case of *Kendall* v. *U. S.* 12 Pet. 610 [9 L. ed. 1215], has been recognized as one of the flowers of our court. In the latter case *Mr. Justice* Thompson, speaking for the supreme court, says: "There are certain political duties imposed upon many officers in the Executive Department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of, and are subject to the control of the law, and not to the direction of the President."

In that case the granting of the writ had been resisted upon the ground of want of authority in the courts of the District, but not because of any distrust in the soundness of the general principles announced in *Marbury* v. *Madison;* and it may not be out of place to quote the following from the report of the argument of *Mr. Attorney General* Butler in that case, as evincing the understanding of a distinguished lawyer of that decision.

"And as the ordinary character of an officer's functions would not always determine the true nature of a particular duty imposed by law, he further agreed that if an executive officer, the head of a Department, or even the President himself, were required by law to perform an act merely ministerial, and necessary to the completion or enjoyment of the rights of individuals, he should be regarded *quoad hoc*, not as an executive, but as a merely ministerial officer; and therefore liable to be directed and compelled to the performance of the act by *mandamus* if Congress saw fit to give the jurisdiction." 12 Pet. 596 [9 L. ed. 1209].

Since 1803 the decision has stood undisturbed, as settled law. It is true it has been criticised, upon the ground that the court had declared itself without jurisdiction to issue the writ; and this was one of the reasons given by Mr. Jefferson in his letter of June 2, 1807, to George Hay, the prosecuting attorney in the trial of Burr, why he thought "it material to stop at the threshold, the citing of that case as authority, and to have it denied to be law."

But in *U. S.* v. *Schurz*, 102 U. S. 395 [26 L. ed. 171], the supreme court, in awarding a *mandamus* against the Secretary of the Interior to deliver a land patent to the patentee, notices this suggestion in these words: "If the relator was entitled to the possession of the patent as his property and it was the plain duty of the Secretary to deliver it to him when demanded, then, under all the authorities, and especially the decisions of this court, he is entitled to the remedy he asks. From the case of *Marbury* v. *Madison*, 1 Cranch, 137, down to the present time, such has been the settled doctrine of this court. And though it may be said that the opinion of *Chief Justice* Marshall in that case was not necessary to the decision made, which was that *this* court had no *original* jurisdiction in that case, the principles of the opinion have since been repeatedly recognized and acted upon in this court and the case cited with approval in its definition of the circumstances under which persons holding public offices will be compelled to perform certain duties which are merely ministerial. *Kendall* v. *U. S.* 12 Pet. 524, [9 L. ed. 1181]; *Decatur* v. *Paulding*, 14 Pet. 497 [7 L. ed. 236].

The decision has been equally followed by the courts of the different States, even where the proceedings were against the highest state officials, to compel the performance of ministerial duties. In *Magruder* v. *Swann*, 25 Md. 173, where the writ was ordered against the Governor, the whole subject was reviewed, and the more prominent state decisions are cited.

It would therefore have been impossible for this court to have held a contrary doctrine; and whatever language was used in the case of *U. S. ex rel. Angarica de la Rua*, v. *Bayard*, 1 Cent. Rep. 826, 4 Mackey, 310, referred to by the defendant, must be understood as relating solely to the facts of that case.

It is well settled that no *mandamus* can be issued against a public officer, unless the party applying shows a clear legal right to the relief claimed; and also that there exists a clear legal duty on the part of the official to perform the ministerial function involved.

In the case in 4 Mackey, 310, neither of these essential prerequisites of jurisdiction appeared. Under a Convention between the United States and Spain, a large sum had been awarded to Angarica de la Rua for losses sustained by him at the hands of the authorities in Cuba, which was paid over by Spain to the Secretary of State. This officer paid over to the claimant the amount so received, except about $41,000, which he retained until the Spanish Government should make provision to pay the expenses of the arbitration. Several years afterwards the Secretary paid over the sum so retained in full, but refused to pay to the claimant an amount of interest which had been realized from the investment of the sum, made by the Secretary's order while awaiting the action of the Spanish Government. To compel the payment of this interest the *mandamus* was applied for; but it was refused by this court, as it appeared that the retention of the $41,000 by the Secretary, and its investment, and the earning of interest on the fund, were all equally without law, but were mere voluntary acts of the Secretary; that the unchangeable practice of the Goverment is not to pay interest upon claims and that there could be no element of contract in the transaction; and hence, however equitable might be the petitioner's claim to the interest, it could not be enforced at law.

2. The next inquiry is whether the relator has shown a clear legal right to the fund he claims.

He avers under oath the allowance by the mixed commission of the claims of Conroy and others; that afterwards and before the payment of any of the awards, he became and still is the assignee of one half of each; and he proceeds :

"That the fact of this relator being such assignee was judicially determined by this court in general term in 1881 in the suits of Thomas P. McManus against Richard H. Porter and others in equity, and afterwards in the case of Richard H. Porter and others in equity, decided in 1884 in the general term of this court.

"That the Department of State has recognized this relator as such assignee, upon full argument and hearing before the Secretary of State, and has paid to this relator nine installments hitherto paid by Mexico and distributed by the Secretary of State.

"That on January 31, 1886, a tenth installment was paid by Mexico to the defendant, as Secretary of State of the United States, and that the defendant has made a ratable distribution of said installment, having paid other claimants and especially having paid said Parsons and Conroy and Standish the moiety which they had not assigned to this relator.

"That by the first section of chapter 262 of the Acts of the Forty-Fifth Congress, approved June 18, 1878, it is made the duty of the Secretary of State to ratably apportion and to pay to the claimants or their assigns each installment of money when received from Mexico.

"That of the said tenth installment there is due this relator on account of the Conroy award $1,806.06; on account of the Standish award $1,519.55; and on account of the Parsons award $1,817.92; which sums are specifically on hand, and the amounts have been computed and set apart by the proper auditing officers of the State Department.

"That notwithstanding the judicial decision of this court and of the Department of State made by two predecessors of the said Bayard in the said office of Secretary of State, the said defendant arbitrarily refuses to perform the duty imposed upon him by law, and to pay to this relator the said sums of money due and apportioned to him."

This constitutes unquestionably a statement of a clear legal right. If he is the assignee, and the money is in the custody of the Department, and by the statute the Secretary is directed to pay it over, after it has been set apart for the assignee, then undoubtedly the petitioner has the right to demand its payment.

The case is heard here upon the agreement of the litigants that the answer of the Secretary is, in all respects, to be considered as though it were a return to an alternative *mandamus* already issued; and the court has considered the case throughout according to the terms of this stipulation.

The reply to the allegations of the petition is thus stated in the return:

"This respondent, answering, saith that true it is that awards were made by the commission established by the Treaty between the United States and Mexico on the 4th day of July, 1868, for the amounts and in favor of the parties named in the said petition; and this respondent is advised that the said relator, Stephen V. White, doth claim an interest in the one half of each of said awards; and this respondent doth admit that the rights and interests claimed by the said White, as aforesaid, were recognized by one, although not recognized by another, of the predecessors of this respondent, and payments made to him accordingly. But this respondent saith that he finds it impossible as the matter now stands, to recognize claims and pretensions of the said White to the moieties of the said awards, without ignoring the conflicting claims and pretensions of a certain Richard H. Porter, between whom and the said White litigation in respect to the said award is now, and for a long time has been, pending.

"And this respondent further saith that he hath always been and is now willing to pay whatever sum or sums may be due on the said moieties out of moneys received under the said Treaty from the Republic of Mexico, on an order and acquittance signed by all the rival claimants of the said moieties; which your respondent respectfully submits is as much as could be done by him without embroiling the United States in a litigation in which it has no interest whatever."

Is this such a return to the supposal of the petition as would disentitle the plaintiff to the writ?

The well settled rules of the common law on the subject of *mandamus* have not been modified by statute in this jurisdiction.

In *Harwood* v. *Marshall*, 10 Md. 463, the court states with much fullness the principles by which the sufficiency of a return should be tested, and that case affords so clear an illustration of the manner in which we should examine that before us that we shall quote from it at length. The facts of that case were these: The Maryland Legislature had elected Marshall state librarian, and the incumbent Harwood refused to give up the office. Marshall applied for a *mandamus* to compel its surrender; and the court below ordered a peremptory writ. In the court of appeals it was insisted that the court below erred in ordering the *mandamus* because the return sufficiently denied the statement of fact upon which the petitioner relied as the ground of his right. The appellate court says:

"In this State, the proceedings in *mandamus* in such a case as the one before us are governed entirely by the rules and principles of the common law. The office in question is a public office, and not within the provisions of the Statute of 9 Anne, chap. 20, nor of the Act of Assembly of 1828, chap. 78.

"If the return state upon its face, with precision and certainty, facts which are sufficient in law to justify the court in refusing the writ, the facts alleged are not traversable; and whether they be true or false, the return is conclusive, and the writ is denied. The only remedy, if the facts alleged in the return be untrue, is by action on the case for a false return. 1 Harr. & J. 557.

"Such is the ancient and well settled principle of the common law governing this case, and remaining to this day unaltered by any statutory enactment in Maryland.

"In the excellent treatise of Tapping on Mandamus, p. 353, it is said: 'The averments of the return must be certain. The certainty required by the common law is, by some of the cases, stated to have been certainty to every intent, and therefore greater certainty than is requisite to a plea. Other cases have decided that the certainty or strictness which prevailed at common law was the same as that which governed estoppels, indictments or returns to writs of *habeas corpus*, and as to them it is laid down that nothing is to be taken or construed by intendment or inference, so that all material facts should be positively and distinctly alleged.' * * *

"If the return deny the supposal of the writ, the traverse must be single, direct and certain. The rule being that every distinct and material allegation contained in the writ must, if it be intended to contradict them, be traversed.

"The question in considering the sufficiency of a return by way of traverse must be whether, if the supposal of the writ be true and sufficiently averred, an action for a false return can be certainly maintained against the defendant; or, in other words, if the facts averred in their return, strictly construed as stated, may be true consistently with the truth of the suggestion of the writ, then the return is vicious.

"Let us apply these rules to the case before us: The facts stated in the writ are, that the petitioner 'hath taken and subscribed the oaths of office, as prescribed by the Constitution and laws for the state librarian.'

"The traverse in the return is as follows: 'This respondent knows nothing of the qualification of the said Marshall, to the said office of state librarian, saving and excepting from the pretenses of the said Marshal as set forth by him in these proceedings, and saving and excepting also, that, from an inspection of the books in the office of the Governor of the State, it appears, and this respondent so avers the fact to be, that the said Marshall did not take and subscribe the oaths of office, required by the Constitution and laws to be taken and subscribed by him before the Governor of the State, in manner and form as directed by the Constitution and laws.'

"This is not a good traverse. First, it is evasive, in not denying in direct terms, on the solemn oath of the respondent, the fact alleged in the writ; expressly disclaiming all knowledge of the fact, except from what is alleged, and from what appears from an inspection of the books in the office of the Governor, the averment amounts to no more than an allegation of a fact derived from the inspection of the books; or if this be not the true construction, the averment is at least ambiguous in its terms, the words, 'and this respondent so avers the fact to be,' are susceptible of being construed to refer either to the *qualification* itself, or *to what appears from the books* of the Governor; and in this view it is bad as wanting the requisite certainty. If the defendant were sued for a false return, the latter construction might be insisted on, with great force, in defense of the action."

And as the court held that those denials were not sufficient to break the force of the averments in the petition, which were therefore to be taken as established, they ordered the peremptory writ to issue.

Tested by this reasoning, it is perfectly plain that the answer in the present case is entirely insufficient. It would be faulty even as an answer in chancery, or in any ordinary legal proceeding, since it does not meet distinctly several of the material averments of the petition. It does not deny that the relator is the assignee, although it admits that he claims an interest in one half of the fund. The nearest approach to a denial of White's right as assignee is the statement that the respondent finds it impossible to recognize White's claims without ignoring the conflicting pretensions of Porter, between whom and the said White it avers that litigation in respect to the award is, and for a long time has been, pending.

Litigation in what way? It is not averred that Porter claims as assignee; for all that appears in the return he may claim only as a creditor of White or of the original assignors. It does not deny that White's claims as assignee have been adjudicated by this court, in cases decided upon hearings in which some of the justices who unite in this judgment participated. Nor does it allege in any way that there has been an appeal from those adjudications, or that a *supersedeas* has been obtained to tie the hands of White and prevent him from claiming his money at once. The reference to Porter's "claims and pretensions" cannot be considered as equivalent to a denial that White is the assignee, or that anyone else claims to be such assignee.

The answer does not deny that the particular sums have been set apart in the department to be paid upon the moieties assigned to White; or that the department had already paid him the dividends from the nine previous installments received from Mexico by the Secretary of State. At the best, each of the denials or averments is vague and uncertain. If an action were brought against the Secretary as for a false return in respect to these several statements in the answer, how could it be successfully contended that the answer denied the material supposals of the petition with such certainty as to sustain the action, when it is quite clear that it has not denied either of them with the directness, singleness and certainty required by the law of *mandamus?*

We are clearly of the opinion that as the answer does not deny with proper certainty the material averments of the petition, they must therefore stand as established, and as presenting a clear legal right to the money claimed.

8. The next inquiry is whether the function to be exercised by the Secretary is a ministerial duty. That would seem to be plain enough. The first section of the Statute of June 18, 1878, authorizes and requires the Secretary of State to receive and distribute in ratable proportions, to the claimants or their legal representatives or assigns, each of the installments which shall have been paid by the Mexican Republic.

This section of the statute was before this court in the case of *U. S.*, *Key*, v. *Frelinghuysen*, 2 Mackey, 301.

That was an application for a *mandamus* against Secretary Frelinghuysen, to require him to pay over a part of an award which had been made in what was known as "The Weil claim" arising under this commission, but which the fifth section of the Act authorizes the President to withhold, if he should see fit, under certain circumstances. This court first speaks of the claims in general, which were not excepted in section 5, and says:

"If the Act had stopped here, there would have been a plain ministerial duty created by it, for the benefit of the parties in whose favor the awards were made, admitting of no exercise of discretion, and proper to be enforced by *mandamus* if its performance was refused."

The Act did stop there, so far as the present case is concerned, for this is not one of the cases excepted by section 5. But the particular case under consideration in 2 Mackey was one of two claims named in that section, which Congress thereby requested the President to investigate, and authorized him, in case he should be of the opinion that the charges of fraud presented as to those claims were well founded, or that other considerations therein referred to rendered it proper, in his opinion, that the case should be retried, to withhold payment of the awards.

The obvious design of this exception in the fifth section was to vary the general rule which applied to all claims not therein named; and as to those two claims, to confer upon the President a discretion which he was not to possess with reference to the claims not so excepted; otherwise, the provision in the fifth section would not have been necessary.

Although the supreme court held that the discretionary power created by section 5 still continued, it said nothing inconsistent with the declaration of this court as to the nature of the duty devolved upon the Secretary of State, with respect to the claims in general. It, therefore, remains as a valid decision of this court that (except as to the Weil and La Abra claims) the payment of the money by the Secretary of State, to the claimants and their assigns, under these awards was purely a ministerial duty, and such as this court could enforce by *mandamus*.

4. Only one point remains. Has this claimant any other reasonable or attainable remedy? Plainly not. This is his only mode of obtaining his money, and if relief is denied him here he would be indeed remediless in the premises, and that deplorable result would ensue which *Chief Justice* Marshall in *Marbury* v. *Madison*, declared would expose to obloquy our system of jurisprudence—that a suitor with a plain right to redress should be powerless to obtain it from the courts, because his rights are with-

held by a powerful officer of a Government created for his protection.

We think it is our plain duty to direct that a peremptory mandamus *shall issue, as prayed; and it is so ordered.*

Powell M. BRADLEY,
v.
William M. GALT and Robert C. Hewett.

Where there is a **traverse of a plea** and on the trial the **jury,** under instructions, **finds for** the **plaintiff,** the **appellate court,** if it finds that the plaintiff was not entitled under the evidence to recover, can only set aside the judgment and remand the case for a new trial; it **cannot render a final judgment for** the **defendant,** for that would be to decide the issue of fact raised by the plea and traverse (*overruling* upon this point *Benham* v. *Vernon*, 3 Cent. Rep. 276, 5 Mackey, 18).

(Decided January 24, 1887.)

THE opinion of the court having been delivered remanding this case for a new trial (5 Cent. Rep. 435), counsel for plaintiff, with a view to carrying the case at once to the Supreme Court of the United States upon the question of law raised as to the sufficiency of the bond sued upon, informally suggested to the court that instead of sending the case back for a new trial a final judgment be entered for the defendant and thereby prevent the delay which must necessarily ensue before the vital question in the case, *i. e.*: the validity of the bond in suit, could be passed upon by the supreme court. The court having thereupon expressed a doubt as to its power to enter such a judgment, in the then state of the record, the point was argued by

Messrs. **W. D. Davidge** and **A. C. Bradley,** in support of the jurisdiction, and—

Messrs. **W. F. Mattingly** and **Nathl. Wilson,** *contra.*

Mr. Justice **Cox** delivered the opinion of the court:

In this case which was decided by us a few days ago a question has been raised as to the judgment which shall be entered; that is to say, since we have held that the plaintiff is not entitled under the evidence to recover, shall we enter judgment finally for the defendant or send the case back for a new trial?

Upon examining the record in that case we find that first there was a declaration, and then a plea, setting forth the facts which were the foundation of the court's opinion here, reversing the judgment below. That is, it set forth the fact that before the bond sued upon was given, another *supersedeas* bond had already been taken, and the judge had become *functus officio* and had no power to take a new bond.

If that had been demurred to, our course would have been plain sailing. We should have seen on the record what would justify us in entering final judgment. But unfortunately, the facts set forth in this plea were traversed by the defendant. The case went to trial, and under the instruction of the court the jury found a verdict for the complainant.

Now we set aside the judgment below. We cannot render judgment for defendant, without setting aside the verdict. In order to do anything, we must set aside that verdict first, and then we find simply an issue of fact; and in order to render a judgment for the defendant we must first decide the issue of fact in favor of the defendant. That it is not competent for an appellate court to do, and therefore we think we are entirely powerless to enter final judgment for the defendant.

Several cases have been cited to us in which it is supposed that the rule is different; for instance, the case of *New Orleans Ins. Asso.* v. *Piaggio*, 16 Wall. 378 [83 U. S. bk. 21, L. ed. 358]. There the declaration claimed—it was a suit on a policy of insurance—first for loss of the vessel, then for loss of the freight, and then, as a separate item, $5,000 damages, for injury done to the credit of the complainant. The jury found not exactly a special verdict, but something very much like one, in which they allowed several items; so much for the vessel, so much for the freight, and $5,000 damages in addition, and a judgment was entered in conformity with the verdict.

The court was satisfied that the judgment and verdict were wrong, as far as the amount allowed for damages was concerned. *Mr. Justice* Clifford said that this particular error appeared on the face of the record, because the writ of error brought up the verdict and judgment in which it appeared that it was not necessary to issue a *venire de novo* in that case, but that, on the general authority given to the court to correct or modify the judgment below, the court could correct that judgment by striking out the $5,000 for damages, which they did. They did not set aside the verdict at all, but directed the court to enter judgment for the two items exclusive of the $5,000 damages.

The same remark will apply in the case of *Barnes* v. *District of Columbia.* [See 91 U. S. 540, bk. 23, L. ed. 440]. There this court had in the first instance ordered the case to be sent back for a new trial, but on reconsideration ordered a verdict for the defendant. But that was on an error on the face of the record. The question there was whether this District was liable for injuries received on the public highways which were under control of the board of public works, that is to say, officers not appointed by the District authorities. That question appeared in the very declaration, and the court had nothing to do but say "On the very face of the pleadings the plaintiff is not entitled to recover, and we have to render judgment for the defendant." So that these cases are not precedents for the form of relief suggested in the present case.

There is, however, a third case directly in point, that of *Benham* v. *Vernon*, 5 Mackey, 18, 3 Cent. Rep. 276. There an action was brought for damages for false arrest against several parties and the court was satisfied on the evidence shown in the bill of exceptions, that there was no case against some of them, but that there was a sufficient evidence to go to the jury in regard to others. And the court did direct a final judgment to be entered in favor of some of the defendants upon reversing the judgment below and let the case go back for a new trial as to the others. There was no question made by counsel as to the form of the judgment. If the counsel for the plaintiff had objected to this form of judgment and stated that a new case might be made upon a further trial, we should have hesitated about it. We did feel some hesitation as it was, but the matter was not discussed or considered. We are satisfied that it was erroneous practice and we do not feel bound by that as a precedent.

Therefore, we can do nothing in this case but send it back for a new trial.

William Taylor SNYDER, Trustee,
v.
Adelaide E. BAKER *et al.*

1. In **construing** a **will** the same **rules of construction to determine** the **quality of** the **estate** bequeathed, whether for life or in fee, will be **applied to trust estates** as to those which are not,—except so far as the creation of the trust may throw light upon the intention of the testator.
2. When one undertakes to make a will, it will be **presumed** that his **purpose is to dispose of** his **entire estate.**
3. The **gift of** the **produce of** a **fund is a gift of** the **fund itself,** unless there be words of qualification restraining the extent and duration of the interest therein.
4. So a **bequest of personalty** without words of limitation **passes an absolute estate** in the thing bequeathed, **unless the contrary intention** is plainly expressed or necessarily implied.
5. A testator bequeathed separate legacies to each of his three daughters, with directions to the trustees to invest and apply the interest to the use of said daughters, and in case of the marriage of any of them, to hold her share in trust for the maintenance of her and her husband, and the survivors of them, for life, then in trust for such issue as she might leave at the time of her death; failing such issue, in trust for the surviving daughters, and the issue of any deceased daughter. One of the daughters died unmarried. *Held,* that not having married, she died possessed of an **absolute estate in** the **legacy** bequeathed by her father, and that her **testamentary disposition of it was valid.**

(Decided March 28, 1887.)

APPEAL from a decree in equity, upon a bill of interpleader to obtain the construction of a will. *Affirmed.*

The facts are stated in the opinion.

Mr. **Wm. Pinckney Whyte,** for Virginia T. Lewis, legatee:

The intention of a testator is to be collected from the words of the will, and the whole of the will is to be considered and compared; and such construction should be made as will gratify every part of the will, if it can be done consistently with the general intent.

Bowley v. *Lammont,* 3 Harr. & J. 4; *Dougherty* v. *Monett,* 5 Gill & J. 459.

In the construction of a will, the intention expressed by the testator, to be collected from the whole instrument, if consistent with the rules of law, and there be apt words to express that intention, shall prevail.

All parts of a will are to be construed in relation to each other, and so as to form one consistent whole, if possible.

Chamberlain v. *Owings,* 30 Md. 454.

The general rule is that any words showing the intention of the testator to dispose of his whole interest in the thing devised will have the same effect as a devise to one in fee simple or forever.

A devise over of personal property must be done by express words or necessary implication.

Evans v. *Iglehart,* 6 Gill & J. 185; *Cassilly* v. *Meyer,* 4 Md. 10.

In bequests of personal property, without words of perpetuity, the legatee does not take a mere life estate, which can be enlarged by subsequent limitation, but an absolute estate, which is incapable of enlargement.

Edelen v. *Middleton,* 9 Gill, 161.

"A restriction on absolute ownership may be rejected as repugnant to the nature and incidents of the estate on which it is engrafted, unless there be a valid limitation over, upon the occurrence of some designated event."

1 Jarm. Wills, 257, 784.

Where there is a trust, however, and a manifest intention to modify the mode of enjoyment, the court will strive to maintain the intent. I do not think that the testator intended to give a life estate to these legatees.

There is no disposition made of the fund after the death of the legatees, if they remained single. The gift is couched in as broad and unlimited terms as possible; and then follows the direction as to investment, which implies that the property shall remain in the hands of the executors, and the donees shall only receive the income. But it is well settled that a gift of income or produce of a fund unaccompanied by words limiting the duration of the benefaction, confers an absolute estate.

Elton v. *Shephard,* 1 Bro. Ch. 532; *Philipps* v. *Chamberlaine,* 4 Ves. 53; *Rawlins* v. *Jennings,* 13 Ves. 39; *Adamson* v. *Armitage,* 19 Ves. 416; *Str-tch* v. *Watkins,* 1 Madd. 253; *Clough* v. *Wynne,* 2 Madd. 188; 4 Bradf. (N.Y.) 341.

This being a general devise of the whole residue of his estate without any words of limitation or perpetuity, devisees will take the entire and absolute interest of the testator, unless it shall appear that the testator intended otherwise.

There is no devise over of this property, and it is not presumed that the testator intended to die intestate of this portion of his estate.

The will must clearly manifest an intention to pass only a life estate before his children can be deprived of the fee.

It being clear that there is no limitation over as to the fortune of the unmarried daughter, Virginia Tayloe, she had power absolutely to leave it to her niece by will.

Mr. **Henry Wise Garnett,** also for Virginia T. Lewis, legatee:

A gift of personal estate without words of limitation is sufficient to pass the absolute interest; and a bequest of the income or annual produce of a fund is equivalent to a gift of the principal.

Hawk. Wills, p. 123.

A gift of personalty to trustees to pay the interest to "A" is an absolute gift of the principal.

Elton v. *Shephard*, 1 Bro. Ch. 532.

A bequest of stock to trustees, upon trust to pay the dividends from time to time to a married woman (for her separate use) is an unlimited gift of the dividends, and consequently passes the capital.

Haig v. *Swiney*, 1 Sim. & Stu. 487.

An indefinite bequest of the dividends gives the absolute property of stock.

Page v. *Leapingwell*, 18 Ves. 463.

A bequest of a fund to a woman, with the interest thereon to be vested in trustees, the income arising therefrom to be for her sole use and benefit, vests the capital for her separate use.

Adamson v. *Armitage*, 19 Ves. 416.

A gift of the interest of the capital sum of £1,000, to a wife, for her sole use and benefit, free from debts or control of any husband, held absolute gift of capital.

Humphrey v. *Humphrey*, 1 Sim. N. S. 536.

By a devise of the rents the land itself would pass, unless a contrary intention appeared.

Kerry v. *Derrick*, Cro. Jac. 104.

A devise of the rents of an estate is held to pass the fee.

2 Redf. Wills, 2d ed. 329.

The gift of the produce of a fund without limit as to time is a gift of the fund; and the interest of each of the legatees is vested and assignable.

Manning v. *Craig*, 3 Green, Ch. 436.

A bequest of the interest or produce of a fund, without limitation as to the extent of its duration, is a bequest of the fund itself.

Garret v. *Rex*, 6 Watts, 14; *App. of Pa. Co. for Ins. on lives*, 83 Pa. 312; *Millard's Appeal*, 87 Pa. 457.

An unconditional bequest of the dividends of the stock is a bequest of the stocks themselves.

Collier v. *Collier*, 3 Ohio St. 369.

When the "interest" or "produce" of a fund is bequeathed to a legatee, or in trust for him, without any limitation as to continuance, the principal will be regarded as bequeathed also.

Craft v. *Snook*, 13 N. J. Eq. 121; *Gulick* v. *Gulick*, 27 N. J. Eq. 498.

Where proceeds of sale are directed to be invested by executors and interest paid to A, B, and C equally, and the survivors of them, without limitation of time, and the will is silent as to further disposition of principal—held, to be a bequest of principal as well as interest.

Earl v. *Grim*, 1 Johns. Ch. 494.

A legacy to a trustee, of certain sums for use of B, and to be used for support and maintenance and no limitation over, is a bequest of an absolute interest to B.

McMichael v. *Hunt*, 83 N. C. 344.

A testator gave to A and B "$1,000 each, the interest to be paid to them annually by my executor, who is to be their trustee in this bequest;" held, that the bequest was of $1,000 absolutely, and not merely the interest on that sum.

Sproul's App. 105 Pa. 438.

In the construction of wills the law, in doubtful cases, leans in favor of an absolute rather than a defeasible estate; of a vested rather than a contingent one; of the primary rather than the secondary intent; of the first rather than the second taker, as the principal object of the testator's bounty, and of a distribution as nearly conformed to the general rules of inheritance as possible.

Smith's App. 23 Pa. 9; *Sheriff* v. *Brown*, 3 Cent. Law Rep. 772.

Where the devise over is made dependent upon the devisee dying before he comes of age, or without issue, or any similar event, it is considered that the devise is equivalent to a provision that the first donee shall take an immediate vested interest, liable to be defeated by the happening of the contingency named, or, if it do not happen, the estate then to become absolute and indefeasible.

2 Redf. Wills, 2d ed. 325, and cases there cited.

Mr. **Leigh Robinson,** *contra:*

It does not have to be argued that if a testator gives an absolute interest in lands or personalty and afterwards shows that he means the donee to take a less estate, the prior gift will be so restricted.

Sheet's Est. 52 Pa. 257; 3 Greenl. Cruise, 343.

As where the devisees or legatees are deprived of the right of alienation, or the property is directed to remain free for their children or heirs, and they are to have the use or income only for life.

Urich's App. 86 Pa. 386; *Terry* v. *Wiggins*, 47 N. Y. 512; *Bell* v. *Warn*, 4 Hun, 406; *Collier* v. *Grimesey*, 36 Ohio St. 22; *Baxter* v. *Bowyer*, 19 Ohio St. 490; *Smith* v. *Bell*, 6 Pet. 76 (31 U. S. bk. 8, L. ed. 325).

The limitation in remainder shows that in the opinion of the testator the previous words had only given an estate for life. *Id.*

If expressions be used which show with sufficient certainty that a qualified gift was intended, a court of equity will look to the clear intention of the testator, and raise a constructive trust, where none has been declared.

Lucas v. *Lockhart*, 10 Smedes & M. 466.

Thus, where property was bequeathed in trust for the testator's daughter "and her heirs born and to be born," held, that the bequest vested in the daughter a life estate in the property with remainder to her children whenever born.

Woodruff v. *Woodruff*, 32 Ga. 361.

In the case under consideration, the legal estate is from the beginning vested in trustees to pay over to each daughter the interest as it may accrue and for the security of the other trusts confided, as the same or any of them might arise. It is quite true that a bequest of personalty, without words of limitation, passes an absolute estate. It is equally true that a bequest of personal property to a trustee, without words of limitation, vests in him the whole estate subject to the trust.

It is very singular, if the provisions of the paragraph in controversy were only intended to protect the property of these daughters from husbands *in futuro,* that similar provisions were wholly omitted from the paragraphs which made provision for daughters who had husbands *in esse.*

See *Bacon's App.* 57 Pa. 512; *Davis' App.* 100 Pa. 205.

The creation of a trust, the direction to pay over income, and the gift of the remainder after the death of the *cestui que trust,* control the general words of gift, and are inconsistent with absolute bequests.

Barrus v. *Kirkland,* 8 Gray, 514; *Butler* v. *Gray,* L. R. 5 Ch. App. 26. And see also the cases of *Pillow* v. *Wade,* 31 Ark. 683; *Baker* v. *Riley,* 16 Ind. 479; *Noe* v. *Miller,* 31 N. J. Eq. 235; *Dean* v. *Hart,* 62 Ala. 309.

A bequest of money for life and then over gives only the interest.

Field v. *Hitchcock,* 17 Pick, 182.

Equally the bequest of interest only gives an estate for life, and then over. A bequest of the use of personalty and of the personalty during life has the same effect.

2 Kent, Com. 352; 2 Story, Eq. § 844.

It is submitted that a bequest of a fund to trustees, with directions to pay over the income as it accrues to the *cestui que trust,* and upon the trust, equally distinct, to retain the principal during the life, and until after the death of the beneficiary, to await and satisfy other trusts which are then expected to arise, does not give to the beneficiary of the income the possession or disposal of the principal.

In opposition to this view, the following rule was cited in the court below: "A gift of personal estate, without words of limitation, is sufficient to pass the absolute interest. But it might be supposed that a bequest of the income or annual produce of a fund, as opposed to a bequest of a fund itself, would be confined to the life of the donee in the absence of a contrary intention. The rule, however, is otherwise, and it is settled that a bequest of the income of personal estate, without limit as to time, is a gift of the principal."

Hawk. Wills, p. 122.

The language cited virtually admits that an opposite view would be only natural. It is, however, of importance here not to controvert, but simply to explain the rule as stated. It is not desirable to multiply rules whereby a testator is presumed to have used words and forms of expression in the sense which they have acquired by decided cases, although such sense be different from their ordinary and natural meaning.

The rule is one of construction, founded on the old feudal law, that a devise of the rents and profits of real estate carries with it the property in the land. But while "A devise of the rents and profits of land will be construed as a devise of the land in order to carry out the testator's intention, it will not be so construed in violation of such intention."

Bowen v. *Payton,* 14 R. I. 257; *Collier* v. *Grimsey,* 36 Ohio St. 21.

In the case under consideration, the corpus of the estate is fully and distinctly given to the trustees, and the bequest to the daughters is of the income only, to be paid to them as it accrues. It is not the enjoyment of the principal, but the gift of the principal itself which is postponed. The direction to pay is the gift, and this gift is exclusively to surviving children or surviving sisters.

The conclusion that when the whole interest of a fund is given in perpetuity, without limit or qualification, the fund is given, follows from the inference, in such case, natural enough, that the testator of course intended to give the principal sum under this description: "If, however, from the nature of the subject, or the context of the will, it appear that the produce or interest of the fund only was intended for the legatee, the gift of the interest will not pass the principal."

Roper, Legacies, p. 421; *Hamilton* v. *Lloyd,* 2 Ves. Jr. 416.

This is the question to be decided. Is the bequest of income so unlimited as to be tantamount to a bequest of the principal? Is a contrary intention absent? Is there not a discrimination between the income and the principal? Is not the corpus or principal vested in the trustees until the death of each daughter, for the ultimate purpose of the will? Does it not appear that the produce or interest of the fund only was intended for the legatee? "Where it appears from the context of the will that no interest in the capital was intended to pass till the determination of the life estate, or other particular period, in such cases the gift of the income and the gift of the capital are considered as distinct gifts."

Wms. Exrs. p. 1067.

"The rule which gives an absolute interest in the fund, where there is a general gift of the income, is not a very strong rule."

Blann v. *Bell,* 5 De G. & Sm. 663.

The cases which hold that the gift of the income of a fund carries the fund too mean that the donee has the fund as completely as the income. Clearly, in the case at bar, the legatee could not touch the principal at any time during her life. She was entitled to the annual produce only; of this, and this only, could she dispose as she pleased. The construction contended for would defeat the scheme of the testator's disposition, by a single provision clearly repugnant to the whole tenor of the will.

Nothing in the cases cited by Hawkins conflicts with the proposition that the placing of property, whether real or personal, in the hands of a trustee, upon a distinct trust to pay over the income to the beneficiary, but with equal clearness not to pay over the principal, gives to the beneficiary a vested equitable estate for life.

Brandon v. *Robinson,* 18 Ves. 429; *Dick* v. *Pitchford.* 1 Dev. & Bat. Eq. 480; *Havens* v. *Healey,* 15 Barb. 301. See also *Blann* v. *Bell,* 5 De G. & Sm. 663; *Innes* v. *Mitchell,* 6 Ves. 466; *Wetherell* v. *Wetherell,* 4 Giff. 59; *Bacon's App.* 57 Pa. 504–514; *Ashurst's App.* 77 Pa. 464; *Phillips' App.* 80 Pa. 472; *Keene's App.* 64 Pa. 268; *Davis' App.* 100 Pa. 201.

In short "Where it is the manifest intent of a testator to sever the product from its source, a bequest of the income of an estate will not carry an absolute estate in the principal."

Bentley v. *Kauffman,* 86 Pa. 99.

"In Redfield's edition of Story's Equity, § 1067, the law is stated in accordance with the late English authorities; and there can be no doubt that this is the true rule, which, applied to the case before us, gives Mrs. M. a life interest only under her father's will. The whole fund is given to trustees, who are to pay her monthly the interest of it, to do which they must first collect and receive it; and therefore during her life it was a subsisting trust, intended to preserve the principal for those in remainder. Of course Mrs. M. could not call for a transfer of the fund from the trustees or executors; and if so, there was no error committed by the court below in confirming the report of the auditor."

Myers' App. 49 Pa. 114.

The bequest in controversy amounts to no more than a bequest to an unmarried woman and her children, in which case, by a great preponderance of authority, she takes a life estate, with the remainder to her children, if any.

Morse v. *Morse*, 2 Sim. 487; *French* v. *French*, 11 Sim. 257; *Hall* v. *Nalder*, 22 L. J. N. S. Ch. 242; *Noe* v. *Miller*, 31 N. J. Eq. 235; *Dean* v. *Hart*, 62 Ala. 309; *Woodruff* v. *Woodruff*, 32 Ga. 361; *Fales* v. *Currier*, 55 N. H. 392; *Turner* v. *Ivie*, 5 Heisk. 222; Perry, Trusts, § 363; Lewin, p. 105.

A bequest of personalty to one for life, remainder to his issue, does not confer an absolute interest upon the first taker.

Sheets' Est. 52 Pa. 268; *Keene's App.* 64 Pa. 268.

In a conveyance to an unmarried woman and her children, "children" is a word of purchase, and she takes a life estate with a remainder to her children.

Fales v. *Currier*, 55 N. H. 392:

A testator gave his daughter one twelfth of his estate, directing that it should not be subject to the control of her husband, but should be hers and her child's or children's. Held, that the daughter took a life estate, with remainder to her children.

Noe v. *Miller*, 31 N. J. Eq. 234.

Bequests expressed in the form of the one under consideration have usually been construed to give a life estate to the parent with remainder to the children. *Id.*

A testator directed that the legacies given by his will to females, married or single, should be for their own benefit and for that of their children and should never be subject to the control of their respective husbands. Held, that the females took for their lives for their separate use, with remainder to their children.

Bain v. *Lescher*, 11 Sim. 397; *Newman* v. *Nightingale*, 1 Cox, 341; *Crawford* v. *Trotter*, 4 Madd. 361; *Jeffery* v. *Honywood*, Id. 398; *Vaughan* v. *Headfort*, 10 Sim. 639; *Crockett* v. *Crockett*, 2 Phil. 553; *Ward* v. *Peloubet*, 2 Stock. 304; *Belote* v. *White*, 2 Head, 703; *Hollister* v. *Shaw*, 46 Conn. 248; *Hatfield* v. *Sohier*, 114 Mass. 48.

Another and more familiar principle would be set at naught by the construction herein opposed. The various bequests over directed by the testator, after the death of his daughters and their husbands, are valid as executory bequests, and are of themselves inconsistent with an absolute estate in the first taker, and would be void for repugnancy, if such absolute estate had been given.

4 Kent, Com. 270; *McRee* v. *Means*, 34 Ala. 368; *Hall* v. *Robinson*, 3 Jones, Eq. 351; *Wead* v. *Gray*, 78 Mo. 59; *Hoxsey* v. *Hoxsey*, 37 N. J. Eq. 21.

For if a legatee possesses the absolute right of property, he certainly has the power of disposing of it in any way he may think proper, and therefore he might defeat the devise or limitation over.

Moody v. *Walker*, 3 Ark. 187.

Personal property may be limited over after a life estate, but not after a gift of the absolute property.

2 Kent, Com. 352; Keyes, Chattels, §§ 73, 143; *Jackson* v. *Bull**, 10 Johns. 20; *Jackson* v. *Robins*, 16 Johns. 537; *M'Donald* v. *Walgrove*, 1 Sandf. Ch. 278; *Ide* v. *Ide*, 5 Mass. 504.

"The plaintiff's counsel (in *Jackson* v. *Robins*) attempted to establish a distinction between real and personal property. But they admitted that the doctrine as above stated was well established as to personal property."

Burbank v. *Whitney*, 24 Pick. 155.

Mr. Justice **Hagner** delivered the opinion of the court:

The bill in this case was filed by Mr. Snyder as Trustee under the appointment of this court, for instructions, as to the proper distribution of a bequest of $20,000 under the will of Colonel John Tayloe, to his daughter Virginia.

It avers that Virginia Tayloe died after executing a last will and testament, by which she bequeathed this $20,000 to her niece, Miss Lewis, who demands payment of the entire sum; but that the money is also claimed by the children and grandchildren of the sisters of the said Virginia, who deny the right of the said Virginia to bequeath the said property by her will; insisting that she was only given a life estate in the legacy by her father, and that upon her death, unmarried and childless, it devolved upon her surviving sisters and their children, under the proper construction of the will of Colonel John Tayloe.

The court below sustained the claim of the legatee, Virginia T. Lewis; and from this decree the present appeal is taken in behalf of the grandchildren of Mrs. Carter, one of the sisters of Virginia Tayloe. The clause referred to is as follows:

"I give and bequeath to my daughters, Catharine, Elizabeth M., Virginia, and Anne O. Tayloe, $20,000 apiece, to be invested in United States bank stock or in government securities, which stock or securities I do hereby direct that my executors, herein after named, shall hold in trust for my said daughters respectively, and shall apply the dividends, interest or profits of said stock or securities to the use and benefit of my said daughters, Catharine, Elizabeth M., Virginia, and Anne O. Tayloe, severally and respectively, as the said dividends, interest or profits shall accrue; and from and after the intermarriage of any of them, then my said executors shall hold the said bank stock or other securities, belonging to said daughters so marrying, in trust for the following purposes, that is to say: in trust for the maintenance of her and her husband during their joint lives, then in trust for the survivor of the said husband and wife during his or her life; and after the death of such survivor, then in trust for such issue as she may leave at the time of her death; and in case she shall die without leaving such issue, then in trust for her surviving sisters (my other daughters), and the issue of any deceased sister, such issue taking such share as the deceased sister, whom they represent, would have taken had she been alive to take; and it is my intention that the stock and securities, as also the dividends, interest or profits thereof, shall be utterly free from the power of control of the husbands of my said daughters."

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*See note, Lawyers' edition. [Ed.]

Then follows this provision: "And the better to secure the payment of these my daughters' portions, I do hereby direct that if the funds hereinafter particularly appropriated for the payment of debts and legacies shall be insufficient for the payment of debts and legacies, my estate generally must be charged to make up the deficiency to my said daughters."

Among the familiar principles of law laid down with reference to the interpretation of wills, which it will be well to keep in mind in arriving at a correct construction in the present case, are these:

First. It makes no difference whatever, in construing such a bequest as that to Virginia Tayloe, that the property was left in the hands of trustees. The same rules of construction to determine the quality of her estate, whether for life or in fee, are equally applicable to estates placed in trust and those which are not, except so far as the creation of the trust may throw light upon the intention of the testator. *Fairfax* v. *Gunn*, 60 Md. 55.

Again; it is a recognized principle that when a man has undertaken to make a will, it is presumed that his purpose was to dispose of his entire estate. If Colonel Tayloe intended to leave to his daughters only a life estate, and neither should have married, then the testator would have died intestate of the remainder of the $80,000, so bequeathed for life to his daughters; and this result would have been inconsistent with the legal presumption that the testator intended to dispose of the sum absolutely; and the will must manifest a clear intention that the daughters should have only a life estate, before the court would declare that the testator had only disposed of a life interest in the legacy, and had died intestate as to the remainder.

And, as to personal property, it is held that a gift of the produce of a fund is a gift of the fund itself, unless there be words of qualification restraining the extent and duration of the interest. And a bequest of personalty, without words of limitation or perpetuity, passes an absolute estate in the thing bequeathed, unless the contrary intention is plainly expressed or necessarily implied. *Adamson* v. *Armitage*, 19 Ves. 416.

There are in this will several bequests, which, it is conceded, give absolute interests, to which no words of limitation are annexed. For example: the testator gives and bequeaths all his slaves who were tradesmen and mechanics of every description, such as smiths, carpenters, joiners, wheelwrights, ship carpenters, masons, shoe makers, etc., to be equally divided among his sons, and all the plate which belongs to the house in Washington wherein he resided is directed to be equally divided, after his wife's death, among all the sons; and he also directs that all his stock of liquors and spirits on hand at his death should in the same manner be equally divided among all his sons; and these bequests of course passed absolute estates in the personalty so bequeathed without any words of limitation.

It is perfectly plain that this will was skillfully and artificially drawn. It is apparent from many items that the testator knew how to frame a devise or bequest for life in apt words; thus, in proper terms, he gives to his wife an estate for life in what is given to her; the charge upon the estates of several of his sons, in favor of one of his nieces, is properly limited to her life only; and so in other instances; all intimating clearly that he knew how to use words properly when he desired to create a life estate. And this circumstance is persuasive to suggest that he would have used similar plain words to limit the interest of his daughters in the fund, for life, if such had been his purpose.

The testator provided most munificiently for his sons and grandson. His will enumerates upwards of thirty plantations, which are devised to them, without exception. The bequests for the daughters are insignificant in comparison, and it would enhance the hardship, if the court should be compelled to cut down to life estates, the slender portions which from his abundance he doled out to his daughters.

Omitting the provision as to marriage from the clause under consideration, there remains not one word to limit the power of disposition on the part of the daughters, or to combat the idea that the testator contemplated the vesting of the property in their personal representatives in case of their intestacy, or their power to bequeath their shares by last will. The language preceding the words "and from and after the intermarriage of any of them," etc., constitutes an ample gift of an absolute estate in the several sums of $20,000 apiece to each daughter; although it declared that the money should be invested in United States bank stock or government securities, and be held in trust "for my said daughters respectively." Those words as fully confer an absolute estate in the sums designated as the bequests before referred to do in the plate and the wines bequeathed by the testator.

The bequest is first, directly to the daughters, of "$20,000 apiece" to be invested in stocks which he directs that his executors shall hold in trust for his said daughters respectively; applying "the dividends, interest or profits thereof to the benefit and use of the said daughters" severally and respectively, "as the said dividends, etc., shall accrue."

Thus far he had made a sufficient bequest of the absolute interest in the fund for the daughters, while single. We have no more reason to suppose that he considered his daughters incompetent, so long as they remained unmarried, to be trusted with $20,000 apiece, than that his sons were incompetent to hold the great estates he had devised to them. They were equally his children and as much deserving of their father's bounty. But he naturally contemplated the probability of their marriage, and he knew that new relations would arise as to the management and ownership of the personalty, from the time they should marry.

From that moment, in the absence of express provisions to the contrary, the legacies would devolve upon their husbands, who might waste it and leave their wives penniless; hence, as a prudent father, he proceeded to impose such limitations upon the gift as should serve to protect it from this risk. The management was first committed to trustees; and this provision would have served as a sufficient safeguard against unwise investments by an unmarried daughter. But the solemnization of a marriage would create new difficulties which it was the sole purpose of the latter part of the clause to deal with; and the testator therefore added the words "and from and after the intermarriage of either of them," etc., to provide for this new condition of things.

That these added words were only intended to apply to the daughters after their respective marriages seems plain to us.

If none of the daughters should marry, it is self evident that the added words could never possibly apply. Everything in the added sentences is predicated only on the marriage of either of the daughters, who in that event only is to be affected by the new provision, since the provision as to husbands and children could have no application to her until marriage. If the entire clause had been four times expressed in the will, each repetition referring to only one daughter separately, how could the added words declaring what should happen from and after the marriage of Virginia by possibility apply if Virginia should not marry at all?

It may well be, as was argued in behalf of the appellants, that an unmarried daughter could not have disposed of her legacy at her pleasure during her life; because if she had applied to the trustees to transfer the property, they would have urged the possibility of her marriage and the consequent coming into force upon that event of the provisions contained in the added words. But this possibility could not interfere with her power of disposal by will, since such disposition could only operate in favor of her legatee after the possibility of marriage had disappeared, namely: after her death.

The cases cited by the appellants' counsel in his careful brief were decided upon the particular phraseology of the will there under examination; and they afford no certain guide where the words are as different as they are in those cases from those before us.

No decision cited comes as near to the present case as that of *Gulick* v. *Gulick*, 27 N. J. Eq. 498, which is singularly like the present case. The fifth section of the will there considered reads as follows:

"I give and bequeath to my daughter Abby Maria the sum of $10,000, to be placed out at interest, on bond and mortgage, so soon as my estate can be collected without sacrifice; the bonds and mortgages to be taken in the names of my executors or the survivor of them, in trust for my said daughter Abby Maria, and the interest to be paid annually to her by my said executors or the survivor of them, and for her sole and separate use, and in nowise liable for the debts or subject to the control of any man she may marry.

"Should she marry and have a child or children, then after her death I give the said $10,000 to such child or children."

The daughter died, never having married, and her personal representative claimed the fund. It was decided that the daughter died seised of an absolute estate against the contention that she was only entitled to a life estate. The court says:

"The testator, it is perceived, first provides for a gift of the fund itself and then the method of its enjoyment by the legatee. The last is equivalent to a gift of the interest of the fund. It is perceived, also, that until we meet the words 'should she marry and have a child,' etc., there is no limitation, express or implied, of the time of enjoyment of this interest. The rule is well established that a bequest of the income of personalty without limit as to time is equivalent to a gift of the property. And the rule applies whether given directly or through the intervention of trustees. This absolute bequest was subject to the concluding clause of the section, 'should she marry and have a child or children, then, after her death, I give the said $10,000 to such child or children.' The legatee never married. The event, upon the happening of which the interest was limited over, never occurred. The rule therefore governs that where an absolute gift is made in the first instance, followed by a limitation over on the death of the first taker, the absolute gift is not defeated unless the gift over takes effect.

"Construing this section as an absolute bequest, limited over upon the happening of an event which has failed, the executor of Abby Maria is entitled to the fund."

This reasoning of the court is very applicable to the case at bar; and we conceive that under the proper construction of this clause, Virginia Tayloe died seised of an absolute estate in the legacy of $20,000, which she was competent to dispose of by her last will.

Being of the opinion that the decree below was correct, it is accordingly affirmed.

Abbot L. HITCHCOCK
v.
Virginia RICHOLD.

1. A **married woman** cannot contract in this District as a sole trader, notwithstanding the Married Woman's Act.
2. A married woman living with her husband, carried on the business of a retail dealer in boots and shoes, on her own account and with her separate estate. For the purpose of keeping up her stock and assortment of sizes she bought a quantity of boots and shoes of the plaintiff, giving her promissory note in payment. On a suit brought against her on the note it was *held* that the plaintiff could not recover, this **not** being a **contract having relation to** the defendant's **separate estate, within** the meaning of the **Married Woman's Act.**

(Decided March 7, 1887.)

APPEAL from a judgment in favor of defendant on a special finding of facts. *Affirmed.*

This was an action brought upon two promissory notes of $59.12, each, given by the defendant, a married woman, to the plaintiff, a merchant, in payment of a bill of boots and shoes bought by her to sell again. The declaration contained two counts, one upon each of the notes, and also the common counts. The pleas were the general issue and coverture. Replication "that the defendant had a separate estate and that the goods were purchased and the notes given in relation to and for the benefit of said separate estate."

Thereupon a stipulation was filed, expressly waiving a trial by jury and submitting the case to the court to be tried and determined under the Act of Congress, 13 Stat. at L. 501.

The special finding of facts by the court was as follows:

"The plaintiff is a manufacturer of boots and shoes in Boston, Mass., and the defendant is a retail dealer in boots and shoes in Washington City. The defendant is a married woman, the wife of Leopold Richold, and was such prior to the sale of goods to her by plaintiff, for which the notes sued on were given, and has always since her marriage cohabited with her said husband. The defendant was, in August, 1882, carrying on the business of a retail dealer in boots and shoes, on her own account, and with her separate estate in the District of Columbia. For the purpose of keeping up her stock and assortment of goods she began buying goods of the plaintiff in said month of August, 1882, and she bought goods of the plaintiff, for her said store, on the following dates; August 19, 1882; October 30, 1882; November 17, 22 and 29, 1882; and December 1 and 9, 1882.

"The defendant paid for the boots and shoes bought prior to December 1, 1882, and gave the notes now sued on, in promise of payment of the two bills bought on December 1 and 9, 1882. The goods so bought in December, 1882, were delivered to the defendant, and used by her in said store in keeping up her stock and assortment, and were sold by her therein; and the said notes given for the same have not been paid, and are still held by the plaintiff."

Then follows a copy of the notes sued upon.

The judgment of the court on these facts was entered for the defendant. The plaintiff appealed.

Messrs. **Edwards & Barnard,** for plaintiff:

1. The contract of purchase of other separate estate to improve or enhance the value and usefulness of a separate estate already acquired or held by a married woman is a contract "having relation to her sole and separate property," under section 729, R. S. D. C.

Hauptman v. *Catlin*, 20 N. Y. 247; *Colvin* v. *Currier*, 22 Barb. 372; *Machir* v. *Burroughs*, 14 Ohio St. 519; *Greenough* v. *Wigginton*, 2 Greene (Iowa), 435; Phillips, Mech. Liens, pp. 142, 143; *Harmon* v. *Garland*, 1 Mackey, 1.

A contract for furniture to be used in a boarding house which belongs to a married woman is valid, as relating to her separate estate.

Tillman v. *Shackleton*, 15 Mich. 447; *Harmon* v. *Garland*, 1 Mackey, 1; *Nispel* v. *Laparle*, 74 Ill. 306; 24 Am. Law Reg. 365.

Also for horses bought for her livery stable.

Manderbach v. *Mock*, 29 Pa. 43.

Or for rent of a store to sell her goods in.

Knowles v. *Hull*, 99 Mass. 562.

The question in this case is, Shall not an absolute separate estate carry with it all the incidents to give it value in its efforts to accumulate and make an income and a livelihood for its owner? If not, then what investments are open to such estate, and how can it be as if its owner were unmarried? It is the estate that is invested in a business that gives credit to the business; and this is one of the elements of its value. If she could not "size up" her stock, a married woman using her separate estate in the business of a retail shoe dealer could not well dispose of sizes already on hand, for she could not attract customers, and her trade would fail; and if she cannot obtain credit on the faith of her separate estate invested in such trade, then her right to it, and power to dispose of it, and to contract about it, cannot be the same as if she were unmarried. She is limited and hampered, as she would not be under section 727, R. S. D. C.

The statutes on this subject usually secure, expressly or by implication, the wife's right to the natural increase of her property.

Stout v. *Perry*, 70 Ind. 501; *Mitchell* v. *Sawyer*, 21 Iowa, 582.

2. How shall the manufacturer be protected in extending a credit to a married woman whose separate estate is invested in business for goods sold for the benefit of that business, and in relation to it, if she is not bound by her contract of purchase? Neither the husband nor his property shall be bound by such contract.

R. S. D. C. § 730.

A married woman's rights in property are statutory in this District; but in equity, before the statute, her contracts relating to equitable separate estate were charged on such estate.

Conkling v. *Doul*, 67 Ill. 355; *Todd* v. *Lee*, 16 Wis. 480.

"Since her personal incapacity to contract is the main cause of a married woman's inability to trade at common law, all statutes enabling her to contract indirectly enable her to trade."

24 Am. Law Reg. 362; *Haight* v. *McVeagh*, 69 Ill. 624; *Krouskop* v. *Shontz*, 51 Wis. 204; *Dayton* v. *Walsh*, 47 Wis. 113; *Tiermeyer* v. *Turnquist*, 85 N. Y. 516, 521.

The statute says her right to property "acquired during marriage, in any other way than by gift or conveyance from her husband shall be absolute," etc.

R. S. D. C. § 727.

This necessarily implies that she may acquire property by purchase; and if she can acquire title to separate property by purchase, surely the contract to pay for it would be one relating to it.

In the case of *Ritch* v. *Hyatt*, 3 MacA. 536, *Justices* Wylie and Cox gave a different construction to this Act; but we submit that the dissenting opinion of *Justice* MacArthur in the same case is founded on the better reasoning and authority. That case did not require a construction of this part of the statute, as the land was in New York, and our law was not applicable, so that it should not be considered as an authority binding on this court.

Judge Wylie himself did not feel bound by that case, as shown by his opinion in *Harmon* v. *Garland*, a year afterwards. The defendant's right and title to the goods sold to her by the plaintiff in this case was absolute. These goods were bought long before the notes were given; were mingled with her previously acquired estate to enhance it; and were actually sold by the defendant, and the money received by her as the proceeds of her own property.

It would require an iron rule, indeed, to compel a court of justice, in such a case to give so narrow a construction to this statute as would allow a married woman, asserting the rights of a *feme sole*, to profit by such dealing at the expense of honest people.

We submit that the judgment of the circuit court should be reversed, and judgment entered for the plaintiff.

Mr. **Leon Tobriner,** for defendant:

The Married Woman's Act of this District gives no power to married women to buy and sell as *feme sole* traders.

Ritch v. *Hyatt*, 3 MacA. 541; *Schneider* v. *Garland*, 1 Mackey, 355.

The construction given the statute in the cases cited is this: the statute was framed having in contemplation the manner in which a married woman, at common law, could acquire a separate estate.

The separate estate in relation to which she can, under the statute, "contract, sue or be sued," must be an estate acquired in the manner contemplated by the statute. No new mode of acquisition is given her, no other right is bestowed or liability imposed upon her but to "contract, sue or be sued" in relation to an estate acquired in that manner.

The contract sued on in the case at bar arises out of an attempted acquisition, not in any of the modes contemplated by the statute. It is then sought to fix liability upon a *feme covert* under a contract upon which she is not liable at common law, or under the statute in force in this District as construed by this court.

In *Stewart* v. *Smith*, 3 Mackey, 281, it was held that a contract by a married woman for the loan of money to carry on the business of a boarding house, in which she is engaged, is not a contract relating to her separate estate.

"Where a married woman, with her husband's consent, kept a restaurant and purchased groceries to enable her to carry on the business, held, not a contract relating to her separate estate."

Conkling v. *Doul*, 67 Ill. 355.

Goods were sold and delivered to a married woman doing business in her own name and right, with her own separate estate and with the consent of her husband; held, that she was not liable therefor.

Hasheagen v. *Specker*, 36 Ind. 418.

A statute empowered a married woman to carry on trade as a *feme sole* with a capital not exceeding $1,000, and fixed her liability to that extent; held, nevertheless, that she could not enter into a copartnership.

Bradstreet v. *Baer*, 41 Md. 19.

In *Glover* v. *Alcott*, 11 Mich. 470, the Supreme Court of Michigan held that the statutes of that State did not empower a married woman to carry on, on credit, a general trade or business; and although that court subsequently in *Tillman* v. *Shackelton*, 15 Mich. 447, limited the rule laid down by them in *Glover* v. *Alcott*, as not intended to include "any business usually carried on by females and which consists largely and almost necessarily of female labor, such for example as that of a milliner," it is submitted that the opinion announced in the first case is based upon sounder reasoning and authority, and should be adopted.

Statutes which authorize married women to hold property by gift, grant, purchase or devise from any person other than the husband, do not by implication carry the wife's earnings.

Yopst v. *Yopst*, 51 Ind. 62; *Hoyt* v. *White*, 46 N. H. 47; *Nat. Bank* v. *Sprague*, 5 C. E. Green (N. J.), 25; *Jenkins* v. *Flinn*, 37 Ind. 351; *Rider* v. *Hulse*, 33 Barb. 270.

In the case last cited the Supreme Court of New York held that the Acts of 1848–49, creating property acquired by a married woman "by inheritance, gift, grant, devise or bequest from some person other than her husband" her separate property, did not include the fruits of her own labor, or the profits or income of any business in which she may have embarked.

The statute has not changed that feature of the common law which makes the earnings of the wife the property of the husband.

Seitz v. *Mitchell*, 94 U. S. 584 (Bk. 24, L. ed. 180).

If she have the right to embark in business, she has the power to withdraw from the husband both her service and her presence. Her earnings, the result of her personal efforts in the conduct of her business, would vest in the husband and be liable to the claims of his creditors; while her stock in trade, the corpus of her "separate estate, would be protected as her 'sole property.'" Such an effect was never intended by Congress. A fair and reasonable construction was made by this court in *Ritch* v. *Hyatt*, when it said: "We think the words of the statute have given no new rights to the married woman, in respect to the means of acquiring property. It makes a very complete settlement of all that she had, and all that she may acquire, to her sole and separate use, without conferring any new right of acquiring property in her own right. A married woman could always acquire property by gift, either by means of deed or will from others; and that faculty is preserved and made effectual by the statute."

Mr. Justice **James** delivered the opinion of the court:

The plaintiff claims that the shoes contracted for were, within the meaning of section 729 of the Revised Statutes relating to the District, a matter having relation to the stock of shoes already owned by the defendant in her separate estate, because a stock of shoes is made up of assorted sizes in certain proportions, and is kept in a merchantable condition by such additions from time to time. A subtle assumption is involved in this proposition, namely: that the separate estate of the wife in this case consisted, not of mere articles of personal property but of such property clothed in contemplation of law with peculiar qualities, because it is used by her as a sole trader. In short, the suggested relation between the articles contracted for and those already owned by her can be established only by showing that she is authorized by this statute to make any contract which may be necessary to the success of her business as a sole trader. Without this condition there can be no relation between the several lots of shoes.

We think it has been settled by former decisions of this court that this section confers no such capacity. *Ritch* v. *Hyatt*, 3 MacA. 536, and *Schneider* v. *Garland*, 1 Mackey, 350.

It is next claimed that even if this contract does not fall within the meaning of section 729, as a contract in a matter having relation to her separate estate, the defendant nevertheless had power, under section 727, to acquire property by purchase, just as a *feme sole* may so acquire property; and that, if she may acquire property by purchase, she may acquire it on the usual terms of purchase for a consideration, and therefore may bind herself to pay the consideration. The section referred to is in the following words: "In the District the right of a married woman to any property personal or real, belonging to her at the time of the marriage, or acquired during marriage *in any other way than by gift or conveyance from her husband*, shall be as absolute as if she were unmarried," etc. It is claimed that these words recognize her capacity to acquire, and in part give her capacity to acquire property in any of the ways by which property is acquired, and that they consequently give her the power to make a contract to pay for it.

This section does not pretend to regulate her *capacity to acquire* or her capacity to make contracts connected with, or with a view to acquisition. It deals simply with the completeness and absoluteness of her right to property acquired by her, in ways already known to the common law. In a word, it regulates her status as a proprietor, and not her power to make contracts. That subject is left wholly to, and is regulated exclusively by, section 729. The fact that this subject is taken up and disposed of in a separate clause or section excludes any implication that another section in any way affects the same matter.

The consideration of hardship and fraud upon creditors is entitled to no weight. It is their duty to know the law relating to the capacity of married women, just as they must be held to know the law as to the capacities of infants. If they deal in ignorance they must accept the consequences. Certainly it is not for us to add to or strain this statute. Our duty is simply to construe it.

Judgment affirmed.

Mr. Justice **MacArthur** dissented.

ANGLO-AMERICAN INSURANCE CO.
v.
DISTRICT OF COLUMBIA.

Under the Act of March 3, 1877, governing the **assessment of taxes** in the District, the yearly assessments must be closed on the first day of July of each year, and the taxation computed from that day for the year ending June 30 next. Property which may come into existence during the interval is not liable to taxation until the commencement of the next taxable year. Thus where a **corporation had filed** its **certificate of organization** on the 23d of **June, 1884, but no** practical **organization** or subscription to stock had been made **until** the **September** following, when the Company announced itself ready for business, an **assessment of taxes upon** the **capital stock for** the **year commencing July 1, 1884,** is **invalid** and void.

(Decided March 14, 1887.)

APPEAL by the District of Columbia from an order of the Circuit Court made in proceedings upon a writ of *certiorari*, quashing a tax assessment. *Order affirmed.*

The facts appear in the opinion.

Mr. **A. G. Riddle,** for the District.

Mr. **William A. Meloy,** for plaintiff.

Mr. Justice **Hagner** delivered the opinion of the court:

This is an appeal by the District of Columbia from an order of the circuit court quashing the proceedings of the district authorities with reference to a tax levied against the defendant company.

The petition filed in the circuit court alleged that this Company had been compelled to pay a portion of a tax which it conceived to be illegal, and that it was threatened with process to compel the payment of the residue; and it asked that a writ of *certiorari* should issue, commanding the district authorities to certify into the circuit court their proceedings, that it might determine whether this averment as to the illegality of the tax was correct. Accordingly, a full return was made; and from the statement thus presented we find the following to be the facts of the case:

On the 23d day of June, 1884, articles of association were filed under the general laws of the District, setting forth the scheme of incorporation of the Anglo-American Insurance Company, stating the proposed amount of its capital, the number of shares, etc. Nothing more seems to have been done by the Company until the second of September, when, as it appears from the papers included in this return, a subscription was commenced; but this was not completed (even to the extent to which it was finally carried) until the 10th of September, on which day certificates for the stock were issued to the subscribers.

In December, 1884, the district authorities conceived it their duty to take notice of this scheme of incorporation (as the Company had published on the 10th of September that it was fully organized for business) with the view of exacting from it a tax upon its capital stock.

Accordingly, an assessment blank was presented to the Company to be filled under the appropriate head, as preliminary to the collection of the tax. This paper under date of January 22, 1885, was signed by Charles W. Tankersley, who swore that he was president of the Company, and filled in one of the spaces in this assessment blank which was entitled "Schedule of personal property." It contained a printed notification that it was to be returned on or before July 15, 1884, under a penalty of an additional charge of 50 per cent for any delay beyond that date, and purported to be an assessment for the taxable year ending June 30, 1885. The entire entry, partly printed, and partly in writing, is as follows—the words and figures in italics being those which were written by Tankersley, or by his authority, in the blank spaces:

"Capital stock of a corporation: All the shares to be appraised in bulk, at a fair marketable value, on the first day of July, 1884, and deduct the assessed value of all real estate owned by said corporation, *fifty thousand shares*, par value *$10* each, subscribed and paid for *September 2, 1884*, fair marketable value on January 1, 1885 and now *$5* per share—$250,000."

It appears that the entry on the assessment books of the district authorities was altered from time to time. In January, 1885, the total assessment was stated at $500,000 and the amount of tax at $7,500. That was changed after the 22d of that month, by reducing the assessment to $250,000; and it then read "1, ½ from September 1, 1884, on $250,000—$1,250; 2, ½ from January 1, 1885, on $250,000—$1,875." And the latter assessment was the basis of the bill finally presented to the Company.

Under circumstances which it is insisted on the part of the petitioner amounted to duress, the Company paid the $1,250, which was not *one half* of the tax for the year; the amount charged for what was called the other *half* being $1,875.

The contention of the Company is that the yearly assessments must be closed according to law, on the first day of July of each year, and that taxes on property generally are to be computed as of this last day until the 30th of June of the next year. It insists that it possessed no property on the 30th of June or the first of July, 1884; that although it had published to the world on the 23d of June a notice that it had filed its certificate of incorporation, yet it was not until the second of September, after the close of the previous assessment year, that any steps whatever were taken towards the realization of its promise; and it was not until the 10th of that month that it could properly be said to have completed even the partial subscription then made.

If this is a correct statement of the facts, then the District Government, in our opinion, had no authority whatever to levy this tax.

There are only two cases recognized by the law governing the assessment of taxes, in which it is permissible for the district authorities to add to the assessment after it has been closed on the 30th of June. Those exceptional cases are specified in section 12 of chapter 117 of the Act approved March 3, 1877, which although it appears from its general language to be applicable only to the current year, yet contains this provision:

"Sec. 18. That this Act shall remain in force as the tax law of the District of Columbia for each subsequent year after June 30, 1878, until repealed."

This Act was therefore in full force in 1885. The first exception thus spoken of appears in the twelfth section, as follows:

"Said assessors shall, before the first day of October, 1877, under the direction of the superintendent of assessments and taxes of said District, assess the value of all *the real property not embraced* in the assessment of the fiscal year ending June 30, 1877, inclusive of all *buildings erected or roofed, improved or enlarged*, and not heretofore taxed," etc.

And the other exceptional provision is this: "Where a person coming into the District subsequent to June 30, 1877, engages in trade of a permanent character, he shall pay a tax proportioned to the fraction of the tax year ending June 30, 1878, *during which he conducted the trade*," etc.

Neither of those provisions describes the case of an assessment of the capital stock of a corporation, which is specially provided for in section 11 of the Act; and it was properly conceded in the argument, on the part of the District, that neither of the two exceptional cases in which the assessors were authorized to add to the closed assessment could be held to include the case at bar.

But the reply of the District is that although it may be true the stockholders did not subscribe nor pay anything on their subscriptions until the second of September, or consummate anything in the way of practical organization until the 10th of that month, yet as they had filed their certificate of organization on the 23d of June, and on the 10th of September had published the advertisement, announcing that they had organized for business and that the capital of the Company was to be $500,000; had named the officers and thus held themselves out as an existing corporation—it resulted that the Company had rendered itself liable to assessment for the year 1884–5; that the incorporation having taken place before the first of July, 1884, they became liable to pay on their capital, whenever during the year they should make good their programme or scheme of business, notwithstanding the money might not be subscribed and paid until after the first of July.

We do not think this position can be sustained. The publication of the 23d of June was merely a project or scheme that might never be realized; probably a large proportion of such schemes, quite as fair of promise, perish and are never heard of again. *Non constat* that the $500,000 or $5 towards that amount, would ever be subscribed; and to say that the right to make an assessment could grow into being, from the mere fact of the incorporation, on the chance of subscriptions being made, seems to us to place upon too uncertain a basis the exercise of the sovereign power of taxation which always requires a grant to sustain it.

The case does not differ materially from that of a person living in another city until after the first of July and then removing to Washington. It is to be supposed that there has already been levied, by the authorities where he had lived, the usual tax on whatever property he had there in the way of stock or other effects, and that he will have been assessed at that place, for the whole year and not for a fractional part only. He removes here, we will say, in the latter part of the year, bringing his personal effects, to make this city his home. To tax him here and make him pay here upon the same property upon which he has already paid a full year's tax at his former home would be most unjust, unless his case should fall within one of the two exceptions already referred to.

For these reasons we think there was no authority for the imposition of this tax. It is unnecessary to consider the further argument on the part of the District, that the Company paid part of this tax voluntarily. The consent of the taxpayer could not confer on the Corporation the sovereign power of taxation, where it had not been given by law.

Nor do we intend to decide, on the other hand, that if the Company paid that part of the charge under circumstances of duress, as it insists, it can recover from the District the amount thus paid.

We simply hold, for the reason given, that the court below was correct in its decision, and that the entire proceedings ought to be quashed; and it is so ordered.

Re William J. HENNICK.

The **Act** of the late Legislative Assembly of the District of Columbia, **imposing a license tax upon commercial agents,** or drummers, whose business it is, as agents for nonresident manufacturers or wholesale dealers, to offer merchandise for sale, is **unconstitutional** and void **as a restriction upon interstate commerce.**

(Decided May 9, 1887.)

HABEAS CORPUS. *Petitioner discharged.*

The petitioner was arrested and convicted in the Police Court of this District for a violation of section 21 of the Act of the Legislative Assembly affirmed August 23, 1871, which is as follows:

Sec. 21. *And be it further enacted,* That a license tax shall be, and hereby is, imposed as follows, that is to say:

"First, Apothecaries shall pay, etc., etc., * * *.

"Second, Auctioneers shall pay, etc., etc., * * *.

"Third, Commericial Agents shall pay $250. Every person residing in the District of Columbia, whose business it is, as agent for nonresident manufacturers or wholesale dealers, to offer for sale merchandise, shall be regarded as a commercial agent." Acts, Sess. 1, p. 98.

After his conviction the petitioner sued out this writ of *habeas corpus,* the hearing upon which was certified by the justice holding the criminal court to the general term, to be there heard in the first instance.

Messrs. **Francis M. Darby, Francis Miller** and **Guion Miller,** for petitioner:

The validity of this license was in question in *Humason's Case,* 2 MacArt. 158. It was contended that the law was illegal, as to commercial agents, because it was in effect an attempt to regulate commerce, and therefore, unconstitutional; but the court held the contrary. This decision, so far as it declares that the Act is not a regulation of commerce, has been overruled by the Supreme Court of the United States in the case of *Robbins* v. *Taxing District of Shelby Co.* 20 U. S. 489 (Bk. 30, L. ed. 694); *S. C.* 1 Interstate Com. Rep. 45.

This would seem to be conclusive of this case.

But it is claimed that this law was passed by the Legislative Assembly, by the authority of Congress, which has exclusive legislative power over this District.

Cohens v. *Va.* 6 Wheat. 441 (19 U. S. bk. 5, L. ed. 300).

But this court has decided that the Legislative Assembly had only municipal power of legislation; that it could not legislate on general subjects; and further that Congress could not give it power to do so.

Roach v. *Van Riswick* and *Cooper* v. *Dist. Col.* 4 MacArt. 171, 250; *Dist. Col.* v. *Waggaman,* 1 Cent. Rep. 823, 4 Mackey, 333; § 98 R. S. D. C; *Dunphy* v. *Kleinschmidt,* 11 Wall. 610 (78 U. S. bk. 20, L. ed. 223).

It is certain, in view of the late decision of the United States Supreme Court that such a law is a regulation of interstate commerce, that Congress could not delegate to a mere municipal body its constitutional power over a great national interstate question.

As Congress could not clothe the Legislative Assembly with this power, its action in passing the License Law was utterly void; and that law cannot gain any validity from the tacit acquiescence of Congress.

The rule of "ratification" is laid down in the case of *Mattingly* v. *Dist. Col.* 97 U. S. 687 (Bk. 24, L. ed. 1098).

It is contended that the fact that Congress has amended this law by repealing some of its provisions has given it the same effect as if it had been passed by Congress itself.

But the Legislative Assembly by the very terms of the organic Act could not pass any law that the Legislature of the State could not. Can it be successfully contended that if, in disobedience of the restriction thus laid upon it, it attempted to exercise the highest constitutional function of Congress itself, the silence of Congress, or the repeal of some purely municipal regulations, is to be construed as a recognition and validation of this assumption of power?

Roach v. *Van Riswick,* 4 MacArt. 171.

But the recent decision of the Supreme Court of the United States in the Tennessee case has conclusively settled that this law is, in effect, a regulation of commerce between the States; for in this connection, as in the case of the constitutional provision as to direct taxes, the District of Columbia and the Territories must be included.

Loughborough v. *Blake,* 5 Wheat. 319 (18 U. S. bk. 5, L. ed. 98).

At least it is an attempt to regulate commerce between the District of Columbia, and (in the case at bar) the State of Maryland. It reaches out and affects the interests of that State, and is in effect an exercise of the national constitutional power of Congress to regulate commerce, and not of the exclusive power of local legislation over the District.

If it is an exercise of this national constitutional power, it must be subject to all the restrictions which the Constitution has imposed upon Congress. It must therefore be uniform. Either this regulation of commerce must be impartially applied to every man who engages in the business of a drummer, or it cannot be enforced against anyone.

The language of the supreme court on this subject, emphatic and oft repeated as it has been, is but an expansion of that of the Constitution itself.

Article 1, section 8, clause 1, says: "All duties, imposts and excises shall be uniform throughout the United States."

Chief Justice Marshall, 5 Wheat. 319 (18 U. S. bk. 5, L. ed. 98), says: "The power, then, to lay and collect duties, imposts and excises, may be exercised and must be exercised throughout the United States. Does this term designate the whole or any particular portion of the American Empire? Certainly this question can admit of but one answer. It is the name given to our great Republic, which is composed of States and Territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties and excises, should be observed in one than in the other. Since, then, the power to lay and collect taxes, * * * is obviously coextensive with the power to lay and collect duties, imposts and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States."

Clause 6 of the same section provides that "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

See *Passenger Cases*, 7 How. 405 (48 U. S. bk. 12, L. ed. 758); *Gibbons* v. *Ogden*, 9 Wheat. 191 (22 U. S. bk. 6, L. ed. 69).

Now if this License Law does give or may give the City of Baltimore any preference over the City of Washington, or the contrary, it is in violation of this clause of the Constitution.

We contend therefore that even if Congress had formally passed this Law and it had been regularly approved by the President, with all the forms prescribed for the enactment of laws of the United States, it would still be void, because of its violation of the fundamental requirement of all such legislation, to wit: that of uniformity throughout the limits of the country; *Exchange Bank of Columbus* v. *Hines*, 3 Ohio St. 1; Cited in *Gilman* v. *Sheboygan*, 2 Black, 510 (67 U. S. bk. 17, L. ed. 305); for this license tax is a tax on the articles to be sold by the drummer.

Brown v. *Md.* 12 Wheat. 444, 448 (25 U. S. bk. 6, L. ed. 687, 688); *Cook* v. *Pa.* 97 U. S. 566 (Bk. 24, L. ed. 1015); *License Tax Cases*, 5 Wall. 462 (72 U. S. bk. 18, L. ed. 497); *Welton* v. *Mo.* 91 U. S. 275 (Bk. 23, L. ed. 347).

Judge Tucker thought that "duties" as used in the Constitution, "were probably intended to comprehend every species of tax or contribution not included in the ordinary terms 'taxes and excises'."

Cited in *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433 (74 U. S. bk. 19, L. ed. 98).

Cooley, Const. Law, p. 494.

Direct taxes must be laid by the rule of apportionment; all others by the rule of uniformity.

Veazie Bank v. *Fenno*, 8 Wall. 533 (75 U. S. bk. 19, L. ed. 482); *Scholey* v. *Rew*, 23 Wall. 331 (90 U. S. bk. 23, L. ed. 99).

In *Ward* v. *Md.* 12 Wall. 418 (79 U. S. bk. 20, L. ed. 449), *Mr. Justice* Bradley foreshadows the recent decision in the Tennessee case.

"It will not be denied that that portion of commerce with foreign countries and between the States which consists of the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation."

Welton v. *Mo.* 91 U. S. 275 (Bk. 23, L. ed. 347), cited and approved in *Tiernan* v. *Rinker*, 102 U. S. 123 (Bk. 26, L. ed. 103).

In respect of commerce between the States, which consists in the transportation, purchase, sale and exchange of commodities, there can of necessity be only one system or plan of regulations; and that Congress alone can prescribe.

Mobile Co. v. *Kimball*, 102 U. S. 691 (Bk. 26, L. ed. 238); *Cooley* v. *Board of Wardens*, 12 How. 299 (53 U. S. bk. 13, L. ed. 996); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 (Bk. 29, L. ed. 158); *Brown* v. *Houston*, 114 U. S. 622 (Bk. 29, L. ed. 257); *Walling* v. *Mich.* 116 U. S. 446 (Bk. 29, L. ed. 691); *Pickard* v. *Pullman etc. Car Co.* 117 U. S. 34 (Bk. 29, L. ed. 785).

But suppose this tax is levied by Congress as the exclusive legislative power in the District of Columbia for the support of the government of the District of Columbia, it is still a tax on the commerce of the States with the District of Columbia, and subjects that commerce to burdens to support the local expenses of the District of Columbia. Can Congress compel the States to do this?

Cooley, Const. Law, p. 499.

We submit that the recent decision of the supreme court is universal in its operation and cuts up by the roots all local regulation of commerce; that it declares that requiring a license for drummers is a regulation of commerce; that therefore such license can only be required by Congress; and that Congress can only exercise its power to regulate commerce by the exercise of its constitutional powers so to do, under the constitutional restriction that the operation of its laws shall be uniform throughout the limits of the United States.

Mr. **Henry E. Davis**, for the District:

I. The law is, in effect, the law of Congress.

The power of the Legislative Assembly, which emanated from Congress, extended "to all rightful subjects of legislation within the District, consistent with the Constitution of the United States * * * subject to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States;" and all Acts of the Assembly were "subject to repeal or modification by the Congress of the United States."

R. S. D. C. §§ 49, 50.

The extent of the power thus conferred upon the Legislative Assembly was considered by this court in *Roach* v. *Van Riswick* and *Cooper* v. *Dist. Col.* 4 MacArt. 171, 250; and in *Dist. Col.* v. *Waggaman*, 1 Cent. Rep. 823, 4 Mackey, 328.

In the last mentioned case the very License Act under consideration was held as within the power; and in *Dist. Col.* v. *Oyster*, 1 Cent. Rep. 84, 4 Mackey, 285, the Act was administered by this court without any question or expression of doubt as to its being properly within the power granted and properly grantable by Congress to the Assembly.

The Act having, then, been within the power of the Assembly to pass, it was in full force and virtue from its passage, unless repealed or modified by Congress.

As was said by this court in *Roach* v. *Van Riswick* (4 MacArt. 172, 173), the "reluctance on the part of Bench and Bar to recognize legislation of the late government as valid, * * * has sometimes sought its excuse in the want of positive confirmation by Congress of the legislation in question. This, however, is a very unsatisfactory foundation for it. The organic Act, * * * which established the District Government, nowhere contains an intimation that the Acts of the new government are to be inoperative until or unless confirmed by Congress; but, on the contrary, by the strongest imputation, excludes such idea. The fiftieth section [of the revision] declares that all Acts of the Legislative Assembly shall at all times be subject to repeal or modification by the Congress of the United States. Until repealed or modified, the clear implication is that they are to operate *proprio vigore.* * * * It is plain to us that as far as Congress could confer the power of original and independent legislation, needing no confirmation, but complete and operative in itself, it has done so by the Act in question."

The effect of this is that the legislation in question, being that of a duly authorized and qualified agent of Congress in the Government of the District of Columbia, is that of Congress itself. And if that be not so, we have a distinct adoption by Congress of this legislation in the several Acts of February 17, 1873 (17 Stat. at L. 464), July 12, 1876 (§ 19, 19 Stat. at L. 83), and January 28, 1887, in part amending and in part repealing the Act of the Assembly; whereby, by the clearest implication, the rest of the Act is adopted.

II. The constitutional question.

The question raised by the petitioner is supposed to find support in article I, § 8 of the Constitution of the United States, which provides that "The Congress shall have power to lay and collect taxes, duties, imposts, and excises * * * but all duties, imposts, and excises shall be uniform throughout the United States" (clause 1), and that "The Congress shall have power * * * to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes" (clause 3); and in section 9 of the same article, which declares that "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another" (clause 6).

As to the first of these provisions, it is enough to say that the license tax in question is not a duty, an impost, or an excise, and is not, therefore, within that provision requiring uniformity throughout the United States. As to the last (§ 9, clause 6), the license law for the District of Columbia gives no preference to the ports of any State, or even of the District, over those of any other State; and it is not easily conceived how that clause can be thought to have any relevancy to the subject in hand.

A question seems, however, to be presented by the remaining of the three clauses above enumerated, viz.: whether, as a regulation of commerce, the license law for the District is invalid, as obnoxious to the Constitution of the United States?

1. It is not doubted that the law regulates commerce, in the sense of the Constitution. The opinion of the Supreme Court of the United States in the recent case of *Robbins* v. *Taxing District of Shelby Co.* 120 U. S. 489 (Bk. 30, L. ed. 694); *S. C.* 1 Interstate Com. Rep. 45, closes the door to any possible contention on that head.

2. It is equally certain that, as above pointed out, the law is, in effect, an enactment by Congress.

3. The question, then, becomes, Has Congress power under the Constitution to pass such a law?

If not, it must be either because such power is not granted, or is denied, to Congress by the Constitution.

The power is undoubtedly granted in terms by article I, § 8, clause 17, whereby Congress is given power to exercise exclusive legislation in all cases whatsoever over the District of Columbia. As was said by Marshall, *Ch. J.*, in *Loughborough* v. *Blake*, 5 Wheat. 324 (18 U. S. bk. 5, L. ed. 100); "On the extent of these terms, according to the common understanding of mankind, there can be no difference of opinion."

But it is contended that this broad grant is limited by the restrictions which the Constitution has imposed upon Congress. Granting this, what restriction of the Constitution upon the power of Congress affects the question under consideration? Petitioner's counsel cite but two such restrictions as of supposed applicability—that requiring uniformity of duties, imposts and excises, and that forbidding preference to the ports of one State over another; both of which have been noticed above.

What limitations, then, exist on the power of Congress in regulating commerce? Seemingly none, except those distinctly prescribed by the Constitution, which "are expressed in plain terms," and none of which applies to the case in hand.

The question thus recurs: Does the regulation of commerce complained of emanate from Congress? That it does is shown above. "Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any given subject." *A fortiori* may it adopt the legislation of its own agency, in the exercise of one of its undoubted powers. The adoption by Congress of any given legislation "gives it the same validity as if its provisions had been specifically made by Congress."

Gibbons v. *Ogden*, 9 Wheat. 196, 207 (22 U. S. bk. 6, L. ed. 70, 73).

4. The recent decision of the Supreme Court of the United States (*Robbins* v. *Taxing District, supra*), in reality does not affect the question under consideration.

In that case it was held only that a given law of the State of Tennessee was invalid, as dealing with the subject of commerce, which, by the Constitution, was committed to Congress. The power of Congress, its extent and its limitations in the premises, were not under consideration.

5. The petitioner has no right to complain of the District License Law. He is not a member of a foreign Nation, nor of an Indian Tribe, and the law does not affect commerce "among the several States."

The District of Columbia is not a State, in the meaning of the Constitution.

Hepburn v. *Ellzey*, 2 Cranch, 445 (6 U. S. bk. 2, L. ed. 332); *New Orleans* v. *Winter*, 1 Wheat. 91 (14 U. S. bk. 4, L. ed. 44); *Scott* v. *Jones*, 5 How. 377 (46 U. S. bk. 12, L. ed. 197); *Barney* v. *Baltimore*, 6 Wall. 287 (73 U. S. bk.

18, L. ed. 827); *Baltimore etc. R. R. Co.* v. *Harris*, 12 Wall. 86 (79 U. S. bk. 20, L. ed. 360).

In respect to regulating commerce, there is in the Constitution no prohibition upon either Congress or any State to discriminate for or against the District, as between it and such or any State. "The sole restraints" against abuse in this respect are those mentioned by *Chief Justice* Marshall in *Gibbons* v. *Ogden*; and disregard of those restraints can only be reached by counter legislation; they cannot be affected by any action of the judiciary.

Mr. Justice **Merrick** delivered the opinion of the court:

I have been assigned to announce the opinion of the court in the case of *William J. Hennick*, certified to this court, from the criminal court.

The petitioner, as it appears by his petition, was convicted before the police court upon an information against him as a commercial agent, or drummer, so-called. The information states:

"That on the 14th day of April, 1887, at the City of Washington he did engage in the business of a commercial agent, to wit: the business of offering for sale as agent of Lyons, Conklin & Co., a firm doing business in the City of Baltimore, State of Maryland, certain goods, wares, and merchandise, by sample, catalogue, and otherwise, without having first obtained a license to do so; contrary to the provisions of an Act of the Legislative Assembly."

Prior to the decision of the Supreme Court of the United States at its present term, in the case of *Robbins* v. *Taxing District of Shelby County*, 120 U. S. 489 [Bk. 30, L. ed. 694]; *S. C.* 1 Interstate Com. Rep. 45, there had been very great diversity of opinion throughout the United States as to the power of a State to tax commercial agents who were transacting business by selling goods by sample or by soliciting contracts for sale of goods owned by persons in other States than where the solicitation or sale was made. That diversity of opinion not only pervaded the legal profession, but, as it appears by this recent decision of the supreme court, it still existed in that tribunal; so that there is a complete justification for those who entertained that opinion, and who urged the liability under such laws.

By justification I mean justification up to the time that that decision was pronounced. That decision being pronounced, however, it is obligatory upon all other tribunals and upon citizens of the United States. It is not obligatory upon the supreme court itself, as a final adjudication, because it is liable to be reviewed by it and reversed by it if, in its better judgment hereafter, it should entertain a different opinion from that which has been expressed by itself, because it is a well defined rule, announced by that court, that in constitutional questions the rule of *stare decisis* is not obligatory upon itself. Constitutional questions are always open for revision by the supreme court itself, notwithstanding there may have been one or more decisions upon the subject. But, while open for revision by that court such decisions, until reversed by it, are obligatory upon all other tribunals, and demand implicit obedience from all citizens throughout this land.

In the case of *Robbins* v. *Shelby County* it was decided that a state law imposing a tax upon commercial agents who solicited contracts for sale of property owned by citizens of another State was beyond the power of the State to enact or enforce; that it was in contravention of the constitutional provision that Congress should have the exclusive power of regulating commerce between the States, a tax upon commercial agents or drummers of one State soliciting business within another State being a tax upon interstate commerce.

It was said in argument that that decision did not cover the whole proposition, that it was limited only to discriminations which were made by the Statute of Tennessee as against the citizens of other States, and that if the law had been equally as applicable to all travelers the decision would not cover it. But an inspection of that decision shows this to be a mistaken view of the subject. The court grasped the whole matter, discussed the whole matter fully, and decided the precise point as law, as will be seen from the following quotation from the decision:

"But to tax the sale of such goods, or the offer to sell them, before they are brought into the State, is a very different thing, and seems to us clearly a tax on interstate commerce itself. It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers,—those of Tennessee and those of other States,—that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of *State Freight Tax Cases*, 15 Wall. 232 [82 U. S. bk. 21, L. ed. 146]. The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because in the one case it is an act of foreign, and in the other of interstate commerce, both of which are subject to regulation by Congress alone."

Thus it will be seen that it does not put the decision at all upon the question of discrimination between drummers within the State and drummers outside the State; but it says that no law which imposes upon the person soliciting sales for merchants outside of the State is admissible, because that is a regulation of interstate commerce.

In connection with that decision it is well to read an extract from the opinion of the Supreme Court of the United States in the case of *Walling* v. *Michigan*, in 116 U. S. 456 [Bk. 29, L. ed. 694], which is as follows:

"The subjects indeed upon which Congress can act under this power are of infinite variety, requiring for their sucessful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States which consists in the transportation, purchase, sale and exchange of commodities. Here there can of necessity be only one system or plan of regulation, and that Congress alone can prescribe. Its nonaction in such cases, with respect to any particular commodity or mode of transportation, is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign Nations and among the States was to insure uniformity of regulation against conflicting and discriminating state legislation."

And further down on page 457 [695] it is said:

"And after an examination of the causes which led to the adoption of the Federal Constitution, one of the principal of which was the necessity for the regulation of commerce and the laying of imposts and duties by a single government, the court says: 'But whatever may be the motive for the tax, whether revenue, restriction, retaliation, or protection of domestic manufactures, it is equally a regulation of commerce, and in effect an exercise of the power of laying duties on imports; and its exercise by the States is entirely at war with the spirit of the Constitution, and would render vain and nugatory the power granted to Congress in relation to those subjects. Can any power more destructive to the union and harmony of the States be exercised than that of imposing discriminating taxes or duties on imports from other States? Whatever may be the motive for such taxes, they cannot fail to beget irritation and lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state of feeling that would seek its gratification in any measures regardless of the consequences.'"

Such is the declaration by the Supreme Court of the United States, of the spirit and scope of these constitutional provisions; that they are necessary to the harmony and repose of the States; that they are necessary to the equal justice and equal privileges of the citizens of all the States of this Union; that they cannot be restricted at all; and that whatever rule is made with reference to them must be a uniform rule by the Congress of the United States acting as the National Legislature, regulating and controlling the commerce of the entire domain of the United States, with a view to do equal justice between all the parts of the country and to take away any possibility of prejudice or any suggestion of injustice or discrimination by one as against another. That being so, it is manifest that any regulation upon this subject must be a regulation by Congress, in its capacity as the National Legislature.

Now, could Congress, if it had been so disposed, have delegated to the Legislative Assembly of this District the power to pass any such law? That is not an open question in this court. In the case of *The District* v. *Waggaman*, 1 Cent. Rep. 823, 4 Mackey, 838, this court said:

"In *Roach* v. *Van Riswick*, 7 Wash. Law Rep. 496, this court held that the very broad terms in which the organic Act of 1870 granted legislative powers to the Legislative Assembly had the effect to clothe that body with only such powers as might be given to a municipal corporation, and that it was not competent for Congress to delegate the larger powers of general legislation which it had itself received from the Constitution."

We have already shown by these extracts that this subject matter belongs to the larger power of general legislation,—belongs to Congress, as the Legislature of the Nation. It could not, therefore, within this announcement, delegate any such part of its general legislative power to a municipal legislative body. It is altogether outside the scope of a municipal body to legislate on this subject.

It would be marvelous indeed if, when the Constitution strips all the States of this Union of power to legislate on this subject, it could be pretended that a municipal body could be clothed with any such faculty. If a State cannot do it, how can a body inferior to a State do it? How can it be said to be within the power of a municipal corporation, when it is not within the power of a sovereign State, to legislate upon this subject matter? It would seem sufficient to stop at this point.

But it has been said here in argument that, the Congress of the United States having the exclusive legislative power of this District of Columbia, there is no restriction upon its capacity to act as such Legislature. If the question were before the court in that aspect, it would not be difficult to say that it is a proposition that cannot be entertained by any who regard the comprehensive power of the Constitution, the object for which it was formed, or the purposes for which this District of Columbia was dedicated to national uses, to maintain that a body may be established here in legislative form, in antagonism to the rights of the various States of this Union.

This community is not even a State. It is an organized body to be legislated over by Congress alone. This District has surrendered its right of representation, and that representation is vested in Congress; but still it is vested in Congress as the National Legislature, and it is to be exercised by Congress in subordination to the principles of the Constitution of the United States. The argument, pushed to its extreme, would simply be this: Congress is without constitutional restraint as to this District; the people are helpless, and not under the sanctions or protection of the Constitution of the United States at all; the United States has here a foreign territory in which it can legislate in antagonism to the interests of the States and in opposition to the policy which prevails in the Constitution, obligatory upon the States in their intercourse one with another to do equal and exact justice, one as to the other and each as to all. Such an argument cannot have any sanction at the hands of this court. This District is set aside and dedicated to the uses of the Nation, and if there be anywhere on the face of the earth a locality where no discrimination should be made as against the rights of any of the

States or any citizens of the United States, it should be upon this soil where all are equal, on which each citizen has an equal right and in which each State has an equal right, as regards all the other States and as regards the United States itself. This Territory is dedicated simply as a temple of justice, as a temple where the liberties of the Nation are to be sacredly preserved; and it is for that purpose that it should be exempt from hostile control or the possibility of antagonism with the purposes of the Union. Congress was vested with the power of exclusive legislation for this District, but not at all for the purpose of enabling it to legislate in any manner in hostility to the rights of any of the States of the Union.

Can it be supposed for an instant that any of the States would have ceded to the Government of the United States a district for the seat of its Government in which hostile legislation should be exercised towards the interests of the citizens of those States or the citizens of their sister States? We cannot suppose such a thing possible. We cannot suppose that when the Congress was vested with power to legislate over this District it was clothed with any power to act as such Legislature in hostility to the rights of the States or to do anything regarding the interests of the citizens of one State which any State of the Union could not do with regard to the citizens of any other State. We are subject to the Constitution of the United States. Here, if anywhere, the Constitution should be venerated, and the most sedulous regard should be had for each and all of its provisions, and we should rejoice that we are under its provisions; we should rejoice that we are under its protection; we should rejoice that we are set apart for the purpose of ministering to the temple of justice, the temple of "Equality of Laws" which has been established in our midst.

It seems impossible, therefore, to argue from the fact that Congress has exclusive legislation over this District that it has the power of the tyrant through this District over the States of the Union. The whole idea is inconsistent with the spirit of our institutions, utterly inconsistent with the object for which the Constitution was formed, and for which this district of country was set apart for the uses of the general government. Therefore, even if Congress had undertaken, with regard to this District, in its general capacity as the Legislature for the District, to pass such a law, it would have been outside the power of Congress so to do; because, as a National Legislature, it can only legislate under the commercial power upon the principle of uniformity, which is to pass laws equally operative upon any, every, and all parts of the Union; and therefore any discrimination in favor of this community would be in violation of the spirit, if not the letter, of the Constitution of the United States.

But we need not go that far for the purposes of this case. It was only necessary to speak of it for the purpose of repelling the argument, and making it be seen how we regard the relations of this community to the legislative power of Congress and to the several States of the Union. It is enough for the purposes of this cause to say that the delegated power to the Legislative Assembly of this District was the delegation only of municipal power, and that any attempt to legislate in this respect is *ultra vires* a municipality as it is *ultra vires* the power of a State of this Union.

For these reasons the court is of opinion that the prosecution was without authority; that so far as this law operates on this class of cases it is null and void, and that the prisoner must be discharged from custody.

But it is necessary to add that this decision on this branch of the law is not at all inconsistent with the decision that was made in the *Case of Waggaman*, where it was held that the Legislative Assembly was empowered to impose a license tax upon people doing business within the District of Columbia. All occupations which are limited to the District of Columbia are subject to the taxing power. That is what was held in that case, and there is nothing in this case at all inconsistent with it. If this party had taken out a license for the District, for the purpose of soliciting business within the District, for sales by people within the District, he might have been subject, and would have been subject, to the license law. But upon the face of this information it appears affirmatively that his exclusive business was to act as the agent of citizens of other States, soliciting contracts of sale for goods within those States, thereafter to be brought under the dominion, and within the control of the taxing power of the District. Therefore, there is no inconsistency between the two decisions. They are entirely harmonious, and there can be no difficulty in maintaining that in the aspect in which this case is presented, it is directly in the face of the decision in *Robbins* v. *Shelby County*, directly in opposition to the whole current of decisions upon the commercial power of the United States as expounded by the Supreme Court of the United States, and cannot be permitted to stand as law.

Mr. Riddle: If I apprehend this decision correctly, it leaves the law to be enforced against the citizens of the District.

Mr. Justice Merrick: Unquestionably.

Mr. Riddle: The license law can be enforced against the citizens of the District?

Mr. Justice Merrick: Against citizens of the District who are soliciting sales for people within the District. But a citizen of the District who is employed as an agent of a citizen of another State, for the purpose of selling the goods of that citizen of the other State, cannot be restrained from so doing by the Legislative Assembly.

Mr. Riddle: I quite apprehended that.

Mr. Justice Merrick: And further than that, I will say that if his business had been to solicit business as a drummer within the District, and he had mingled with it the business of the people of a State, he would be obnoxious to the law, not for soliciting business for citizens of States, but as acting as a drummer generally. But here, the information says that he is charged with doing exclusively the business of a commercial agent, soliciting and selling his goods for citizens of other States. That is the exclusive business with which he is charged, and therefore it may well stand with the other matter about which the counsel has made the inquiry.

NEW JERSEY.

Court of Chancery.

John EASTWOOD
v.
Lawrence WORRALL *et al.**

In a suit to foreclose a mortgage, *held*, on the facts, that the alleged **defenses** of an agreement to extend the time of payment of the mortgage and an agreement to **assign** the same, are **not maintained.**

(Decided April 12, 1887.)

Bill to foreclose a mortgage. On final hearing upon bill, answers in nature of a cross bill, replication and proofs. *Decree for complainant.*

The case is stated in the opinion.

Mr. **G. W. Hubbell,** for complainant.

Mr. **P. H. Gilhooly,** for defendants:

The complainant's bill should be dismissed because his mortgage was not due when his suit was commenced.

The time for payment was extended for five years from February 5, 1881, by agreement in writing between the parties.

See *Eastwood* v. *Worrall*, 3 Cent. Rep. 77; 4 Cent. Rep. 91.

Hubbell admits that the bond and mortgage after execution were mailed to him by Mr. Worrall, and that he immediately inspected them and observed that they were payable in four years from February 1, 1883; he recorded them and delivered them to Eastwood, but he claimed that Mr. Worrall had changed 1881 to 1883, and that neither he nor Eastwood ever made any objection. This amounts to a ratification.

Wharton, Agency, §§ 86, 87.

Eastwood is bound by the acts of Hubbell, not only because he was his agent and attorney in this affair, but because of previous dealings between the same parties upon the same subject matter, in which Eastwood adopted all that Hubbell had done in his behalf.

Id. § 87.

The agreement made by Hubbell with Mrs. Worrall for one year additional time was upon a good consideration, and binding upon the complainant.

An agreement to extend the time of payment of a mortgage is a valid contract, and will be enforced in equity.

Bigelow v. *Rommell*, 9 C. E. Green, 117.

The agreement may be by parol.

Tompkins v. *Tompkins*, 6 C. E. Green, 338.

In this case the complainant in October, 1867, agreed to extend the time for the payment of interest until June, 1868. He filed his bill to foreclose in January, 1868; and at the February Term, 1871, his bill was dismissed because it was prematurely filed.

Jones, Mort. §§ 1189, 1190.

The complainant should be decreed to execute a written agreement to assign his bond and mortgage and all collateral securities to the defendant, Lawrence Worrall, or to such person as he shall procure to take the same, whenever the money due the complainant shall be tendered him. In this State he cannot be compelled in the absence of such agreement to assign his mortgage.

Davis v. *Flagg*, 8 Stew. Eq. 491.

The relief asked for in the cross bill of defendants should be granted.

Where a party agrees to assign a claim upon delivery of certain notes, and the notes are tendered, equity will enforce the performance of the contract.

Cutting v. *Dana*, 10 C. E. Green, 265.

So of a contract to purchase a debt.

Adderly v. *Dixon*, 1 Sim. & Stu. 608.

So of a contract to assign choses in action.

Pomeroy, Cont. § 20, p. 24 and notes.

So of an agreement to execute and deliver an instrument in writing.

Id. § 291.

So of covenants to renew a lease.

Fry, Spec. Perf. § 948.

So of contracts for the sale or assignment of things in action, where the legal damages might be too uncertain and conjectural to constitute an adequate compensation.

3 Pomeroy, Eq. Jur. § 1402, p. 443. See note 2.

So a contract to renew a license.

Domestic Telegraph etc. Co. v. *Metropolitan Telephone etc. Co.* 12 Stew. Eq. 160, 164; *S. C.* 14 Stew. Eq. 241.

If a contract can be completely performed at the time, although there may be future acts dependent upon it, the court will be able to grant specific performance.

Fry, Spec. Perf. § 553.

A verbal agreement to plant peach trees and divide the profits has been enforced, the trees having been planted.

McKnight v. *Robbins*, 1 Halst. Ch. 229; affd. *Id.* 642.

Part performance took this case out of the Statute of Frauds.

See *Adderly* v. *Dixon*, 1 Sim. & Stu. 608.

It is settled in England that choses in action are not comprehended in the phrase "goods, wares and merchandise."

Browne, Stat. of Frauds, § 296.

In Massachusetts shares of stock are held to be within the statute, but not letters patent.

Id. §§ 296, 297.

The English rule has been adopted in New Hampshire, Indiana, Georgia and Alabama.

Wood, Fraud, § 503.

But in New Jersey this precise point does not seem to have been decided, except inferentially in *Brown* v. *Brown*, 6 Stew. Eq. 650.

In Massachusetts, Maine, Maryland, Vermont, and Connecticut, choses in action are regarded as goods, wares and merchandise. In California, Dakota, Nebraska, Nevada, New York, Minnesota, Montana, Utah, Wisconsin and Wyoming, choses in action are included in the statutory provisions; while in Alabama, Delaware, Illinois, Kansas, Kentucky, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, and West Virginia, the Statute of Frauds does not extend to the sale of goods, wares and merchandise.

Wood, Fraud, § 504.

The defendant's remedy is by cross bill.

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*See previous suit to foreclose the same mortgage, 3 Cent. Rep. 77; and motion to strike out answer in this suit, 4 Cent. Rep. 91.

Kirkpatrick v. *Corning*, 12 Stew. Eq. 141; *Galatian* v. *Erwin*, Hopk. Ch. 48; *Cartright* v. *Clark*, 4 Met. 104; *Atlanta Mills* v. *Mason*, 120 Mass. 244; Story, Eq. Pl. 367; *Chester Iron Co.* v. *Beach*, 13 Stew. Eq. 63; *Duryee* v. *Linsheimer*, 12 C. E. Green, 366; *Graham* v. *Berryman*, 4 C. E. Green, 29; *S. C.* 6 C. E. Green, 370.

Runyon, *Chancellor*, delivered the following opinion:

This suit is brought to foreclose a mortgage given by Noah Worrall and Wade B. Worrall, to the complainant, January 4, 1869, upon land in the City of Elizabeth, to secure the payment of $20,000 in one year from the date of the instrument with interest. The defense is twofold; one ground is that the time for payment of the mortgage was extended in June, 1883, for the period of four years from the 5th of February in that year, in consideration of the giving by the defendants, Georgia A. Worrall, holder of the second mortgage upon the premises, and her husband, Lawrence Worrall, of a mortgage for $5,000 on her own property in Monmouth County, as collateral security for the payment of the complainant's mortgage; the other ground is that the complainant in 1881, in consideration of the giving to him by the same parties of a like collateral mortgage upon the same property of Georgia A. Worrall, agreed with them to extend the time of payment of the principal mortgage for five years from the 5th of February in that year, and also that he would accept payment of that mortgage whenever tendered to him by them, and would upon such payment assign the mortgage and the bond, the payment of which it was given to secure, with all collaterals, to anyone whom they might designate; and that he would execute an agreement binding him accordingly.

It appears that an agreement was drawn about that time and sent to the complainant to be signed by him but he did not sign it. It is said that when he received the paper he was making his preparations for a visit to Europe and that owing to press of business he did not sign it and that when he returned, finding as he alleges that Worrall and his wife had not complied with what he states was part of the terms, the payment of taxes upon the Elizabeth property, he was unwilling to sign it and in fact never did execute it and it has been lost.

The questions raised are whether the alleged extension for four years from the 5th of February, 1883, was made, and whether the complainant made the agreement to assign. The alleged agreement to assign is not proved. It may be added that the money due upon the principal mortgage has never been tendered to the complainant, and he has been willing to assign upon receiving the money, although he has denied, as he still does, that he ever made such agreement.

As to the agreement to extend the time of payment: Mr. Worrall testifies that there have been four extensions granted by the complainant, but according to his testimony there were only three; the first for one year, from January 24, 1878, to January 24, 1879, the next for three years, from January, 1879, to January, 1882, and the third for five years from the last mentioned date, *i. e.*, to January, 1887. The bill was filed February 16, 1886.

It seems clear that there was a definite agreement between the parties for an extension of five years from either the first of January or 6th of February, 1881, in consideration of the giving of the $10,000 collateral mortgage. Mr. Hubbell, who was the attorney for the complainant in that matter, says in his testimony that the extension was for five years from the 6th of February, 1881, but in his letter of May 12, 1883, to Mr. Worrall he says that the complainant "recognizes the agreement already made providing for a five years' extension from January 1, 1881;" and in a subsequent letter to the same person dated May 22, 1883, he refers to the extension as one of five years from January 1, 1881.

The complainant in the replication says that the extension was from February 5, 1881, and he seems to have thought so when he testified in the cause.

On the other hand, Mr. Worrall testifies that the five years' extension was from the month of January. The discrepancy as to the month in which the extension began is not material. The important question is as to the year. The $10,000 collateral bond and mortgage which were given in pursuance of that agreement were dated February 5, 1881, and were made payable in five years from that date. It is very noteworthy that Mr. Worrall did not deny, nor did he in any way protest against or seek to correct or even refer to the statements in the letters just mentioned, that the extension was for five years from January 1, 1881, but passed them by in silence. Nor does he give any plausible reason for not speaking of them. It may be added that in the answers, both of which are sworn to in pursuance of the call of the bill, it is stated that the agreement was that the time should be extended for the term of five years from the 5th day of February, 1883, and further that the principal debt will not be due until the 5th of February, 1888. They are both sworn to by Mr. Worrall.

These statements are contrary to his testimony upon the subject. He says, however, that they are erroneous and that the mistake is due to a clerical error. Nor do the collateral bond and mortgage for $5,000 which were given in 1883, considered in the light of the evidence in reference to them, support the claim that the extension was until 1887. Those instruments were drawn by Mr. Hubbell. As drawn by him the bond was payable in four years from February 5, 1883, and the mortgage stated that the money would be payable in four years from February 5, 1881, and it stated that such was the condition of the bond. Mr. Worrall altered the mortgage before execution, by changing that statement therein so as to conform to the statement in the condition of the bond.

Mr. Hubbell says he cannot account for those errors in the bond and mortgage, and that he did not perceive them until the papers were returned to him executed, and that he then regarded the mistakes as of no importance practically, because the bond and mortgage were given merely as collateral security. In his letter of May 12, 1883, before referred to, in which Mr. Hubbell asked for a collateral bond and mortgage for $5,000, he said that if such bond and mortgage were given, the complainant would execute an agreement not to call for the principal (of the principal mortgage) in five years from January 1, 1881, provided that the interest and taxes should be paid in the meanwhile; and added that (as before stated) the complainant recognized the agreement already made providing for a five years' extension from January 1, 1881, but that the complainant insisted that it was upon condition that the interest and taxes should be paid, and that as the taxes for 1881 and 1882 had not been paid, and the total amount of taxes and assessments had been allowed to exceed by the sum of $900 the market value of the bonds (Alabama State bonds which in 1879 Worrall had deposited with the complainant to answer for the payment of taxes upon the property) held by the complainant as security, the agreement was forfeited.

The $5,000 bond and mortgage were given in pursuance of that application and proposition; and the evidence leads to the conclusion that they were given in order to obtain not a new and further extension, but the benefit of the extension of 1881 which in consideration of the giving of such collateral security the complainant was willing to recognize and accord. The evidence does not establish the defense that the bill was filed prematurely.

There will be a decree for the complainant, in accordance with this decision.

Tyler R. BLAKE
v.
Mary J. GARWOOD *et al.*

1. A **mortgagor cannot maintain** a **bill to interplead against** one who claims, as agent of the owner of the mortgage under a power of attorney, to be entitled to the money due thereon, and against a daughter of such owner who forbids the mortgagor to pay the money to such agent on the ground of the mental incapacity of the owner when she executed the power of attorney, **without joining such owner** as a party to the bill.
2. The **agency** was **revoked** or inoperative, **when** such **owner became incapacitated,** to all who had notice of the fact, and therefore such alleged agent has no claim to the money, and there is no foundation for the bill to interplead.

(Filed —— — 1886.)

BILL of interpleader.

The case is stated in the opinion.

Mr. **R. S. Clymer,** for complainant.

Mr. **B. D. Shreve,** for defendant Garwood.

Mr. **M. B. Taylor,** for defendant Cox.

Bird, *V. C.*, filed the following opinion:

This bill is styled an interpleader. It is filed by a mortgagor. He admits the execution of the mortgage, and that there is a certain amount due. He says that Mrs. Ross, the owner of the mortgage, is incapacitated, from age or other causes, to take the money due; that Cox claims to be her agent by virtue of a power of attorney, and as such entitled to the money, and claims the money of him; that Garwood is a daughter of Mrs. Ross, and forbids him to pay said money to Cox because Mrs. Ross was of unsound mind when she executed said power of attorney, and prays that said Cox and Garwood may interplead and settle their rights, and that he may pay the money due into court, and be dismissed with his costs, and for subpena against Cox and Garwood only.

Mrs. Ross is not made a party. The case must rest here until she is brought in. Her insanity is no excuse. Her insanity or imbecility makes it all the more necessary for the court to have her in court. The method of bringing the unfortunate into court is well known.

Perhaps, under the circumstances of the case, I will be justified in saying that I cannot see why Cox or Garwood is brought into court. The bill proceeds on the ground that Mrs. Ross is insane or mentally incapacitated to contract, and that Cox was once her agent, and claims to still be. Supposing him to have been an agent, and supposing Mrs. Ross to be incapable to contract, then clearly, on the best of reasons and highest authority, that agency was revoked, or inoperative when she become incapacitated, to all who had notice of the fact. *Matthiessen etc. Refining Co.* v. *McMahon*, 9 Vroom, 536; *Hill* v. *Day*, 7 Stew. Eq. 150.

Therefore Cox is an utter stranger to the complainant, who, from the complainant's own showing, has not the slightest claim against him.

If I am correct in these views, and in my understanding of the law, there is no foundation for the bill to interplead.

If the defendants ask for it, *I shall advise a decree dismissing the bill.* And I will refuse to advise any decree in favor of the complainant, until Mrs. Ross is before the court. I do not mean to be understood as saying that this bill can be so fashioned as to stand.

Enos W. CUBBERLY
v.
Ira YAGER.

Where in a warranty deed of land the **grantee assumes** and agrees to pay certain bonds and **mortgages** on the property, **as part of** the **purchase money, he becomes** the **principal debtor,** and equity will compel him to discharge the obligation.

(Filed —— — 1886.)

BILL to compel the grantee of realty to discharge a mortgage thereon assumed by him. *Decree for complainant.*

The case is stated in the opinion.

Mr. **A. S. Appleget,** for complainant.

Mr. **Wm. Clark,** for defendant.

Bird, *V. C.*, filed the following opinion:

The complainant sold to defendant a tract of land for $4,000. In the deed was this clause:

"And the said Ira Yager doth assume two certain bonds and mortgages, held on said property, one held by Jacob Fisher for $500, and one held by John F. Applegate for $2,300, which sums the said Yager is to pay, and is deducted from the said purchase money."

The deed contains covenants of warranty. The deed was executed and delivered in 1869. The defendant immediately took possession of the land, but neglects to pay the balance due the mortgagees.

Yager became the principal debtor and Cubberly the surety, in the judgment of law. In such case equity will compel the principal to discharge the obligation. *Irick* v. *Black*, 2 C. E. Green, 189; *Marsh* v. *Pike*, 1 Sandf. Ch. 210; 10 Paige, 595.

I think the complainant is entitled to the aid of the court in compelling the defendant to discharge this obligation. He must pay the whole balance due. I cannot determine the amount due, as the holders of the mortgages are not before the court, and they have a right to be heard. But it is the business of the defendant to know the amount due, and to pay it.

There ought to be a decree in accordance with these views, with costs.

John M. HARPER
v.
Archibald C. McELROY.

1. On a **bill by a lessee** for an injunction **to restrain** the **grantees of** his **landlord from trespassing** on one of two lots which he claims he rented, but for which the alleged trespasser has a conveyance in fee, there being a serious dispute between the complainant and his landlord, whether or not such lot was included in the verbal agreement to rent, and it being plain that the complainant had only a license to pass over such lot, *held*, that the **order to show cause** should be **discharged,** with costs.

2. An **injunction** will **not issue unless** the **complainant's right** to the subject matter in dispute, and also to the remedy, **is clear.** If there be reasonable or serious doubt, the injunction will be denied.

(Filed ——— — 1886.)

ORDER to show cause why an injunction should not issue to restrain trespassing and the cutting of trees. *Discharged.*

The case is stated in the opinion.

Mr. **Meredith** and *Mr.* **B. Stockton,** for complainant.

Mr. **F. Voorhees,** for defendant.

Bird, *V. C.*, filed the following opinion:

The bill in this case is presented by a lessee, asking for an injunction to restrain the grantee of his landlord from trespassing on one of two lots which he claims he rented, but for which the alleged trespasser has a deed of conveyance in fee. The complainant did rent one lot, and insists that he also rented the adjoining lot, which extends from the rear of the first one to the Delaware River. This last one has been conveyed, and the purchaser has entered upon it, and has cut a sycamore tree and two pines. He has also commenced excavations for a house cellar. It is declared that the defendant threatens other similar acts of trespass.

It is admitted that an injunction will not issue unless the complainant's right to the subject matter in dispute, and also to the remedy, is clear. If there be reasonable or serious doubt, his prayer will be denied. The cases on this point are collected in Stewart, Dig. p. 620, §§ 13, 15.

This plain and most valuable rule forbids that I should make the order in this case absolute. There is a serious dispute between the complainant and his landlord, whether the rear lot was included in the verbal agreement to rent or not. The landlord is very emphatic that it was not, and says that he only gave the complainant permission to pass over the rear lot to the river. I think it appears that the rear lot was, all of the time, offered for sale; that the complainant not only knew this fact, but had made offers for it, or made inquiries about the price.

These facts make one thing only quite plain, which is that the complainant had a license simply to pass over the rear lot to the river, which was revocable, at any time, by the owner. If he acquired any other right by his agreement, it is not established before me.

This view renders it wholly unnecessary for me to decide whether the trees cut were ornamental shade trees or not, and whether the threat to cut others should be restrained by injunction or not.

I will advise that the order to show cause be discharged, with costs.

George LOMERSON, *Exr.*,
v.
George L. VROOM *et al.*

To a **bill** filed **for the construction of a will** of real estate, the **heirs at law** of the testator are **necessary parties.**

(Filed ——— — 1886.)

DEMURRER to a bill for the construction of a will. *Allowed.*

The case is stated in the opinion.

Mr. **W. H. Morrow,** for demurrant.

Mr. **L. DeWitt Taylor,** *contra.*

Bird, *V. C.*, filed the following opinion:

The demurrer is for want of parties. The bill is filed for the construction of a will, in and by which the testator attempts to dispose of his real and personal estate. One of the questions is whether he has succeeded in disposing of the former or not. If not, his heirs at law are interested.

The legatees and devisees named in the will are made parties, but the heirs at law of the testator are not. It is said that it does not appear but that the legatees and devisees are his only heirs at law. This, I think, might be answered by saying that they are not made parties as heirs at law, but only as legatees or devisees; consequently, they would not, as heirs at law, be bound. I understand the rule to be that you must present the party to the court in the precise capacity in which you wish to charge or bind him. See *Wade* v. *Miller*, 3 Vroom, 296; *Kirkpatrick* v. *Corning*, 11 Stew. Eq. 234.

The demurrer must be allowed with costs.

Frank A. MALLALIEU
v.
Wilbur N. WICKHAM *et al.*

A **judgment creditor of** a **mortgagor**, who is made a defendant in a suit to foreclose the mortgage, **may compel** the **mortgagee complainant**, who took possession under his mortgage before such defendant obtained his judgment, **to account for** the **rents and profits** of the mortgaged premises.

(Filed —— — 1886.)

MOTION to strike out parts of an answer to a bill to foreclose a mortgage. *Denied.*

The case is stated in the opinion.

Mr. **W. C. Fisk**, for the motion.

Mr. **H. V. Condict**, *contra.*

Bird, *V. C.*, filed the following conclusions:

The complainant files a bill to foreclose a mortgage on the lands of one of the defendants. Another defendant, Newkirk, who was made a party because he had obtained a judgment against the mortgagor, answers and says that the complainant is in possession of the mortgaged premises, and has been for a long time, and that he should account for the rents and profits.

So much of the answer as relates to this possession and accounting the complainant moves to strike out. He rests this motion on the ground that he took the possession under his mortgage long before the defendant obtained his judgment, which act of taking possession so destroyed the mortgagor's equity of redemption that nothing of interest was left in the mortgagor that the judgment could become a lien upon; and consequently, having no lien, he is not entitled to be heard in his effort to compel the mortgagee in possession to account. It is said that this resistance is fully supported by the case of *Ketchum* v. *Johnson*, 3 Green, Ch. 370, 377.

In that case it is said: "By the English law the equity of redemption, even if the mortgagor remain in possession, cannot be sold on execution at law; but in this country it is otherwise. The mortgage is deemed with us a mere security for a debt, and the property may be sold by execution, subject to the lien. It may well be doubted, however, whether this is so when the mortgagee is in possession, for if the mortgagor surrenders that, the position of things is materially changed. The entry of the mortgagee, or a foreclosure, puts a new aspect on the rights of the parties. Before entry or foreclosure it is held that the equity of redemption may be sold on execution against the mortgagor, but not afterwards. Then the legal title in the mortgage becomes the subject of a sale by execution against him. This is the doctrine recognized in *Jackson* v. *Willard*,* 4 Johns. 42; *Collins* v. *Torrey*,* 7 Johns. 282."

Accepting the law as thus expounded, the inquiry is not ended. The whole case is not met. The inquiry does not cease with the determination of the question whether or not the judgment creditor can find things tangible on which to levy; for equity often aids a judgment creditor when his law execution is wholly unavailing. Indeed, this seems to be a highly favored and most useful branch of equity jurisprudence. On every hand creditors are seen coming to this tribunal to have their judgments at law satisfied out of equitable interests of the defendants.

In this very case the defendant mortgagor has rights; manifestly equities exist between him and the complainant, else why is the complainant here in court? Why does he file his bill to foreclose? Undoubtedly, to cut off or bar the right of redemption which the mortgagor still has. "Once a mortgage always a mortgage."

I cannot conceive of such a thing as a mortgage or pledge without the right to redeem the thing pledged. But the complainant treats the title under which he has possession as a mortgage; and all the equities which the mortgagor ever had he still has, among which is the right to an account from the mortgagee in possession, extending to all the rents and profits. This is such familiar law that I will not cite authorities.

Therefore, it seems to follow as a matter of course that the judgment creditor of the mortgagor is likewise entitled to an account. It is simply a question of the amount due upon the mortgage of the complainant. It can make no difference whatever how he has been paid, if paid at all, whether by the cash of the defendant mortgagor, or by the products of his lands subject to the mortgage. In such cases the law does not bar the creditor, if the mortgagor refuses or declines to demand the account; the law permits the creditor to make it. Were it otherwise, debtors would find the most abundant protection against the just demands of their creditors, not only from executions at law, but from all proceedings in equity.

I will advise an order denying the motion to strike out, with costs.

William H. VARRIAN
v.
Caroline BERRIEN *et al.*

1. Where there are **conflicting claims to** a share of a **fund** which the holder of the fund desires to pay but cannot safely do so, on account of such conflict of claims, and he files a **bill of interpleader**, it is unnecessary to make the persons claiming the other shares of the fund in regard to which there is no controversy, parties to the bill; and if made parties, the bill will be dismissed as to them.
2. In a bill of interpleader the **claims should be specifically set forth**, so that they may appear to be fit subjects of the bill and warrant a decree of interpleader.

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*See digested citations at end of cases, Lawyers' edition. [Ed.]

(Decided —— — 1886.)

MOTION to dismiss bill of interpleader. *Granted.*

The case is stated in the opinion.

Mr. **A. S. Appleget,** for the motion.

Mr. **C. T. Cowenhoven,** *contra.*

Runyon, *Chancellor,* delivered the following opinion:

The complainant, by the bill, states that a mortgage was given upon certain land to secure the payment of $3,801 and interest to Eliza Pullen, widow, and William A. Pullen, Catharine A. Applegate, Caroline Berrien, Emma Rogers and George E. Pullen; the interest to Eliza Pullen for life, and the principal, at her death, to be equally divided among the others; that he purchased the land, subject to the mortgage, and assumed the payment thereof; that Eliza Pullen, to whom the interest was payable for life, and on whose death the principal was payable to the others, is dead, and that he is ready to pay the principal, but cannot safely do so, because of conflicting claims to the money; that Catharine A. Applegate and her husband are dead; that she left children, who claim her share, and that the defendant, John Berrien, pretends to be her administrator, and has notified the complainant not to pay the money, due on the mortgage, to anyone; and that he, Berrien, claims an interest in the share to which Mrs. Applegate would be entitled if she were now living.

Not only are Berrien and the children of Mrs. Applegate parties to the bill, but the other persons who are entitled to shares of the fund, William A. Pullen, Caroline Berrien, Emma Rogers and George E. Pullen, are made parties also. And the complainant asks leave to pay into court, not merely the share of Mrs. Applegate, but the whole fund; and he prays, not that Berrien and Mrs. Applegate's children may interplead as to her share, but that the defendants may interplead as to the whole fund. William A. Pullen, Caroline Berrien, Emma Rogers and George E. Pullen now move to dismiss the bill. It is clear that it has no equity as to them. The controversy as to Mrs. Applegate's share cannot justly affect any interest of theirs in the fund. They have no interest whatever in that dispute, nor have they any in the subject of it. They make no claim to that share, and the complainant might safely pay their shares over to them.

The bill states, indeed, that Berrien has notified the complainant, in writing, not to pay the money due on the mortgage to anyone; but it also states that his claim is confined to Mrs. Applegate's share, and that the opposing claim is that of her children to that share. According to the bill, there is no controversy as to the other shares.

Nor is the alleged claim of Berrien so stated as to warrant a decree of interpleader. The bill states that he claims to be the administrator of Mrs. Applegate, and also that he claims an interest in her share; but it does not state what that interest is, nor how it was obtained, whether by assignment or how otherwise. But it does state that he claims that the share is due to him personally, and that it is also due to him as administrator of Mrs. Applegate. According to that statement, the share might safely be paid over to him as administrator.

In a bill of interpleader, the claims should be specifically set forth, so that they may appear to be of the same nature and character, and the fit subject of a bill of interpleader. Story, Eq. Pl. § 293; *Mohawk etc. R. R. Co.* v. *Clute,* 4 Paige, 384.

The bill will be dismissed.

NEWTON TOWNSHIP BUILDING & LOAN ASSOCIATION

v.

William A. BOYER *et al.*

1. A mortgagee who has assigned the bond and mortgage before any payment of interest is due, cannot, in a **suit to foreclose** the **mortgage** for default in payment of interest, be permitted to put in the **defense** to the suit that **before the assignment** the **interest was settled** with him **but not indorsed, as against** the purchaser who had no knowledge of such payment.
2. A **subsequent purchaser** of the premises who purchased subject to the bond and mortgage, who has paid nothing on his purchase nor assumed payment of the bond or any part of it, and who does not allege that he supposed the interest was paid, **cannot** in such suit **claim** any **benefit from** the **alleged** previous **payment of interest**.

(Filed —— — 1886.)

BILL to foreclose a mortgage. *Decree for complainant.*

The case is stated in the opinion.

Messrs. **D. J. Pancoast** and **J. Willard Morgan,** for complainant.

Mr. **C. T. Reed,** for Dickson and Boyer.

Bird, *V. C.,* filed the following opinion:

Frederick J. Gilling, being a member of the Association above named, borrowed therefrom $800, and gave his bond and mortgage to secure the repayment thereof, dated March 31, 1876.

On December 19, A. D. 1878, said Gilling, being indebted (so it is alleged) to the defendant, James F. Dickson, in the sum of $2,000, executed to him a bond and mortgage on the lands named in the bill of complaint, to secure the repayment thereof. The condition was that the bond should be paid in five years, with interest, semi-annually, at 6 per cent, but in case default in the payment of interest should be made for thirty days, then the principal should be considered due.

On March 5, 1879, before the first six months' interest fell due, Dickson assigned this bond and mortgage to the complainant, first, as collateral security for the payment by said Gilling of the balance due on his bond; and second, to retain, out of any moneys that may be recovered on said bond, the sum of $500, and to pay the same to Cooper, Stone & Co., on account of a judgment against the said Gilling, and to pay the balance to said Dickson.

This bill is filed to foreclose the mortgage given to Dickson and assigned to complainant, and expressly charges that no part of the interest has been paid. Of course, the five years not having elapsed, the right of the complainant to bring his suit rested wholly upon this allegation. The only defense attempted by the evidence and the argument of the counsel was that the whole amount of the interest for the five years had been paid, although not indorsed on the bond. James F. Dickson and William H. Boyer, a subsequent purchaser, answer, and meet the charge of nonpayment of interest, if answered at all, in these words:

"That these answering defendants have in all particulars complied with the condition of said $2,000 bond and mortgage, and charges that the same is not due and owing until December, 1883."

In his testimony Dickson says the interest on this bond was paid for the five years between the making thereof in December, 1878, and the assignment to complainant in March, 1879, by a settlement between himself and Gilling of their accounts, but no indorsement of such payment was made on the bond.

Supposing the answer is sufficiently responsive to the charge in the bill that no interest has been paid; such a defense cannot justly come from the lips of Dickson, who made the assignment. The law imposes silence on him. He cannot be permitted to send the man with whom he deals on such a trail, and when he has gone a long distance at great expense, not only to call a halt but demand a return.

And where stands Mr. Boyer? Is he in a position to claim any benefit from the alleged payment of interest? Under the circumstances, I think not. It does not appear, by the answer or otherwise, that he paid one dollar for the premises. He alleges that he purchased, subject alone to the said bond and mortgage, for $2,000. He does not allege that the interest then due had been paid, nor that he was told it had been paid, nor that he supposed or believed it had been paid, nor that he in any way assumed the payment of the bond or any part of it. I can see nothing in the case that raises the slightest equity between Boyer and the complainant in favor of Boyer.

Besides, the testimony shows most satisfactorily that the bond and mortgage created no legal liability in equity as between Gilling and Dickson. It was a scheme devised to aid Gilling, and was without any other consideration than such aid. And I am very clear in the conviction that the alleged credit of five years' interest on the $2,000 (being $600), on settlement of their accounts, almost immediately after the mortgage was executed, had no other consideration than friendship, or some prospective advantage to Gilling as betweeen himself and his creditors in case it became convenient to interpose it for that purpose; and that neither party relied upon the bond and mortgage as an evidence of liability as between themselves, nor upon the alleged credit of interest as a discharge in their mutual accounts; but if I should be mistaken in this last, it would be highly inequitable to allow their negligence or indifference to be pleaded when others have been misled thereby.

There is no fact or circumstance in the case which calls for an application of the rule of law that an assignee of a mortgage takes it subject to all equities between the prior parties thereto, insisted upon by the counsel of defendants.

I shall advise a decree for the complainant, with costs.

Jennie E. NEILSON, Admrx. of John Neilson, Deceased,

v.

Ira D. WILLIAMS and Wife.

1. One of two sureties of a guardian of an infant who has paid a judgment in the orphans' court against his principal, fixing the amount due from him as guardian, may file a **bill to compel his cosurety to pay** one half of such amount and to make disclosures respecting the conveyance of his property, **without first obtaining a judgment at law against his cosurety.**
2. A **promise by one to his intended wife** before marriage: that all he had or might have was to be hers, is **not sufficient consideration for a deed** made by him to her fourteen years after marriage and after he had failed.

(Filed —— — 1886.)

BILL in equity to enforce contribution by a cosurety on a guardian's bond. *Decree for complainant.*

The case is stated in the opinion.

Mr. **R. S. Clymer,** for complainant.

Mr. **C. G. Garrison,** for defendants.

Bird, *V. C.*, filed the following opinion:

Mathews was appointed a guardian of infants, and John Neilson and Ira D. Williams became his sureties. Mathews became insolvent. The orphans' court, upon an accounting, found that there were in his hands and due to the wards $829.99, which he failed to pay. The complainant's intestate offered to pay his half of the amount so found due to the infants, and there is some proof that Williams, the other bondsman, agreed with Neilson to pay the other half. This, however, is denied by Williams, which, in my judgment, is not decisive of the case.

The bond was prosecuted and judgment recovered thereon against the obligors. Execution was issued, the property of Neilson levied upon, when he paid the whole amount that remained due. Thus it will be observed that Neilson, one of the sureties, discharged the entire obligation by paying the $829.99, the amount which was adjudged to be due from the guardian by the judgment of the orphans' court, together with the interest and costs of the judgment at law.

Neilson's administratrix brings this suit to recover from Williams, his cosurety, the one half of the amount of money which he has so paid, as well the one half which he voluntarily paid after the judgment of the orphans' court against his principal, as the one half of what he was compelled to pay after the judgment at law against him and his cosurety. In order to success in this direction, he found it necessary to compel discovery by the defendants. This he attempted to do by leave of *Mr. Justice* Parker, in the circuit court, under which such discovery was made as to induce her to file this bill. In the bill, she alleges that Williams was possessed of real estate, and that after this liability was incurred and the inability of the guardian to pay had been made certain, he conveyed his lands to his wife for the purpose of preventing the complainant from collecting the amount equitably due from him.

As I understood the counsel for the defendants, three objections are made to any decree against them: first, the complainant has no standing in court; second, the conveyance was not fraudulent, but *bona fide*, and for a valuable consideration; and third, a tender was made for the one half of the judgment at law, including costs and interests, and the cost of these proceedings up to the time of the tender, which was refused. The propositions thus involved we will consider.

Has the complainant a right to institute these proceedings? In other words, Has the court jurisdiction of the case made by the bill? It is urged that the want of jurisdiction arises from the absence of any judgment at law in favor of the complainant against the defendant. This objection, I think, beyond question, must fail so far as concerns the judgment at law on the bond against all the obligors. Surely this court would not require the idle process of establishing again by a judgment in a court of law the obligation which one of these parties is under to the other, since the statute authorizes a court at law to proceed without any such additional adjudication; and the force of this, I think, is conceded in the fact that a tender was made. I conclude that the court has jurisdiction of the case made by the bill.

Other things being established, Can this court, in this proceeding, compel the defendants to make disclosure of their transactions which are alleged to be fraudulent, in order to secure the payment of the amount which was voluntarily paid by Neilson after the judgment of the orphans' court finding the amount due, without also obtaining a judgment of a court of law determining the amount due as between the sureties? It seems to me this should be answered in the affirmative. A judgment is not always necessary. It was so determined by the chancellor in *Haston* v. *Castner*, 2 Stew. Eq. 536, and by the court of errors and appeals in the same case, 4 Stew. Eq. 697.

In that case the complainants had filed their claims under the statute, with an executor. The estate in the hands of the executor proving insufficient to discharge all the debts for which the testator was liable in his lifetime, the complainants filed their bill to set aside certain conveyances which had been made by the testator in his lifetime to two of his children. No judgment was obtained upon the claims presented by the creditors, who were afterwards complainants in this court. Under the circumstances it was held that a judgment at law was not necessary. Without more, I think the spirit of the rule thus established ought to control this case.

But we have a case decided by the chancellor, and reviewed by the court of errors and appeals, more nearly like the one in hand. I refer to the case of *Shurts* v. *Howell*, 3 Stew. Eq. 418, and 4 Stew. Eq. 796.

That case came before the chancellor after the case of *Haston* v. *Castner*, and was reviewed by the court of errors and appeals at the same time at which they disposed of *Haston* v. *Castner*. Shurts was the executor of Aller, and Aller and Howell were sureties to Wilcox on his bond as guardian. Wilcox became insolvent. The orphans' court found and adjudged that he had in his hands $3,285. Aller's administrator paid the whole amount with interest. Howell refused to contribute in his lifetime, and after his death his administrator refused to contribute. Howell in his lifetime had made an assignment of a bond and mortgage to his daughter. Aller's administrator filed a bill asking the court to declare that assignment fraudulent. The assignee of the mortgage and the administrator were made parties. There was a demurrer to the bill; one of the points urged was the absence of a judgment at law. The demurrer was overruled. In that case the proceedings show that the orphans' court had fixed, by its judgment, the extent of the liability of the guardian. The court of errors adopted the views of the chancellor. It seems to me that the rule there laid down is reasonable and just, and that any other would impose unnecessary hardships, risks and delays.

Looking at the case in hand, the judgment of the orphans' court fixed the amount due from the guardian. The judgment was not appealed from; and so long as it is not attacked for fraud or mistake I think it should be accepted as conclusive upon the sureties of the guardian. Hence, a judgment at law was unnecessary before the complainant filed this bill, in order to compel the cosurety to pay one half of the amount which the complainant's decedent had voluntarily paid, and to make disclosures respecting the conveyance of his property.

Look now at the question respecting the consideration: it is said that, prior to the marriage of Williams and his wife, he promised that all he had, or that all he had or might have, was to be hers. I think this must go for naught. The marriage took place in 1866, but there was no conveyance until after the emergency created by the failure of Mathews in 1880. To my mind this removes all doubt. But besides, Mrs. Williams says she did not know but that she would have married Mr. Williams anyhow. To accept of such an allegation, sustained only by the verbal testimony of the parties themselves, after the lapse of eighteen years, I think would be most dangerous, and wholly contrary to the policy of the law.

If I am correct in the foregoing views, the question of tender need not be considered; for, manifestly, the whole amount due was not tendered.

I think it is my plain duty to advise a decree for the complainant, in accordance with the prayer of her bill, with costs.

Charles F. FITCH
v.
Elizabeth M. T. BROWER *et al.*

Where a **maker of a note** desires to pay the amount due on it to the person entitled to receive it, but one person claims the amount of it by virtue of a transfer to him before maturity and another claims it by virtue of an attachment and claims that the former is not a *bona fide* holder, *held*, that such maker is **entitled to a bill of interpleader, to settle** the question **who is entitled to receive** such **payment**.

(Filed —— — 1886.)

MOTION to dissolve injunction and dismiss bill of interpleader. *Denied.*

The case is stated in the opinion.

Mr. **W. Y. Johnson,** for the motion.

Mr. **C. F. Fitch,** *contra.*

Bird, *V. C.*, filed the following opinion:

This bill is an interpleader. The question is: At the time of filing the bill, were there such claims upon the complainant, as a stake holder, as justified him in coming into this court for aid?

The complainant resides in New Jersey, the defendant Brower in New York, and the defendant The Express Publishing Company in Pennsylvania. The complainant purchased a printing press of the Campbell Printing Press & Manufacturing Company, of New York, and gave his note therefor, dated October 9, 1882, payable in three months, for $1,050.10 at the Philipsburg National Bank.

On October 19, 1882, the said The Express Publishing Company issued an attachment out of the court in Pennsylvania, against the said Campbell Printing Press Company, and had it served on the complainant, who happened at the time to be within the jurisdiction of that court.

By virtue of this attachment the plaintiff therein claimed to have seized upon and attached, under the law, all the right, title and interest of the said The Campbell Printing Press Company in or to the said note, it being served in due form upon this complainant. This suit in attachment is still pending and undetermined. The defendant therein, the Campbell Printing Press Company, refuses to make any defense to said action in attachment.

But the same note was transferred to Brower, and, as far as it appears, for a valuable consideration, and before maturity. This fact was communicated to the complainant, January 10, 1883, after which he was informed that the said note was transferred on December 9, 1882, about six weeks after the attachment had been issued and served.

The complainant offered to pay Brower the amount due upon the note, provided she would indemnify him against the attachment; but on this proposition they did not finally agree.

The bill alleges that complainant immediately informed the said The Campbell Printing Press Company of the service of said writ of attachment.

The complainant says he is desirous of paying the amount due on the note to the person entitled to receive it. But he says that while the defendant Brower claims the amount due on said note by virtue of the transfer before its maturity, the said The Express Publishing Company also claims it by virtue of said attachment, and *insists* that, although she (Brower) took the note before maturity, she is not a *bona fide* holder.

Brower has commenced suit in New Jersey against Fitch, the complainant, for the recovery of the amount due on the note.

These are the complications which lead to the filing of this bill. Do they make a case? The parties defendant have answered. After the answers were in, it was agreed between counsel that a motion should be made, as on demurrer, to dismiss the bill for want of equity. Counsel were heard.

I thought then that this case came so nearly within *Briant* v. *Reed*, 1 McCart. 271, that I ought to follow it. I thought a cautious man would not feel safe in paying either claimant.

But counsel for Brower came in and urged a rehearing. It was thought the court had misunderstood the force of the argument on one important point, viz.: that the note which represented the rights or interests which were attached was *payable at Phillipsburgh, New Jersey*, and not in Pennsylvania, where the attachment issued, and that these things being so, the attachment did not and could not bind Fitch, in any sense, and that he was not and could not, by any legal procedure, be placed under any obligations to the plaintiff in attachment.

Then it appears that, on the first discussion, two points were urged: the one above stated, which it is thought the court did not fully comprehend, and also that a note duly transferred to a *bona fide* holder before maturity is not the subject of an attachment. The latter proposition is not disputed, so far as I am aware. It seems to be very reasonable, and in strict accord with the law governing commercial paper. But I thought it did not devolve on the complainant to show that Brower was such *bona fide* holder for value. I thought the law did not impose such a burden on him. I thought that he might justly ask this court to help him in this regard, and that this court would be justified in compelling both claimants to stay their hands as against Fitch, until they should settle that question, as to the *bona fides* of the transfer, between themselves.

I thought then that there was difficulty enough on the other point to warrant me in retaining the bill; and I still think the bill should stand. My mind does not rest so contentedly on this branch of the case as on the other; but I have been and am impressed with the view that these attachment proceedings, having been served on the defendant, create such a *claim* as also to bring the case within the learned opinion in *Briant* v. *Reed.*

It is not what I might or what any other judge might decide, under the facts as given, as to the very right of the parties in the law, *but whether there is such a claim made* as ought to impel this court to say, to the parties claiming: "You must settle this between yourselves." I might believe that the law is with Brower, and that it would be safe for me to dismiss this bill and thereby send the complainant to contest the demand of the plaintiff in the attachment in another State; but then, since this point has not been decided in either New Jersey or in Pennsylvania, I might possibly be in error, which again, as I think, brings the case within *Briant* v. *Reed.*

The counsel of Brower says that Fitch gave his note, which Brower holds, and that the note is made payable at Phillipsburgh, a place outside of the jurisdiction in which the attachment issued, and that it is necessarily beyond the power of the court in a foreign jurisdiction to change the terms of the contract, and to compel Fitch to pay anywhere else than at Phillipsburgh. The attachment proceedings, it is urged, are a nullity as to the amount due upon the note, and so absolutely so as to dissipate the thought that the plaintiff therein makes any claim whatever against Fitch worthy of the attention of this court.

In *Tingley* v. *Bateman*, 10 Mass. 343, in *Nye* v. *Liscombe*, 21 Pick. 263, and in other cases in Massachusetts and New Hampshire and Vermont, under their statutes, the question raised has been decided in accordance with the view of Brower's counsel.

But it has not been settled, as I understand the law, in Pennsylvania, in such a way as to leave no room for doubt. I admit the reasonableness of the rule. I think it ought to be adopted in general terms. I think the views expressed as to commercial paper, in Drake on Attachments, see chap. 28, § 573, etc., are just; but the labors of that learned editor most conclusively show how wide is the field of discussion generally, and how divergent are the views of the different courts in the Union as to the attachability of commercial paper.

And as to the exact point now pending (the attachability of a note payable, in its very terms, outside of the jurisdiction issuing the writ), the views of the same author are reasonably convincing; see chap. 19, § 47, etc., but, as intimated above, that very important question is not, even in Pennsylvania, beyond the domain of legal controversy. I am not sure that this complainant could resist the attachment in Pennsylvania, on the ground that it was payable in New Jersey by its very terms, notwithstanding, I say, I think it ought so to be. The bill shows that the note was still in the hands of the defendant in attachment at the time the writ issued. It also shows that the said defendant knew of the existence of the attachment, and of its service on this complainant. There are cases which declare that, after such knowledge, the defendant could not assign or transfer the note without fraud. But the bill also declares that the assignee took the note with knowledge.

Now, then, under these complications of facts and allegations (which allegations, on this motion, I must take as facts), and the uncertain or contrary declarations of the Courts of Pennsylvania on the subject of such attachments, ought this court of equity, in New Jersey, to compel one of its citizens to take his chances before a foreign tribunal, and thereby settle these conflicting claims?

In the first place, in *Ludlow* v. *Bingham*, 4 Dall. 47 [4 U. S. bk. 1, L. ed. 736], the court said commercial paper could not be attached before it became due.

But in *Kieffer* v. *Ehler*, 18 Pa. 388, it was determined that such note could be attached in the hands of the maker before maturity, subject to the rights of a *bona fide* holder before such maturity.

In *Childs* v. *Digby*, 24 Pa. 23, 27, the court says that anyone having the possession of goods or effects may surrender them in obedience to a judgment in a foreign attachment, although he may happen to be in a foreign jurisdiction at the time the writ issued.

But this case is criticised in the same court; *Pennsylvania R. R. Co.* v. *Pennock*, 51 Pa. 244, 253; and, I should suppose, would not be followed in that State. But, in the last case referred to, the thing sought to be attached was a chattel, and not a mere credit, as in the case in hand. And the court said that if the thing attached were the proceeds of the goods (a credit), instead of the goods, a different question would be presented.

Noble v. *Thompson Oil Co.* 79 Pa. 354, is very much relied on; but in that case the discussion was more particularly on the precedence to be given to an assignment in Pennsylvania, or to an attachment in New York. Certain general principles are recognized in the case, as they are everywhere. The case does not decide that Fitch would not, in any event, be bound as garnishee, since the obligation which he was under to the defendant in attachment was to be discharged in New Jersey, by its very terms.

It still seems to me that this is a fair case for an interpleader bill; that there is such reasonable doubt arising from this claim as to justify the court in requiring the defendants to settle it, and not to put the complainant to the risk and cost. It is not the mere assertion of the right, without more; but it is a claim through the process of a court which has jurisdiction, by statute, in such cases, generally; and I think the defendants in this suit should proceed to determine whether, in this case, such court has acquired jurisdiction of the thing sought to be attached or not, so as to compel Fitch to pay as garnishee or otherwise. In other words, there is the same sort of claim as controlled *Chancellor* Green in *Briant* v. *Reed*, *supra*.

Sarah C. DICKERSON
v.
William K. BOWERS *et al.*

1. A **deed sent to** the **clerk** to be recorded, **without** the payment of his **fees** and which he "pigeon holed," **is** not, it seems, **"lodged"** with him **for record** within the meaning of the Recording Act.
2. **Notice of** an **unrecorded deed, given to** an attorney or **agent, is** equivalent to **notice to** his **principal.**

(Filed ——— 1886.)

BILL for an injunction to restrain the sale of certain real estate. *Granted.*

The case is stated in the opinion.

Mr. **J. M. Robeson,** for complainant.
Mr. **W. H. Morrow,** for defendants.

Bird, *V. C.*, filed the following opinion:

In 1879 the complainant joined with her husband in conveying the title to certain lands to her father, and the father at once conveyed them back to the complainant. In 1883 the complainant's husband and his brother, as partners, became indebted to the defendants, Greer and Larison, who recovered judgments, issued executions, and levied upon the land included in the above conveyances, as the land of the complainant's husband. They threaten to sell the same. This bill is filed to restrain such sale.

The defendants insist that if there was any such conveyance, the deeds were not recorded, and that they had no notice of them; and that, therefore, the conveyances are no bar.

The complainant says that the same day that the deeds were executed and delivered, she caused them to be mailed to the clerk of common pleas of the county, with a request to record the same, and to inform her of the necessary charges therefor, and also promised to remit the amount of such charges on the receipt of such information. She also says that the defendants had actual notice.

The deeds reached the clerk's office. They were received by him. He neither recorded them nor indorsed them in any manner. He says they were "pigeon holed." He says it was his custom to receive and record all deeds from persons whom he knew to be responsible, whether the fees for recording were paid or not; but if he did not know the party who deposited the deed for record, he would not record it until the fees had been paid, but would "pigeon hole" it.

I am not satisfied that the deeds were "lodged" with the clerk, for record, within the true meaning of the Act; and yet there are very good grounds for holding that they were so lodged, and that the clerk had no right, without more, to put them in a private place. It is the duty of the clerk to record the deeds lodged with him for that purpose; and it is the duty of the grantee to pay him therefor the fees allowed by law. I do not discover by the Act that the clerk can refuse to record until the fees are paid.

The obligation of the respective parties is not fixed in order of time by the law; but it would seem reasonable to require the payment of the fees in the first instance, since the statute imposes a penalty on the clerk for any neglect, and subjects him to a liability for all damages which any party may sustain for the nonperformance of any duty.

But I think the defendants are barred because they had actual or direct notice through their attorney or agent, Mr. Fisher. Mr. Dickerson, Mr. Fisher and others were together, respecting the liabilities and assets of Dickerson & Co.; and Dickerson said to Warren, in the presence of Fisher, that they held the premises in question under lease from his wife; that the place belonged to his wife, and he supposed she would rent it. This was before the judgments were docketed. These statements, thus sworn to by Dickerson, are not questioned in any manner. They are entitled to all the force of an uncontradicted statement by an unimpeached witness.

The answers of the defendants deny all notice in the most positive manner. Although sworn to, this is not enough. The broad rule, giving so much weight to an answer under oath, is not quite universal. I think this case comes within the exception. Where it is the duty of a defendant to know of the existence of a fact, he is charged with knowledge, whether he knows it or not. The court will not allow a defendant to make the defense of ignorance, when it was only necessary for him to open his eyes, that he might see and be informed.

The counsel or attorney of the defendants, Mr. Fisher, was informed, and information to him was knowledge to the defendants. This being apparent to the court, the court seems to be obliged to follow the exception to the general rule. Were it not so, in every case, in order to avoid the effect of notice, the party has only to put forward his agent. In every such case, in order to have all the advantages of an answer under oath, it is only necessary that the principal direct his agent to learn everything, but communicate to his principal nothing, so that he may swear that he is without any notice. The doctrine which should control in such cases is announced in *Smallwood* v. *Lewin*, 2 McCart. 60.

I think the injunction should prevail, and will so advise.

Ephraim P. EMSON
v.
Howard IVINS *et al.*, Exrs. of Thomas W. Ivins, Deceased.

Where a **creditor of a deceased** person brought **a suit in equity for** the recovery of the **amount claimed to be due** him **from** the **executors,** without having filed his claim with them or established it by judgment at law, they having recognized the claim by payments thereon, *held*, that a preliminary **injunction** (issued in the suit **to restrain** the **collection of** an **alleged fraudulent claim from** the **property of** the **deceased**) will **not** be **dissolved** on motion before the final hearing, the question whether the suit can be maintained not being decided.

(Filed —— — 1886.)

MOTION to dissolve an injunction restraining a sheriff from paying over moneys procured on a sale of property under an execution on a judgment alleged to have been confessed in fraud of complainant's rights as a creditor. *Decree for complainant.*

The case is stated in the opinion.

Messrs. **I. W. Carmichael** and **W. H. Vredenburgh,** for complainant.

Messrs. **J. H. Gaskill** and **F. Voorhees,** for defendants.

Bird, *V. C.*, filed the following opinion:

A very interesting question arises in this case. Can the creditor of a deceased person, who has never filed any claim whatever with his executors or administrators, maintain a suit in equity for the recovery of the amount due upon his alleged claim, without first having established such claim by a judgment at law, however much such executors or administrators may have recognized the existence of such claim? It is true that, in this particular case, other questions are involved, but it seems to me they are utterly without vitality unless the former be decided in favor of the complainant.

The complainant had and has a claim of several thousand dollars against the estate of Thomas W. Ivins, deceased. He never filed any claim with the executors. The rule to bar expired long ago and was made absolute. The executors, during the period of limitation fixed by the rule and afterwards, made payments on one or both of these claims. Within the statutory period other claims were presented, all of which the executors have paid. They have filed no account nor obtained any decree of distribution.

The complainant alleges that there is a large amount of assets, real and personal, in the hands of the executors, and that he is entitled to the payment of his claim or a *pro rata* share thereof out of those assets. He also says that the testator gave the residue of his estate, after the payment of his debts, to his wife, Mary A. Ivins, who is also executrix, and alleges that she holds the balance of said assets as executrix, but which, however important it may be ultimately, I shall not now attempt to decide.

The bill further alleges that the said Mary A. Ivins, as devisee, confessed a judgment to James Lippincott, administrator *de bonis non* of George W. Ivins, deceased, for a real debt of over $49,000, on which execution was issued, and by virtue of which execution the sheriff levied upon all the interest of said Mary A. Ivins in the estate of her deceased husband, and sold the personal property, the proceeds of which he now holds.

The allegation is that this is a device to defraud the complainant, and that it is illegal; and he asks an injunction restraining the sheriff from paying those moneys as directed by the writ. A preliminary injunction was allowed. The defendant, Mary A. Ivins, has answered. The above facts are not disputed. The allegation of fraud is. There are other statements in the bill which are denied.

The defendants come in and ask that the injunction be dissolved, insisting that there is no equity in the bill, and that the complainant has relief in the orphans' court or in a court of law. They also insist that if there is any equity in the bill it is fully answered.

I think the injunction should not be dissolved. If the complainant is entitled to his share of these assets under the law, I think they ought not to be swept away beyond his reach by means of this confessed judgment. I cannot believe it was the intention of the Legislature to make the beneficial provisions of the Act to depend upon questions of priority thus obtained. The ninety-fourth section of the Orphans' Court Act (Rev. p. 773) says:

"Any creditor who shall not exhibit his claim to the executor or administrator as aforesaid, within the time limited and prescribed by the said court, shall be forever barred from prosecuting or recovering his said demand, unless the estate shall prove sufficient after all debts exhibited and allowed are fully satisfied, or such creditor shall find some other estate not inventoried or accounted for by the executor or administrator before distribution, in which case such creditor shall receive his ratable proportion out of the same."

I believe that this section embraces the complainant, provided he has taken the necessary steps before filing his bill. I am inclined to believe that he has no standing in court until he has filed his claim in writing, under oath, with the executors; *Haston* v. *Castner*, 4 Stew. Eq. 697; or established his claim by an action at law. This, however, I do not decide. I think it merits fuller consideration than I can now give it; and since the defendants will not be greatly injured, and, if the complainant is right, he, in all probability, would be irreparably, it seems to be my duty to maintain the injunction. The costs of this motion to abide final hearing.

The amendments asked for by the complainant I think should be made without re-engrossing the bill. Copies thereof to be served within ten days upon the solicitor of the defendants.

I will advise a decree in accordance with these views.

Joseph McPHERSON *et al.*

v.

Benjamin F. WALTON *et al.*

1. One who has agreed to take his **pay for erecting buildings,** by **taking one of** them, **may sell** it **before** he has completed their **erection.**
2. Where the person for whom the buildings were to be erected accepted an **order from** the **contractor in favor of material men,** they are entitled to payment of it out of the first money due the contractor.
3. Where a **notice** is given under the Act respecting **mechanics' liens,** by a **material man,** of the amount due and demanded, the amount demanded must be the amount due; if he claims more than is in fact due, it is fatal to the proceeding.
4. Where the material man had **extended** the **time of payment of** his **claim by accepting notes** which at the time of the demand and refusal had not yet matured, his claim will be rejected.

(Filed —— — 1886.)

BILL for distribution of a fund.

The case is stated in the opinion.

Mr. **W. D. Holt,** for complainants.

Mr. **James S. Atkin,** for Mrs. Conner.

Mr. **E. T. Green,** for McPherson & Maharg.

Mr. **G. D. W. Vroom,** for Hughes, Hutchinson & Co.

Messrs. **Howell & Brother,** for Samuel Heath.

Mr. **James Buchanan,** for S. B. Packer.

Mr. **F. C. Lowthorp,** for J. P. Baily.

Mr. **D. Cooper Allinson,** for J. P. McGalliard.

Bird, *V. C.*, filed the following opinion:

In this case I find that the consideration which the complainants agreed to pay for the houses to be built by the defendant Walton, independent of extras, was....	$20,840 00
I find that Walton did extra work to the value of	1,073 48
	$21,913 48

I find that the complainants paid Walton, cash	$12,870 60	
And his due bill	2,040 00	
To which is to be added the cost of completing the buildings after his failure	3,458 01	
		18,368 61
Showing a balance of		$3,544 87

This would be the cash due to Walton on the contract, had not the contract made provision that $6,000 of the consideration money should be paid in houses. The contract provides that on final settlement Walton shall take two of the houses on Wall Street, at $6,000, in payment. The title to these houses is still in the complainants, and the amount due Walton is not equivalent to the value put upon the houses in the agreement, by $2,455.13.

Because of Walton's failure to complete his contract, a number of material men, having claims which Walton refused to pay, presented their claims to the complainants and demanded payment. The claims greatly exceed the balance due, $3,544.87. But this balance is in the two houses and lots to be conveyed to Walton by the contract. And the case is complicated by the fact that Walton agreed with one J. W. McKelvy to convey one of the Walton houses to Mrs. Conner for $2,500. I find that the complainants had knowledge of this agreement, and in the law assented to the transfer. I do not mean to say they assented to the price.

Mrs. Conner was put into possession. Walton had a right to make sale of his interest in these two houses. I know of no principle embodied in the mechanics' lien law, nor in any other, that offers a bar to such a transaction. Nor was he obliged to wait until the contract between him and complainants was complete, and a final settlement concluded. The complainants could not interfere, nor could creditors of Walton. The rights that may spring up between laborers and material men, on the one hand, and the complainants on the other, under such a contract, filed, as this was, under the statute, is perhaps a more difficult question. It is not so clear to my mind that the complainants were not bound to retain the $6,000 until the final settlement, or at least until a reasonable time after the contract was completed. However, it may be claimed that it could make no difference in the result; which is perhaps the truth.

On November 1, 1879, the defendant Walton gave an order on the complainants for $1,000 to McPherson & Maharg, material men. McPherson & Maharg now claim that they are entitled to be first paid the amount of this order out of the funds still due on this contract to Walton.

It is claimed by counsel that this was an assignment of $1,000 of these moneys to McPherson & Maharg. This view is resisted. It is said that the order was general, having no application to any certain funds, and that at the time of its acceptance, if it was accepted, there was no such amount due on this particular contract. As to the first point, Mr. McPherson, the defendant, says:

"That it was distinctly understood at that time that this order was not in payment for any lumber that went on Wall Street; he still owed us that amount and $1,164 on our books over that amount; that he gave me the order for, and he owed me $1,250 on notes that had been furnished within four months from the date that I made this thing, making $3,400; the order was not for lumber furnished for the Wall Street or Clinton Street houses; it was a general order."

With such a clear and emphatic statement as this from Mr. McPherson, it is quite apparent that the other material men are justified in resisting the payment of this $1,000 order out of the funds in hand.

As to the next point, the acceptance; he took the order at once to one of the complainants, Mr. Joseph McPherson, who said "there was no money coming to Mr. Walton at that time," and "out of the first money due Mr. Walton he would pay this order."

There was no formal acceptance, but the complainant, Mr. Joseph McPherson, took possession of the order, and held it until the day of hearing, over three years. When asked whether or not Joseph paid him the cost, he answered:

"No, sir; there was no money coming to Mr. Walton; he gave me, after some days, a note 'for $1,000.' He gave me this note for $1,000, which I supposed was for the order; went to the office and credited Benjamin F. Walton with $1,000 on our books; but my brother's understanding of the matter was, as I afterwards learned, that he loaned me that $1,000 to assist me, as I needed money."

I find from these facts that the complainants accepted that order, and that the defendants McPherson & Maharg were entitled to the payment thereof out of the first money due to Walton on that contract. That order has not been paid; I shall advise a decree directing its payment out of the funds in the hands of the complainants due to Walton on the contract named.

Besides the amount of this order, other large sums of money were due McPherson & Maharg. On November 3, 1879, three days after they obtained the order, they gave notice to the complainants that they should look to them for the payment of $1,000, for materials furnished to Walton in the construction of the houses above referred to. This notice was given under the third section of the Act respecting mechanics' liens.

The other material men resist this claim also. They insist that every such demand is founded on a request of the debtor to pay, and of a refusal by him of a sum of money actually due, and that in this case there was not $1,000 due, if anything. The views expressed by the Chief Justice in *Reeve* v. *Elmendorf*, 9 Vroom, 125, 133, very emphatically sustain this view of the statute. His language is:

"A privilege to make exorbitant and ill founded claims, and on a refusal of payment to intercept such sums and hold them in the hands of the owner an indefinite time, would be simply an instrument of vexation and oppression. The statute says the workman or material man shall give notice of the contractor's refusal to make payment, and of the amount due to him or them and so demanded; and it proceeds to authorize the owner thereupon to retain the amount so due and claimed. Obviously, then, the amount demanded must be the amount due. As the amount claimed is to be retained by the owner, it would be a sheer injustice to allow more to be claimed than is justly due. If the workman or material man claims therefrom more than has in fact been earned by him, such exaggeration is, I think, fatal to his right to use the statutory procedure against the owner."

These plain, sensible and business like rules settle this branch of the case against McPherson & Maharg. They had taken the order November 1, for $1,000; and although the defendant McPherson says it was on the general account, yet the order itself expressly says it was to be charged against Walton's account respecting these houses, and it nowhere appears that the complainants had any other account with Walton. I say they had procured that order November 1, when the defendant McPherson admits there was nothing due to Walton from complainants, and on the third of November he makes this demand of $1,000, when the order had not yet been paid nor formally accepted.

Besides this, the statement of account, showing all the materials furnished to their particular houses, offered in evidence, presents, in the aggregate, only $1,144.22, without crediting the order, leaving, over and above the order, only $144.22, including therein two items furnished November 5, and also including several items which may not belong in that list at all. Plainly, then, since the order is accounted a valid claim, it is my duty to advise the rejection of this one.

We next come to the claim of Hughes, Hutchinson & Co., for $1,500, which was made of the complainants January 2, 1880, at 12 o'clock and forty minutes. This claim is resisted by other material men, not because Walton did not justly owe them for materials furnished on this contract to that amount, but because that amount was not due at the time of the demand and notice. It is said that he truly owed them, but that the time for payment had been extended by Hughes, Hutchinson & Co., by accepting notes which had not yet matured. And *Dey* v. *Anderson*, 10 Vroom, 199, is relied on.

The value of the goods furnished was $1,630.52, from May 29, 1879, to January 2, 1880. Including this, they had an account against Walton, at this time, amounting to $5,811, for $3,762 of which they had taken and held Walton's notes. These notes were given from time to time on the general account, and, it is admitted, included large portions of the items of material furnished for these houses. It is also admitted that these notes all matured after the demand and refusal. Under the decisions in our own courts, then, these facts would seem to exclude all necessity for further inquiry, and to oblige me to advise against the claim of Messrs. Hughes, Hutchinson & Co.

J. P. McGalliard & Co. filed their claim with complainants January 2, 1880, and notified them to retain the amount out of any moneys due Walton. The claim was for $1,300. This amount was not only not due to him from Walton on account of these houses, but the whole claim was embraced in a note or notes which had not yet matured. Hence, further consideration of this demand would prove unavailing.

I shall advise a decree in favor of the payment to Samuel Heath of the sum of $123.73, with interest from January 2, 1880, and of $326.82, with interest from January 13, 1880, next after the payment of the order for $1,000 given to McPherson & Maharg.

The defendant Samuel B. Packer gave three separate notices to the complainants and directed them to retain the amounts named in each; one of them was for $104.15, one for $450, and one for $368.65. The first two were served January 3, 1880, and the last January 6. It is unfortunate for the first one that it contains items amounting to $69.74 for materials for flagging the sidewalks in front of the houses named, which, I think, are not proper for such a claim. This obliges me to reject the first claim, under *Reeve* v. *Elmendorf*, *supra*.

The same principle of construction condemns the third claim. The noxious items are small, indeed; one being "Two flaggers ¾ day at $2.50—$1.80," and one "One laborer ½ day at $1.50—.75," but the statute is not to be construed by numbers or quantities, but upon principle.

Upon this intelligent view, Walton is as well justified in refusing a bill that has an excess of $2.55 as of $255. And in such a case, on no conceivable grounds could the complainants justify a payment of any part of the claim under the statute.

The claim for $450 stands without any such weakness. I shall advise its payment.

Fletcher Coleman presented a claim for $105.20, and having been refused payment by Walton, he gave the complainants notice to retain that amount. I will advise the payment of that claim. His claim matured or was made complete, under the statute, February 24, 1880.

Josiah P. Baily had an account amounting to $856.43, against Walton, for materials furnished him to go into these houses. He demanded payment of Walton, April 7, 1880, and he refused to pay; of this refusal he at once gave notice to complainants, and requested them to retain that sum. I think this claim is free from objection, and advise its payment with interest.

I will advise a decree directing the sale of the two Wall Street houses by a master of this court, unless Mrs. Conner pay into court $500 for the lot purchased by her of Walton, within thirty days from a service of a copy of the decree which shall be made in this case upon her, and unless Benjamin F. Walton pay into this court the sum of $3,000 within thirty days from the service of a copy of the said decree. Both Mrs. Conner and Walton will be required to pay interest on the said sum, respectively, from the first day of April, 1880.

Upon the payment of these moneys, the complainants will be required to execute a deed or deeds in accordance with the terms of their contract. If Walton or his assigns fail to comply with this provision, then, upon a sale, this court will direct the execution of proper conveyances.

I will advise that the claims be paid in the order in which I have considered them. Those claimants who have prevailed are entitled to costs out of the fund; those who have not, must pay their own costs

MARYLAND.
COURT OF APPEALS.

John C. LAMB, *Appt.*,
v.
Henry TAYLOR, Sr.

1. In an **action by a father** to recover **for** the **loss of services of** his **daughter,** caused by her seduction, slight evidence is sufficient to establish the relation of master and servant.
2. In such a case, if the **daughter** is living with her father, rendering services, the fact that she is **over twenty-one** years of age is immaterial.
3. It is immaterial whether the **services rendered by** the **daughter** were paid for or not, or whether any special contract existed.
4. It is no objection to the father's right of action that the **daughter** was **employed** by a third party **out of** her **father's house** during the day, **and** that she **paid** for her **board** at her father's.
5. **It is too late, after prayers** have been **granted** by the court, **to raise** the **objection** for the first time **that evidence** in the case, upon which a prayer was based, **was illegal.**

(Decided March 16, 1887.)

APPEAL from a judgment of the Baltimore City Court, entered upon a verdict for plaintiff of $10,000 damages in an action for seduction. *Affirmed.*

Argued before Alvey, *Ch. J.*, Miller, Robinson, Irving, Stone, Yellott and Bryan, *JJ.*

The case is stated in the opinion.

The rulings of the court below complained of in the first bill of exceptions were the refusal of defendant's first prayer and the granting of plaintiff's first prayer.

Defendant's first prayer was as follows:

"That the plaintiff has offered no evidence legally sufficient, under the pleadings in this case, to entitle him to recover; and their verdict must, therefore, be for the defendant."

Plaintiff's first prayer was as follows:

"If the jury find from the evidence that Rachel Taylor is the daughter of the plaintiff, and that she has always lived with him and performed service for him as his servant in and about his household, and 'slight service' is sufficient to sustain this action; and further find that while she so lived with her father and performed service for him as aforesaid, she was seduced by the defendant and gave birth to a child begotten by him, and the plaintiff lost her service by reason of the confinement and lying in of said Rachel, and was subjected to the payment of costs and charges on account thereof, then they ought to find for the plaintiff, notwithstanding they may believe that the said Rachel was, at the time of said seduction, over twenty-one years of age."

The rulings complained of in the second bill of exceptions were the refusal of defendant's second prayer and the granting of plaintiff's third prayer.

Defendant's second prayer was as follows:

"If the jury find for the plaintiff, they are restricted in their estimation of damages to such loss of services as they find the plaintiff sustained by reason of the seduction of the plaintiff's daughter by the defendant."

Plaintiff's third prayer was as follows:

"If the jury find the facts stated in plaintiff's first prayer, it is competent for them to find such damage for the plaintiff as they may deem right and proper under all the evidence in the cause."

Mr. **Benjamin Kurtz,** for appellant:

The daughter was over twenty-one years of age at the time of the alleged seduction, and was also under a contract of employment with another from whom she received wages.

The alleged services were rendered to the mother; and although it may be contended that they inured to the benefit of the father, they were entirely voluntary and gratuitous on the part of the daughter, and the natural and usual outcome of her filial relation. There was no legal right in the father, based upon support furnished the daughter or any other consideration, which entitled him to command her services. On the contrary, the daughter seemed to be supporting the father. She was not, therefore, his servant, *de facto;* and he cannot maintain this action.

Mercer v. *Walmsley*, 5 Harr. & J. 27; *Keller* v. *Donnelly*, 5 Md. 216, 218; *Greenwood* v. *Greenwood*, 28 Md. 381; 2 Greenl. Ev. §§ 572, 573; 2 Selw. *N. P.* 1103, 1104, 10th ed.; *Maunder* v. *Venn*, 1 Moody & M. 623; *Nickleson* v. *Stryker*, 10 Johns. 115; *Martin* v. *Payne*, 9 Johns. 387; *Bartley* v. *Richtmyer*, 4 N. Y. 45; Bigelow Torts, p. 291.

Drop from the record in this appeal that Rachel A. Taylor was the plaintiff's daughter, and consider her only as a factory girl boarding in the house in which the plaintiff lived, and rendering his wife the voluntary services referred to, and who would then contend that this action could be maintained?

Mercer v. *Walmsley*, 5 Harr. & J. 33, 34; *Postlethwaite* v. *Parks*, 3 Burr. 1878; *Satterwaite* v. *Dewhurst*, 4 Doug. 315; *McDaniel* v. *Edwards*, 7 Ired. 412;, *Sutton* v. *Huffman*, 2 Vroom (N. J.), 58, 62.

Plaintiff's third prayer was misleading. It allowed the jury to take into consideration the probable expense of supporting the illegitimate child, and to award damages therefor to the plaintiff, which they are not entitled to do.

1 Sedg. Dam. p. 146, note a.; 2 Id. p. 516; *Hitchman* v. *Whitney*, 9 Hun (N. Y.), 512; *Sargent* v. ———, 5 Cow. 106.

Also to award damages for the breach of promise of marriage, for which the daughter had her separate right of action. This evidence, although admitted without objection, it was the duty of the court, *ex mero motu*, to exclude from the consideration of the jury in awarding the plaintiff damages.

2 Add. Torts, chap. 19, pp. 1096, 1097; 2 Sedg. Dam. 516, marg. p. 544; *Sauer* v. *Schulenberg*, 33 Md. 288; *Dodd* v. *Norris*, 3 Camp. 519; *Elliott* v. *Nicklin*, 5 Price, 641; *Tullidge* v. *Wade*, 3 Wils. 18; *Gillet* v. *Mead*, 7 Wend. 193; *Foster* v. *Scoffield*, 1 Johns. 296; *Brownell* v. *McEwen*, 5 Denio, 367; *Whitney* v. *Elmer*, 60 Barb. 250.

The broadest rule of damages yet suggested, in actions of this kind, allows the jury to consider evidence outside of the loss of services and expenses for medical treatment, etc., only to compensate the plaintiff for the injury done to his feelings as parent, etc.

3 Suth. Dam. p. 739; *Phelin* v. *Kenderdine*, 20 Pa. 361.

Mr. **Alex. H. Hobbs**, for appellee:

As to the sufficiency of the service, and that slightest evidence will suffice to prove the relation of master and servant, see *Greenwood* v. *Greenwood*, 28 Md. 371; *Keller* v. *Donnelly*, 5 Md. 211, 218; *Mercer* v. *Walmsley*, 5 Harr. & J. 27, 33; *White* v. *Chappell*, 13 Gratt. 573, 574; and 32 N. Y. 232, 233.

Reasonable expectation of services or pecuniary aid is sufficient.

B. & O. R. R. Co. v. *Mahone*, 63 Md. 145–147; *Dalton* v. *South Eastern R. Co.* 93 E. C. L. 296.

A condition or relation once established is presumed to continue, in the absence of testimony to the contrary.

1 Greenl. Ev. §§ 41, 42 and 48; 4 Gill, 394; 7 Gill & J. 386; Wood, Pr. Ev. pp. 180–182.

As to exemplary damage, see 5 Barb. 665, 666; 3 Suth. Dam. pp. 735, 737, 739, 741; 2 Greenl. Ev. § 579; 32 N. Y. 236–238.

Stone, *J.*, delivered the opinion of the court:

This was an action brought by the plaintiff, Taylor, against the defendant, Lamb, for the seduction of his daughter Rachel. The declaration is in the usual form, alleging loss of service, etc.

The evidence shows that the daughter was over twenty-one years of age; that she was living and always had lived with her father and mother, but from the age of fourteen had been working during the day in the cotton mills at Woodbury, returning to the house of her father at night; that she received her own wages, and out of them clothed herself and paid her board to her mother, and sometimes assisted her mother in paying her rent; that the family consisted of the plaintiff, his wife and two daughters; that this daughter gave birth to a child at home, and was kept there about two months, and the doctor who attended her in her confinement had charged the bill to the plaintiff, which he had not paid.

It was further proved by the daughter that she was seduced at home and that when not working in the mill her father had no control over her and that whatever services she rendered were entirely voluntary. The evidence relating to the service is as follows:

The plaintiff says "That the said Rachel, after returning from the mill in the evening, would assist her mother in the work about the house, and when her mother was taken sick she made up her bed for her."

The daughter herself says that in the morning before going to work at the mill, and in the evening after her returning she would assist her mother in her work about the house, and when her mother was taken sick she made up her bed for her; this is the evidence as to the services of the daughter.

It is well said by a learned author (Sutherland on Damages) that slight evidence is sufficient to establish the relation of master and servant, and that the allegation and proof on that point is almost an unmeaning formula, an obeisance to a shadow of the past, to reach the actual grievance.

So in the case of *Mercer* v. *Walmsley*, 5 Harr. & J. 27, the court said: "Any slight service will be sufficient to raise the inference of fact that she was his servant."

So in *Keller* v. *Donnelly*, 5 Md. 218, the court said: "The slightest evidence will suffice to prove the relation of master and servant."

The evidence of the services rendered so as to establish the merely technical relation of master and servant, is certainly in this case sufficient. According to her testimony she daily did some of the ordinary woman's work about the house. There are many cases to be found where the action has been sustained where the evidence of the service was much less than we find in this record.

Nor does it matter that the daughter was over twenty-one years of age. If the daughter is living with her father, rendering services, that connection is sufficient although she is over twenty-one years. *Mercer* v. *Walmsley*, 5 Harr. & J. 27.

It has been settled by this case and many others both in England and this country, that a father may maintain an action for the seduction of an adult daughter, provided she is living with him and rendering him any service however slight. This law we do not understand to be questioned; but it is insisted that these services must not be voluntary, and that the fact that the daughter was in service elsewhere will defeat the action.

But the services of an adult daughter to the father must be voluntary, as he has no legal right to require them after her majority.

It is immaterial whether the services so rendered by the child are paid for or not, or whether any special contract existed. *Lipe* v. *Eisenlerd*, 32 N. Y. 229; *Badgley* v. *Decker*, 44 Barb. 577.

The other question argued by the appellant, that because the daughter in this case was engaged in the cotton mills, and paid her board at home, the plaintiff could not recover, is not tenable upon authority.

It was said in *Mercer* v. *Walmsley*, above quoted, that where the daughter is over twenty-one years and living with her father, any slight act of service is sufficient to establish the relation of master and servant. In the common acceptation of the term, the place where the daughter boards and lodges is the place where she is said to live. She may work out by the day, but where she eats and sleeps is her home, and there she lives, more especially when that place is her father's house which has always furnished her with shelter. But ample authority is not wanting on that point.

The case of *Rist* v. *Faup*, 4 Best & S. 409, was this: The daughter lived in her father's family, and was always at home from 6 o'clock in the evening until 7 o'clock in the morning, and while there assisted in the house work. That from 7 o'clock in the morning to 6 in the evening she was in the service of the defendant as a laborer on his farm. Held by the court, unanimously, that there was sufficient evidence to go to the jury.

The case of *Badgley* v. *Decker*, 44 Barb. 577, was this: The mother kept a boarding house, and the daughter, who was over twenty-one years of age, kept a milliner's shop in her own name, but lived with her mother and helped her to do the work about the house; and it was held that the mother could recover.

So in the case of *Villepigue* v. *Shular*, 3 Strobh. (S. C.) Law, 462, the daughter, over twenty-one, owned the house and furniture in which she and her mother lived, but she performed services for the mother. Held, that the mother was entitled to recover.

In this last case the court said: "That the daughter was owner of the establishment may serve to show her merit and her mother's destitution, but did not render the injury more tolerable to the mother."

So in the case before us the fact that the daughter paid her board and sometimes aided in paying the rent shows that she was rendering a service to the family more important and commendable than the mere formal averment of the loss of service required in the declaration.

From the cases above cited we are of opinion that the court below committed no error in the rulings on the first bill of exceptions.

The second exception contains a prayer of the defendant which was refused, and a prayer of the plaintiff which was granted. We do not understand the appellant to make any serious contest about his second prayer which the court properly refused; but he insists that the prayer of the plaintiff contained in that exception should not have been granted. This prayer of the plaintiff, so granted, instructed the jury that it was competent for them to find such damage for the plaintiff as they may deem right and proper under all the evidence in the cause, provided they found the facts as stated in the plaintiff's first prayer.

The reason assigned why this prayer should not have been granted is that the jury might, under it, have taken into consideration the expense of supporting the child, or damage for the breach of a promise to marry, as something was said in the evidence about the defendant having been required to give bond for the support of the child, and a breach of promise to marry was proved by the plaintiff.

If, in a case of this sort, only legal testimony is before the jury, the instruction is clearly correct. But a prayer cannot properly be made to perform the office of an objection to illegal testimony. If any of the testimony offered by the plaintiff was not legal testimony in the cause, it was the duty of the defendant to object to its admissibility at the time it was offered. When the objection is to the evidence, if it is known or apparent, it must be taken before and not after it has gone to the jury. If unaware of the objection to the admissibility of such evidence at the time of its offer, he must raise his objection within a reasonable time thereafter. It is too late after the prayers have been granted by the court based upon the evidence, or the argument before the jury commenced. *Dent* v. *Hancock*, 5 Gill, 120; *Davis* v. *Patton*, 19 Md. 120.

No such objection having been made in the court below, this court, even if it was to concede that any of the evidence was inadmissible (which we by no means do) could not remedy the error. It was very ingeniously argued by the counsel for the appellant that, although the court could not now decide the question of admissibility, the court had the right to examine and see if it, or some of it, might not have improperly affected the verdict.

But this is not so. If the evidence is in the case, it must be considered and allowed its full force. *Gibbbs* v. *Gale*, 7 Md. 76.

Perceiving no error in the ruling of the court below on the second exception, *the judgment must be affirmed*

BALTIMORE & OHIO R. R. CO., *Appt.*,
v.
James A. GOULD, Trustee.

The **owner of a tract of land,** on a plat of which a street called Henry Street was designated, but not then opened or used as a street, **conveyed a portion** of the land **by a deed** containing the following description: "Beginning at the corner formed by the intersection of the north side of Winder Street and the east side of Johnson Street, and running thence easterly binding on the north side of Winder Street 379 feet, more or less, to the corner formed by the intersection of Winder and Henry Streets; thence northerly **binding on the west side of Henry Street** 320 feet, more or less, to the corner formed by the intersection of Henry Street and Wells Street, as now laid out and widened; thence westerly binding on the south side of Wells Street * * * containing two and one half acres, more or less." **Thereafter Henry Street was closed** by the public authorities with the acquiescence of the then holder of the abutting lot conveyed by said deed. *Held*, in an action of ejectment by the original grantor, that said **deed did not convey** the **fee in** the **road bed** of Henry Street, **and that,** on its ceasing to be used as a street, the **grantor was entitled to recover possession** of the road bed to the center in front of said abutting lot, from the holder of said lot.

(Decided March 16, 1887.)

APPEAL from a judgment of the Baltimore City Court, in favor of plaintiff in ejectment. *Affirmed.*

Argued before Alvey, *Ch. J.*, Miller, Bryan, Robinson, Stone and Irving, *JJ.*

In addition to the facts stated in the opinion, it appeared that by certain mesne conveyances the leasehold interest in the land conveyed to Preston, as stated in the opinion, became the property of the defendant in this action prior to 1874, and the defendant has ever since held possession thereof.

Messrs. **John K. Cowen** and **Hugh L. Bond, Jr.,** for appellant:

At common law the title to the bed of a highway or fresh water stream is *prima facie* presumed to be in the owners of the adjacent land.

Salisbury v. *Great Northern R. Co.* 5 C. B. N. S. 174; *Simpson* v. *Dendy*, 8 C. B. N. S. 433; *Berridge* v. *Ward*, 10 C. B. N. S. 400; *Micklethwait* v. *Newlay Bridge Co.* 55 L. T. 336.

The title to the bed of a fresh water stream is, in the language of Sir Matthew Hale, in the owners of the land on either side, "of common right."

*Ex parte Jennings**, 6 Cow. 518, 537, note *a.*

So when land adjoining a stream or highway is conveyed, the presumption of law is that the conveyance is intended to carry the bed of the adjoining highway or stream to the center, unless there be something in the deed or the circumstances to show a clear intention to exclude the highway or stream.

3 Kent, Com. 433; *Berridge* v. *Ward*, 10 C. B. N. S. 400.

If a lot adjoining a highway be described by reference to a plat, the moiety of the highway will pass, although the lines of the lot as shown on the plat include no part of the highway.

Banks v. *Ogden*, 2 Wall. 57 (69 U. S. bk. 17, L. ed. 818); *Cox* v. *Louisville etc. R. R. Co.* 48 Ind. 178; *Kimball* v. *Kenosha*, 4 Wis. 321; *Pettibone* v. *Hamilton*, 40 Wis. 402; *Dubuque* v. *Maloney*, 9 Iowa, 450; *Berridge* v. *Ward*, 10 C. B. N. S. 400; *Watson* v. *Peters*, 26 Mich. 509; *Champlin* v. *Pendleton*, 13 Conn. 23.

The Supreme Court of Wisconsin had before it this very question in *Kneeland* v. *Van Valkenburgh*, 46 Wis. 434, decided in 1879. The property was described as the tract of land "known as the east part of lot number 1," etc., "and bounded as follows: commencing at a point on the south line of Biddle Street," etc., thence running back from the street and around to Lake Street; "thence northerly on the westerly line of Lake Street to the south line of Biddle Street; thence westerly on the south line of Biddle Street to the beginning." The court held that the adjoining moiety of each street passed by the description.

See also *Woodman* v. *Spencer*, 54 N. H. 507, and note thereon in 14 Am. Law Reg. N. S. 418; *Salter* v. *Jonas*, 10 Vroom, 469; *Hinchman* v. *Paterson Horse R. R. Co.* 2 C. E. Green, 75; *Paul* v. *Carver*, 23 Pa. 223; *Cox* v. *Freedley*, 33 Pa. 124; *Transue* v. *Sell*, 105 Pa. 604.

The decisions of the Courts of Massachusetts and New York are in conflict with those which we have cited.

Perley v. *Chandler*, 6 Mass. 454; *Alden* v. *Murdock*, 13 Mass. 256; *Tyler* v. *Hammond*, 11 Pick. 193, 213; *Sibley* v. *Holden*, 10 Pick. 249; *Newhall* v. *Ireson*, 8 Cush. 595; *Phillips* v. *Bowers*, 7 Gray, 21; *Boston* v. *Richardson*, 13 Allen, 146, 153; *Webber* v. *Eastern R. R. Co.* 2 Met. 151; *Codman* v. *Evans*, 1 Allen, 446; *Jackson* v. *Hathaway*, 15 Johns. 447; *Kings Co. Fire Ins. Co.* v. *Stevens*, 87 N. Y. 287.

The difference between the Massachusetts and New York Courts, on the one hand, and the other courts whose opinions we have cited, on the other, is exactly that between *Judge* Redfield's associates on the Vermont Bench and himself, in the decision of *Buck* v. *Squiers*, 22 Vt. 484.

In the note on *Woodman* v. *Spencer*, 14 Am. Law Reg. N. S. 418, *Judge* Redfield says: "Many years back we had occasion to participate in the careful consideration of the question with able associates, with whom we could not agree, but who decided that the question was one of intent merely, to be determined like any other question of construction, by the intention of the grantor, as drawn from the words of the instrument as applied to the subject matter."

Messrs. **Charles Marshall** and **Thomas W. Hall,** for appellee.

Irving, *J.*, delivered the opinion of the court:

This was an action of ejectment brought by the appellee against the appellant, for the recovery of a strip of land, being the one half of the bed of "Henry Street," between "Winder Street" and "Mills Street," as those streets are laid down on "Poppleton's plat" of the City of Baltimore. "Henry Street," however, was never actually opened by the city as a street or used as such, and had been in fact closed by order of the city council, and rejected as a street before the institution of this suit. The land on both sides of Henry Street, as laid down on Poppleton's plat (where the land sued for lies), belonged to Alexander Gould, Sr. By his will he gave it to trustees, with power to sell in whole, or in lots, as they thought best, and to open such streets as they thought proper. The plaintiff in this action (the appellee) is, by decree of the Circuit Court of Baltimore City, the legitimate successor to the trustees named in the will, who have either died or resigned. The originally appointed trustees sold to J. Alexander Preston a portion of this land, all of which at the time was unimproved land. In the report of sale, which was ratified by the court, the land sold to Preston is thus described: "All that parcel or square of ground situated in the City of Baltimore, and which is bounded by 'Winder Street' on the south, 'Johnson Street' on the west, 'Wells Street' on the north, and 'Henry Street' on the east." In the deed of the trustees to J. Alexander Preston for the property thus sold him, and dated the 2d of December; 1872, it is described as follows: "Beginning for the same at the corner formed by the intersection of the north side of Winder Street and the east side of Johnson Street, and running thence easterly binding on the north side of Winder Street 379 feet more or less to the corner formed by the intersection of Winder and Henry Streets; thence northerly binding on the west side of Henry Street 320 feet more or less to the corner formed by the intersection of Henry Street and Wells Street as now laid out and widened; thence westerly binding on the south side of Wells Street 379 feet more or less to the intersection of Wells and Johnson Streets; thence southerly binding on the east side of Johnson Street to the place of begining, containing 2½ acres more or less."

As already stated, at the date of this sale and deed, the grantors owned the land on both sides of this projected "Henry Street."

Subsequently to this conveyance, to wit: in March, 1874, the trustees conveyed to the appellant the land on the other side of "Henry Street;" and by express description in that deed the conveyance was in terms "to the center of Henry Street."

It is an admitted fact in the cause that at the time of these deeds being executed Henry Street had not been opened as a public street, nor actually used as a public highway, and had not been used as a private way. It is also admitted that, by an ordinance of the city, approved on the 9th of November, 1874, Henry Street was by proper officers closed, and damages were assessed to the appellant as the owner of the property on each side of the street so closed, to the amount of $500; and the appellant was also assessed to the amount of $725 for benefits for the acquisition of the bed of the street free from the public easement; in all which the appellant acquiesced and settled with the city accordingly.

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*See editorial note to this case, Lawyers' edition. [Ed.]

By the well established law as laid down in *White* v. *Flannigan*, 1 Md. 525, and *Moale* v. *Mayor*, 5 Md. 314, and *Hull* v. *Mayor*, 56 Md. 188, the deed to Preston, by calling on the street, operated as a covenant that the grantee should have a permanent right to use the street as such. In fact, by so calling on a street laid out on the public plat of the city made by due authority, there is a dedication by its owner of the use of such street by the public as a street. The owner may retain the fee by a description which does not cover the street and does not convey it to the grantee; but such fee is burdened with the easement which the deed gives, by necessary implication, in calling for the street; and the easement is confined to a use of the street for the purpose of a street. When that is abandoned entirely, as and for a street, by the public and the grantee, if the road bed has not been conveyed the unrestricted rights of the grantor will revive; and the implication spoken of will interpose no obstacle to a recovery of possession by the grantor of the abutting lots, from the grantee thereof, if he has appropriated the road bed to his individual use as his property.

As we have already seen, the street which was mentioned in Preston's deed has been abandoned by the city, with the acquiescence of the appellant, which has been paid for the injury it was supposed to sustain by the closing of the street between its lots.

If, therefore, the deed to Preston does not convey the street bed, to the center thereof, the court committed no error in allowing a recovery to the extent claimed in the declaration.

The ordinary presumption is that a conveyance of land bordering on a highway carries the fee to the center of the highway, so that the question always is whether the description or the deed is such as to repel this presumption, and exclude the road bed from the operation of the conveyance. Mr. Angell, in his work on Highways (§ 141) says: "Whether the soil passes or not is purely a question of intention, to be ascertained in each case from the description contained in the deed, explained and illustrated by all the other parts of the conveyance, and by the localities and subject matter to which it applies."

The same author, in section 315 (3d ed.), says it may be stated as a fair conclusion from the authorities that a grant of land described as bounded generally "by" or "on" or "along" a highway carries the fee to the center of the highway, if the grantor owns so far; and as on the other hand, where the descriptive words are "by the side of" or "by the margin of" or "by the line of" or expressions equivalent thereto, the soil of the highway is excluded.

Chancellor Kent states the law in the same way; and this court in *Peabody Heights Co.* v. *Sadtler*, 63 Md. 533, laid down the law in accordance with the view of those distinguished authors. This rule of construction, however, and of determining the question of intention on the part of the grantor has not uniformly obtained; but in some of the States stronger language indicative of intention is required to rebut the presumption of intent to grant the way as a part of the fee sold. But this court having emphatically adopted the views of *Chancellor* Kent and Mr. Angell as a fair deduction from the weight of authority, it will not be necessary or profitable to review the cases cited from other States by the counsel for appellant and relied on as containing the better law.

We see no reason to depart from the view adopted in *Sadtler's Case*, 63 Md. 533, and the only question for us to decide in this case is whether the descriptive language in the appellant's title paper (the deed to Preston) is of such definite character as to lead to the same conclusion, as to intention, as the deed in *Sadtler's Case* did. In other words, it is whether this deed can be distinguished from that case in any way, so as to make this deed include the fee in the road bed; whereas, Sadtler's deed did not.

No stone bounders are called for in this deed, as was the case in Sadtler's deed; but the description of the starting points and endings of the lines, and of how the line from one to the other is to bind, fixes the beginnings and endings of the lines with as much certainty and positiveness as if stones had been called for in the deed. We have already quoted the language of the deed, and following it literally, the counsel for appellant, with commendable candor, admitted that the road bed was not included within the lines of the deed. The description could not be made more definite. The line is expressly made to "bind on the west side of Henry Street."

The very language is used which the authorities we have cited say will rebut the presumption of intention to convey the fee in the street bed, and which this court decided in *Sadtler's Case* had that effect there.

In the Sadtler deed stones were described as located on particular sides of the road, and the lines from stone to stone were described as running along the road. Of course being a straight line it was held that it must of necessity follow the same side of the road on which the stones were located. Here not only are the points of departure and ending quite as distinctly fixed, but the line from one to the other is confined to particular sides of the streets in terms.

As to the street here concerned, it is "to bind on the west side of Henry Street;" if possible, it is even more definite than the description in the Sadtler deed; and we are wholly unable to see any distinction between the cases in favor of appellant's contention. The report of the sale filed by the trustees gives no description of the property, save that it is a square of ground bounded by certain streets. The deed follows and makes the description more certainly intelligible as to the intention in the sale as to the street bed.

It operates as the deed in the case of *Langley* v. *Jones*, 33 Md. 179, was held to operate to make the description of the property more perfect and intelligible than the sheriff's return had left it. The report, therefore, cannot be resorted to as supplying an intention by presumption, which has been expressly excluded and rebutted by the deed made to carry out the intentions in fact of the parties. Looking to the localities and subject matter on which the deed was to operate (as Mr. Angell says may be done) it is not unreasonable to suppose the grantor intended to reserve to himself the fee that the benefits of actual condemnation for public use or shutting the same up when resorted to (as had not then been done) might result to him.

The argument of appellant's counsel was in reality against the soundness of the policy adopted in the decision in *Sadtler's Case*, and a contention that sound public policy did not justify adherence to the doctrine of *Chancellor* Kent and Mr. Angell adopted in *Sadtler's Case*. Public policy, it was contended, had induced a contrary view to prevail in many other places, and it was submitted that serious inconvenience and most unexpected results would follow in the City of Baltimore from adherence to the principles settled in *Sadtler's Case*. Such results may occur in some cases; but it will be because the parties to deeds have not taken the precaution to protect themselves, as was done by the appellant when it took its second deed direct from the trustees. We have been able to see no good ground for retracing our steps, as being contrary to sound public policy. We have been able to find in this case no affirmative evidence of intention different from that which we have indicated the language used imports, according to the best authority.

No objection was made to the plaintiff's prayer, granted by the court below, other than to the principles of law which it declared. From what we have said, it is apparent that we think there was no error; and *the judgment of the court below must be affirmed.*

James E. RABBITT *et al.*, *Appts.*,
v.
Susanna V. GAITHER.

Complainant's **husband,** shortly after their marriage, **purchased a farm** and paid for it, **but had** the **deed made out to a third party** as grantee, who was put in possession. After her husband's death, complainant filed a bill to have dower laid off and assigned to her in said farm, as land of her deceased husband, claiming that his having the deed made out to a third party was in fraud of her dower rights. *Held*, that a **decree directing** commissioners to lay off and assign **dower** to complainant in said farm should be **affirmed.** (*Miller*, J., *dissenting.*)

(Decided March 16, 1887.)

APPEAL from a decree of the Circuit Court for Montgomery County, in equity, in favor of complainant in a bill for the assignment of dower. *Affirmed.*

Argued before Alvey, *Ch. J.*, Miller, Robinson and Bryan, *JJ.*

The facts are stated in the opinion.

Messrs. **Richard R. Beall** and **W. P. Maulsby, Jr.**, for appellants.

Messrs. **Thomas Anderson, W. V. Bowie, Jr.**, and **Arthur W. Machen,** for appellee:

The statute gives dower in lands held by equitable title.

Code, art. 45, § 5; Laws 1818, chap. 193, § 10.

It is a fraud upon the wife to attempt to cheat her of her dower in such land.

The circumstance that the equitable title may be aliened without the wife's concurrence, whereas the legal title cannot be, is immaterial, where the conveyance is not *bona fide*, but is fraudulent as against her, and therefore, so far as her rights are concerned, void.

Nothing can be more completely alienable, at the pleasure of the husband, than his personal property; yet it is well settled that a conveyance of personal property made for the purpose of defeating the wife's legal rights is null and void as against her.

Hays v. *Henry*, 1 Md. Ch. 337; *Dunnock* v. *Dunnock*, 3 Md. Ch. 140; *Feigley* v. *Feigley*, 7 Md. 562; *Sanborn* v. *Lang*, 41 Md. 113.

And even if the conveyance of an equitable title is free from fraud, it will not always bar dower.

Bank of Commerce v. *Owens*, 31 Md. 325.

The doctrine that the wife's right to dower is protected in equity against any conveyance made by the husband, with intent to defeat it, is well established by authorities elsewhere.

2 Scribner, Dower, 163; *Chandler* v. *Hollingsworth*, 3 Del. Ch. 99; *Brown* v. *Bronson*, 35 Mich. 415; *Swaine* v. *Perine*, 5 Johns. Ch. 482; *Petty* v. *Petty*, 4 B. Mon. 217, 219; *Jiggitts* v. *Jiggitts*, 40 Miss. 718; *Youngs* v. *Carter*, 10 Hun, 194.

The fact that such a conveyance may carry out a previous purpose, not communicated to the wife, as to settle property conveyed to the husband by a former wife upon her family, is immaterial.

Brown v. *Bronson*, 35 Mich. 415, 418.

Where a husband with his own money purchased land, but, for the purpose of defrauding his wife of her right of dower therein, caused the conveyance to be made of a life estate only to himself, with remainder in fee to his daughter, it was held that the vendor's conveyance of the remainder to the daughter would be treated in equity as the husband's conveyance, and that in respect to the widow's dower right the husband would be taken to have been seised of an estate in land which he had afterwards conveyed away.

Crecelius v. *Horst*, 4 Mo. App. 419.

As to the favor with which the wife's right to dower should be regarded, see *Reed* v. *Whitney*, 7 Gray, 583.

The correlative doctrine of the invalidity of antenuptial conveyances by a wife, in fraud of the marital rights of her intended husband, cases for the application of which have more frequently arisen in England, is well settled both there and here.

1 White & T. L. Cas. Eq. 405 *et seq.*, notes to *Countess of Strathmore* v. *Bowes*; *Cole* v. *O'Neill*, 3 Md. Ch. 174.

No objection lies to the competency of Mrs.

Gaither as a witness, although her case is abundantly established by the other evidence.

Sanborn v. *Lang*, 41 Md. 107.

Miller, *J.*, delivered the following opinion:

This case was assigned to me to prepare the opinion of the court therein. The record is a large one and the testimony voluminous. The questions of law involved are important and those of fact depend upon a close scrutiny of the testimony and great care in deducing conclusions therefrom. The duty thus imposed I discharged to the best of my ability, but the conclusions I have reached have not in all respects met the approval of my brothers who heard the case with me, and they are in favor of the affirmance of the decree *in toto*. The parties however in this, as in every other case, are entitled to the best considered judgment of each judge who heard it; and instead of a silent dissent I have deemed it proper to express my views at some length, the excuse therefor being such as I have stated.

The bill was filed by Susanna V. Gaither to have dower laid off and assigned to her in all the lands of her deceased husband, James B. Gaither, who died in February, 1885, and the only controversy made in this court relates to her right to dower in what is called the "Locust Grove Farm," containing about 150 acres.

Mr. Gaither was twice married. His marriage with the complainant took place on the 17th of June, 1879, about seven months after the death of his first wife. He had no children by either marriage, but had taken to his home, when she was a child, Emily V. Cecil, a grand-niece of his first wife. This child was treated as a daughter by him and his wife, and was raised and educated by them as such. They were both devotedly attached to her, and she, with equal devotion and affection, regarded them as her parents. The legal title to all the lands mentioned in the bill, except this Locust Grove Farm, was devolved upon Mr. Gaither by the will of his first wife, executed in August, 1871, and it appears that when he was first married he had very little property of his own. He purchased the Locust Grove Farm at a trustee's sale on the 10th of November, 1879, after his second marriage, for $2,300 cash, and paid the money to the trustees; but before the sale was ratified he procured an order from the court by which Emily V. Cecil was substituted as purchaser in his stead, and the court afterwards ratified the sale as made to her as purchaser, and the trustees thereupon executed a deed conveying the land to her. This deed bears date the 17th of January, 1880, recites the order substituting Emily V. Cecil as purchaser, and conveys the property to her absolutely and unconditionally.

Miss Cecil, the grantee, afterwards (on the 30th of November, 1882) married James E. Rabbitt; and she and her husband subsequently, in October, 1884, sold and conveyed the land to John S. Crawford, one of the defendants to the bill.

From these facts, about which there is no dispute, it is apparent that Mr. Gaither was never vested with the legal title to this farm. By his purchase from the trustees, and payment of the purchase money, he acquired an equitable interest therein, but, so far as appears from the face of the papers, he held such equitable title at least not longer than up to the date of the deed from the trustees. If then there was nothing more in the case, there would be no difficulty in deciding that the complainant was not entitled to dower in this land.

In this State the right to dower has always been regulated by the common law, with the single modification thereof made by the Act of 1818, chap. 193, which provides that "A widow shall be entitled to dower in lands held by equitable title in the husband; but such right of dower shall not operate to the prejudice of any claim for the purchase money of such lands, or other lien on the same." Code. art. 45, § 5.

This statute was construed by the court of appeals in *Hopkins* v. *Frey*, 2 Gill, 359, and *Miller* v. *Stump*, 3 Gill, 304; and in the latter case the court declared that this Act "does not say and it ought not to be construed to mean that the widow shall be entitled to dower in lands held by equitable title in the husband at any time during the coverture."

By this the court undoubtedly decided that this Act does not give to the wife the same right of dower (indefeasible except with her consent, where the husband holds or acquires an equitable title) that the common law gives her where he holds or acquires the legal title; and such has been its accepted construction ever since that decision was made. It has always been held that an absolute sale and transfer of an equitable interest in land, by the husband alone, during his life, will bar all claim to dower. It was so decided by the chancellor in *Bowie* v. *Berry*, 1 Md. Ch. 452; and this doctrine is in nowise impugned by the decision of this court in *Bank of Commerce* v. *Owens*, 31 Md. 320.

In that case the husband was seised of the legal title in the land upon which theretofore the wife's inchoate right of dower had attached at common law. She had joined her husband in the execution of mortgages, and the property was afterwards sold under a deed of trust executed by the husband alone, for the purpose of paying all mortgages and incumbrances according to their legal priority; and the court held that she was dowable of the surplus after payment of the mortgages in which she had joined, and that this was her right at the common law. That was all that was actually decided in that case, but it may be inferred from what the court said in its opinion, as well as from the decision of the chancellor in *Mantz* v. *Buchanan*, 1 Md. Ch. 205, and of this court in *Lynn* v. *Lynn*, 27 Md. 547, that the same result would follow in the case of a simple mortgage of an equitable interest, although the chancellor, in *Purdy* v. *Purdy*, 3 Md. Ch. 547, seems to have regarded a mortgage as a transfer or parting with the equitable estate.

But no such question arises in the present case. There is here no mortgage nor any claim to a surplus. The claim is for the assignment of dower in the land, and from the construction placed upon this Act of Assembly by all these decisions, it seems to me quite clear that the husband has the same power of absolute alienation over an equitable interest in land that he has over his personal property, and that the same alienation that will defeat the widow's right to a distributive share in the one will defeat her claim to dower in the other.

But the complainant charges in her bill that her deceased husband adopted the plan of having this farm conveyed to Emily V. Cecil for the purpose of cheating and defrauding her of her dower in his estate; and it is contended that the whole arrangement was a scheme devised and carried out to accomplish that purpose; that Miss Cecil was made the mere nominal holder of the legal title, while Gaither remained the real and substantial owner, and that such was the understanding between them when the transaction took place. Before considering the testimony upon which this grave charge is founded, it is well to ascertain clearly what the law upon this subject is; and in doing this reference must be made to the Maryland decisions only, because they alone are binding authorities in the case, and it would seem that they have settled the question.

In *Hays* v. *Henry*, 1 Md. Ch. 337, a bill was filed by a widow for relief against certain conveyances of leasehold property (a house and lot) as made in fraud of her rights. The husband was living apart from his wife, and with a woman by whom he had children. He bought the property with his own money, and had it conveyed to the woman, who a few days afterwards conveyed the same to him upon certain trusts; but this trust deed contained a covenant that he should hold and use the property without hindrance from her, and he lived and died in the house. Both deeds were recorded on the same day, and were parcels of the same transaction. In deciding the case the chancellor lays down the law in very clear and emphatic terms, to the effect that while a husband cannot by will deprive his widow of her share of his personal property, there can be no doubt of his power to dispose of such property absolutely during his life, without the concurrence of his wife, and free from any claim on her part, provided the transaction is not merely colorable, and be unattended with circumstances indicative of fraud upon her rights.

"If the disposition," says the chancellor, "by the husband be *bona fide*, and no right is reserved to him, then, though made to defeat the claim of the wife, it will be good against her, because an act cannot be denounced as fraudulent which the law authorizes to be done. But if it be a mere device or contrivance by which the husband, not parting with the absolute dominion over the property during his life, seeks at his death, to deny his widow the share of his personal estate which the law assigns to her, then it will be ineffectual against her."

He then proceeds to decide the case before him, and decides it for the widow, upon the express ground of the reservation in the deed of trust, in favor of the husband, and his continued possession of the property down to the time of his death. In speaking of the purpose of the transaction he says: "That purpose, I am fully convinced, was to deprive the complainant of her share of her husband's estate," and adds: "This purpose, there is no doubt, could have been accomplished by an absolute and unconditional alienation of the property by sale or gift; and although such alienation was made with the intent imputed to this act, it would not vitiate it provided there was a transfer of the possession as well as the title and no reservation whatever to the husband."

It is plain from the whole tenor of the chancellor's decision in this case that when he declared that the disposition made by the husband must be *bona fide*, he had no reference to good faith on the part of the husband towards the wife, but to the transaction itself, as between the husband and his grantee or donee. The plain meaning of his language is that the transfer by the husband, whether by sale or gift, must be absolute and unconditional and not colorable merely.

In *Dunnock* v. *Dunnock*, 3 Md. Ch. 140, there was a bill by a wife for alimony out of the estate of her husband, who had abandoned her; and the charge was that he had conveyed away by bill of sale certain negro slaves, with a design to defraud her of her right to a reasonable maintenance, and of all interest (present or prospective) in these slaves. The chancellor found upon the proof that the bill of sale was absolute on its face, was accompanied with delivery of possession, and that there was no such reservation of right in the husband as to "defeat his unquestionable right to give away his personal property, to the prejudice of his wife's claim to a distributive share after his death," and denied the relief prayed. There was parol proof of a written agreement between the grantor and grantee, that the latter should return the negroes to the former when he should call for them, or forfeit $1,200. This proof was not admitted, but the chancellor held that such an agreement would not have affected the case, even if it had been proved, because it did not bind the grantee to return the property, but only to do so or pay $1,200. In this case the chancellor reaffirmed the law as he had stated it in *Hays* v. *Henry*, 1 Md. Ch. 337, and in the course of his opinion said:

"It is not enough to show that the conveyance, assuming it to be without a valuable consideration, was made to defeat the claim of the wife; that the law allows the husband to do by gift, so far as his personal estate is concerned, provided there be no right reserved to himself; and it is not a mere fiction by which, not devesting himself of the dominion over his property during his life, he attempts after his death to deprive her of her distributive share thereof."

In *Feigley* v. *Feigley*, 7 Md. 537, a wife filed a bill for a divorce and alimony; she subsequently amended her bill and charged that her husband, in order to deprive her of all hope of any provision out of his property, and confederating with his sister for that purpose, had executed a deed conveying to the latter all his interest in the estate of his deceased father, for a trifling and pretended consideration; that this conveyance was merely fictitious, and not intended really to deprive the grantor of the benefit of this estate, but to save the same for his own use, and the sister was brought in as a party to the suit. The case was elaborately argued, and the court, after deciding that the wife had, under the terms of the Statute of Elizabeth, a standing in court to impeach the deed, considered the question whether it was a *bona fide* transaction or the result of a deliberate purpose to defraud the wife of her claim to alimony. Upon this question they say they had no doubt but that the deed was executed by the husband in fraud of her rights, but that there was no direct or sufficient proof (in face of the denials in her answer) of any fraudulent participation by the sister in the transaction, and that there was no such glaring inadequacy of consideration as would of itself stamp the transaction with fraud, and thereby render the deed void; they, therefore, reversed so much of the decree below as vacated this deed, and refused to allow the wife alimony, because the husband had no estate out of which it could be allowed. There is plainly nothing in this decision which overrules or modifies the law as laid down by the chancellor in cases above cited.

In *Sanborn* v. *Long*, 41 Md. 107, a widow filed a bill to vacate a deed of real and personal property executed, as she averred, by her husband, in contemplation of his death, and with the avowed and express purpose of depriving her of her distributive share of his estate. It was conceded that she was entitled to dower in the real estate, the husband having had the legal title thereto, and the controversy was over her right to her share of the personal property. The court conceded that the legal principles involved were stated with substantial accuracy by the chancellor in *Hays* v. *Henry*, but that the facts showed that there was a reservation of an interest in the grantor, and that he remained in possession of the property until his death. The gist of the court's opinion in this case is in the following extract:

"The facts that the power of attorney was prepared at Sanborn's instance and sent on to be executed before the deed was made; that it secured to him the unlimited right of disposing of the property as owner; that he did so deal with it by having a portion of it mortgaged to obtain money for his own use; and that he remained in possession of it till his death, conclusively show that though the deed was absolute on its face, the intent and purpose of the transaction and of the parties was that while Sanborn retained dominion and control over the property in his lifetime, his wife should have no part or share of it after his death. This being so the case falls directly within the principles laid down by the chancellor in *Hays* v. *Henry*, and by this court in *Feigley* v. *Feigley*. The deed was not made *bona fide*, but as respects the wife was fraudulent, and cannot operate to deprive her of her legal rights as widow and distributee."

The fair conclusion from these authorities is that a husband may alienate his personal property and his equitable interest in land, either by sale or gift without the concurrence or assent of his wife; and if the transfer be absolute and unconditional, and without any reservation of interest in or control over the property to himself, and if the possession be parted with or delivered in pursuance of the conveyance, it is valid, even though his intent and purpose in making it may have been to deprive his wife of her dower or thirds therein, provided there be no fraudulent participation on the part of the grantee or donee in such intent or purpose. In fact this power of the husband over such property has been so long recognized by the courts, and so often exercised, as to have become not only a well established principle of law, but a settled rule of property upon which a large number of titles depend.

But on the other hand if the transfer be colorable, merely, that is to say if it be a mere device or contrivance by which the husband does not part with the absolute dominion over the property during his life, but seeks thereby to defeat the claims of his widow at his death, the law pronounces it a fraud upon her rights; and this fraud may be proved and established by his retention of possession during his life, by a reservation of an interest to himself on the face of the conveyance, or by any outside agreement or arrangement between him and his grantee or donee, to the effect that he shall receive the benefit of, or have control over the property, during his life, or by any other fraudulent participation on the part of the grantee or donee to aid him in his purpose of defeating the rights which the law gives to his widow upon his death.

The question then is, Does the proof in this record make out a case of such fraud in the transaction relating to this farm? The testimony is voluminous; and all that can be expected in an opinion is a statement of the facts bearing upon the material points, established by the preponderance of proof.

It appears, then, that at the date of Mr. Gaither's second marriage the favorite and petted child, Emily, had grown to womanhood; and after the marriage she and the new wife did not get along well together, although there is no proof of any open rupture between them. Mr. Gaither then determined to provide her with a separate home and residence, and accordingly purchased this farm and had the title conveyed to her in the manner already stated. The deed from the trustees was absolute on its face, without any reservation or condition whatever, and was promptly delivered and recorded.

In December, 1879, shortly after his purchase and before the deed had been executed by the trustees, Mr. Gaither fitted up and furnished the house upon the farm, and Emily went there to live and her brother John F. Cecil lived with her, up to the time of her marriage on the 30th of November, 1882. During the three years prior to her marriage Mr. Gaither cultivated the farm and received the proceeds of the crops, but at the same time improved the place, by clearing up, ditching and liming the land and putting up new fences. When the marriage took place he attended a reception given at the house, and there in the presence of a number of witnesses and guests he declared he had given her this farm and that there was not the "scratch of a pen against it," and then addressing the young couple said "Now, my children, you must go to work and do the best you can." After this and up to the time of his death in February, 1885, he was never in possession of the property. All this is quite consistent with what a father upon his second marriage would have done under similar circumstances for a grown up and unmarried daughter by his first wife, to whom he wished and was able to make an advancement.

But it appears that on the 12th of June, 1879, five days before his marriage to the complainant, he also conveyed certain personal and real property in Gaithersburg to Emily V. Cecil, the consideration therefor, as stated in the deed, being love and affection and "her devoted attention to me," the grantor, "for years past."

But by this deed he reserved a life estate in the property to himself, and moreover did not deliver it until some weeks or months after his marriage, and no question is made as to the complainant's right to dower in this real estate, He also took from the grantee an agreement in writing to reconvey this property to him in fee simple, at any time he should call upon her to do so, under a penalty of $5,000; but this agreement was executed after, although it is dated before, her marriage.

In February, 1883, Mr. Gaither desired to have the reversionary interest in this Gaithersburg property conveyed to John F. Cecil, the brother of Mrs. Rabbitt; and the latter seems to have been willing to execute such a deed, but her husband refused to join in the conveyance, and in this refusal was supported by his father. This brought about a bitter quarrel between Gaither and the Rabbitts, and the former instituted an action at law against Mrs. Rabbitt and her husband, upon two sealed notes or single bills each for $3,000 payable on demand and bearing interest from date and both purporting to have been signed by Mrs. Rabbitt before her marriage. The first bears date the 22d of March, 1882, and is a renewal of another one to the same effect which had been accidentally destroyed. This one was signed by her before her marriage; but the second, although dated the 17th of June, 1879, was in fact signed by her in her maiden name in March, 1883, after her marriage.

Mrs. Rabbitt and her husband then filed a bill in equity for an injunction to restrain the prosecution of this suit, upon the ground that these notes were without consideration and void. The bill states at length the circumstances under which and the purposes for which these notes were given, and prays that they be delivered up and canceled. A preliminary injunction was granted, and in his answer to the bill Mr. Gaither disavowed all intention of proceeding upon the second note; and in the narr. which he afterwards filed in the law case, he declared only upon the first. He insisted in his answer that this note was given upon a valuable, valid, and sufficient consideration; that he required it of her when the Locust Grove farm was deeded to Emily V. Cecil, and denied that the transaction was a gift to her. This suit was a protracted one, and was prosecuted with much bitterness on both sides. Mr. Gaither died before it was decided, but after he had testified; and his executors were made defendants.

The position taken by Mrs. Rabbitt in her testimony was that she executed the note upon the representation of Mr. Gaither, in whom she placed implicit confidence and trust, that he wanted it in case she should die before he did, so that her relations in St. Mary's County could not get the property, and that it should only be used in that event; that she kept it in her own possession, and delivered it up to him in March, 1883, and executed the other note at his instance, and upon his suggestion that in his hands they could be used as a means of inducing or making h— husband unite in the conveyance of the Gaithersburg property to her brother; while that of Mr. Gaither was that he had required her to give him this note as security for the purchase money he had paid for the Locust Grove farm.

The court reviewed the testimony in an elaborate and able opinion, decided the case in her favor, and passed a decree (from which no appeal was taken) making the injunction perpetual and canceling both notes. The court held that the proof showed that Mr. Gaither made a free and voluntary gift of this farm to Mrs. Rabbitt, and that the note was without consideration and was executed under the circumstances and for the purpose stated by her in her testimony.

The present complainant was not a party to that suit, and of course is not bound by the decree or by anything said in the court's opinion. But the record and testimony taken in that case was offered in evidence in this, and is therefore to be considered. The testimony which bears upon the question whether there was any fraudulent participation on the part of Mrs. Rabbitt in the supposed or actual intent of Mr. Gaither to defeat his wife's right of dower in this land, is mainly that of Mr. Gaither and Mrs. Rabbitt. The latter was not examined as a witness in the present case; she died before it was decided, leaving two infant children who have been made defendants. The testimony of the other witnesses in both cases throws very little light upon the question now under consideration. Her testimony shows that she had the utmost confidence in Mr. Gaither, who stood to her *in loco parentis;* that he was her adviser in all business matters; that she did whatever he required; that she looked upon him as a father, was grateful to him for his kindness and benefactions; and it may be fairly inferred that had she remained unmarried she would have devoted this property, as well as everything else she had, to his use if his necessities had required such a sacrifice.

On cross examination she was asked: "Was it not understood between you and Mr. Gaither that he was to use and farm this place as long as he lived or thought proper to do so?" And her reply was "Yes, sir; he was to use it as long as he lived, but never to sell it from me; but after I was married he gave it up to me, and said now let my husband work it; that he was not going to work it any longer; he said he was buying lime and fixing it up for me and he wanted me to stay there as long as I lived, and never to sell it."

Her husband also testified that about two weeks after his marriage Mr. Gaither said to him: "I give up this place to you, and all that is on it except my wheat crop; and now you can go ahead, because I have been bothered with it long enough, and if you need any help I will help you all I can;" that the delivery of possession and control over the place was absolute, and he was only to have the privilege of harvesting and threshing his wheat crop the following summer, and that he asked as an accommodation (which was accorded) permission to keep his hogs there until fattening time, and a heifer until the first of the year.

It is quite probable that if the donee had remained unmarried, things would have gone on as at first. She would have continued to live in the house, and Mr. Gaither would have continued to cultivate and improve the farm, but whatever may have been the original understanding between them as to his continued possession of the property, it was abandoned by him upon her marriage; he knew and approved of her contemplated marriage; and when it took place he delivered possession to her and her husband. The weight of proof on this point is overwhelming, and the legal conclusion is irresistible that this gift was fully and finally consummated during the lifetime of the donor. Nor is there anything to be found in the testimony of Mr. Gaither when carefully examined to warrant the conclusion that Mrs. Rabbitt was a participant in this alleged fraud upon the rights of his wife.

He admits upon cross examination that he did not have any agreement with Mrs. Rabbitt that she should deed the property back to him whenever he wanted it; that he never said anything to her on that subject and never told her that she was merely to hold the title and convey it back whenever he wished. Then, upon re-examination by his own counsel, this question was put to him: "You have stated on cross examination that you never said anything to Emily V. Cecil about reconveying the Locust Grove farm to you, nor had any arrangement or understanding with her, by which said farm was to be reconveyed, and yet you state you knew she would convey it to you if you asked her. How do you know it?" And his answer was: "It was my opinion, from the confidence I had in her. I mean that I simply believed that she would do it." But his mere belief as to what she would do is by no means tantamount to an agreement on her part to do it, and this is what must be proved in order to make her a participant in the fraud. Her own conduct itself refutes this imputation. When the gift was perfected by delivery of possession on her marriage, she thereafter firmly asserted her rights as donee. She voluntarily joined her husband in filing the injunction bill, and resolutely and successfully resisted the effort of Mr. Gaither to enforce the note in order to subject this property to its payment.

Here, as in every other case where fraud is charged or imputed, it must be made out by clear and satisfactory proof; and it is not the province of a court to strain the evidence in order to establish it, even in aid of the favored claim for dower. Beyond doubt the evidence is insufficient to fasten the imputation of fraud in this transaction upon Mrs. Rabbitt; and in fact no such charge is made against her in the bill. What the bill charges is that the husband by this transaction intended to cheat and defraud his wife of her dower in this land, but the proof clearly shows that as between donor and donee the transaction was not colorable merely, nor a fiction, nor a sham, but a *bona fide* perfected and effectual gift.

The case then is one in which a husband has seen fit to make in his lifetime an absolute donation to another of his equitable interest in land. He had the legal right to do this, even if his purpose was to defeat his wife's claim to dower, and having done it, the claim is defeated, unless the long established construction of the Act of 1818, as well as settled rules and principles of evidence and law, is to be overturned and set at naught for the purpose of giving the widow relief in this case. But this it is not competent for the court to do, no matter what the apparent or supposed hardship of the particular case may be. It is for the Legislature, if it sees fit, to place equitable interests in land upon the same footing, as regards the right of dower therein, as legal interests; but this it has not yet done, and it is clear that the courts ought not to usurp legislative power. They can construe a statute, but having once clearly and definitely done so, and that construction having been acquiesced in and acted upon for more than forty years, it is for the Legislature to change the statute rather than for the courts now to change its construction, even if they should deem it erroneous. There can however be no reasonable doubt as to the correctness of the construction placed upon this Act by our predecessors.

These are the views I entertain both as to the law and the facts of this case; and in my opinion so much of the decree as directs the commissioners to lay off and assign dower to the complainant in this Locust Grove farm should be reversed, and in other respects affirmed.

In this result however a majority of my brothers who heard the case with me do not concur, and I am instructed by them to say that if it be conceded (without however so deciding) that it was necessary to prove that Mrs. Rabbitt participated in the fraudulent intent on the part of Mr. Gaither to defraud the appellee of her rights as his wife, they are of opinion that the evidence in the record shows that she had knowledge of such fraudulent intent at the time this farm was conveyed to her, and participated therein. They are therefore of opinion that *the decree should be affirmed in its entirety, and it is accordingly so ordered.*

Decree affirmed and cause remanded.

William A. DUNNINGTON, *Appt.*,

v.

George W. HUBBARD, Admr., *et al.*

1. **When an instrument** in writing **is required** by law **to be recorded,** the **enrollment** of it **is evidence** of all circumstances necessary to give it validity. But this evidence is only *prima facie* and not conclusive and may be rebutted.
2. **Where one of** the **joint owners of land obtains** the **signatures** of the other owners **to a deed** thereof **by fraud** and deceit and misrepresentation as to the character of the paper, they not intending to sell it, and also by false statements induced the grantee to believe that he represented the other owners and was authorized to sell their interests and thereby obtained from the grantee payment of the purchase price, the **deed** will be **set aside** and declared void.

(Decided March 10, 1886.)

APPEAL from a decree of the Circuit Court of Baltimore City, in favor of complainants in an action to set aside a deed. *Affirmed.*

This was a bill in equity filed by Elizabeth Hubbard, George W. Hubbard and Mary J.

Hubbard, his wife, and Thomas J. Hubbard, an infant suing by his next friend, against William A. Dunnington, to set aside a deed which purported to convey to defendant certain real estate alleged to belong to complainants.

The bill charged that the signatures to said deed were forgeries, and averred a belief that they were affixed thereto by one John William Willson or by his procurement.

The bill further alleged that although complainants fully believed that the signatures to the deed are forgeries, yet if they are in the genuine handwriting of the grantors, that they were fixed to the paper upon the false and fraudulent representation of said Willson; that the paper was one which they had agreed to sign, for the purpose of authorizing the closing of an alley and for no other purpose; that they signed it in full reliance by them upon the truth of said Willson's assertion; that said Willson was acting as an agent of the defendant Dunnington, and that said Dunnington is responsible for his acts. But complainants do not mean to charge that Dunnington had any knowledge of the guilty conduct of Willson.

The answer of defendant denied the material allegations of the bill and averred that the deed was duly signed, sealed, acknowledged and delivered, and was in all respects a genuine and authentic instrument.

At the trial in the court below the evidence in regard to the genuineness of the signatures of the adult complainants was conflicting. It appeared that John William Willson was a part owner of the property in question; that the adult complainants never intended to convey away their property; that they never received any of the purchase money and that said Willson was not their agent; that they signed a paper which they thought was an agreement for closing an alley and were induced to sign it by the statements and representations of said Willson; that such was the character of the paper; that after the paper was signed it was taken possession of by Willson and a justice of the peace; that the deed, which purported to convey the property for $3,175, was dated August 20, 1880, and the certificate of the justice of the peace to its acknowledgement was of the same date; that September 9 thereafter it was executed by Thomas J. Hubbard, who was at that time under age, and acknowledged before another justice of the peace. Said Thomas J. executed it at the instance of Willson, and at the trial testified that he did not know the nature of the instrument at the time he signed it.

It further appears that Willson falsely stated to Dunnington, the grantee, that he was authorized to sell the interests of the other owners in the property, and had received from Dunnington the greater portion of the purchase price before the date of the deed, and September 11, 1880, delivered the deed with certificates of acknowledgement attached to the grantees' agent and received at that time the balance of the purchase price; that Willson retained the whole of this money to his own use; that he was not authorized to negotiate and sell by the other owners and none of them except Thomas J. knew that a sale was in contemplation; that they did not deal in any way with Dunnington, nor at any time authorize Willson or anyone else to deliver the deed in their behalf, nor did they know that it had been delivered.

Elizabeth Hubbard died during the pendency of the suit, and George W. Hubbard as her administrator was made a party complainant in her place.

The court below ordered a decree setting the deed aside: and defendant appealed to this court.

Argued before Alvey, *Ch. J.*, Robinson, Irving, Ritchie, and Bryan, *JJ.*

Mr. **N. P. Bond,** for appellant.

Mr. **Bernard Carter,** for appellees.

Bryan, *J.*, delivered the opinion of the court:

Some of the facts in this case are involved in considerable obscurity. But it is very certain that a gross fraud has been perpetrated by one John William Willson, an attorney at law. The details of the transaction were carried out with singular skill and audacity.

The deed in question was recorded in the manner required by law, and it must therefore be held valid, unless it is overthrown by competent proof. "Where an instrument of writing is required by law to be recorded, the enrollment of it is evidence of all circumstances necessary to give it validity. But this evidence is not conclusive; it is only *prima facie*, and like all *prima facie* evidence may be rebutted. To give it a conclusive effect might be ruinous to the community; an enrollment however obtained would exclude all inquiry; it would be a shield and protection to fraud, forgery and deceit." *Crawford* v. *State*, 6 Harr. & J. 234.

One of the supposed grantors is under the age of twenty-one years, and the instrument is, of course, void as to him. We are satisfied from the proof that the other supposed grantors never consciously signed the deed. If the signatures are in their genuine handwriting, they were obtained by fraud and deceit practiced by Willson, and under the belief on their part, that they were signing a totally different paper. They never received a cent for their property; they never intended to sell it; they never knowingly signed a deed of conveyance for it; and certainly nothing was further from their thoughts than to authorize the delivery of this deed by Willson, or by anyone else.

Under these circumstances, there was no delivery of the deed. Let us quote a passage from Sheppard's Touchstone: "The fifth thing required in every well made deed is that there be a delivery of it. * * * And though the party to whom it is made take it to himself, or happen to get it into his hands, yet will it do him no good, nor him that made it any hurt, until it be delivered. And a deed may be delivered by the party himself that doth make it, or by any other by his appointment or authority precedent, or assent or agreement subsequent, for *Omnis ratihabitio mandato æquiparatur*. And when it is delivered by another that hath a good authority and doth pursue it, it is as good a deed as if it were delivered by the party himself; but if he do not pursue his authority, then it is otherwise. And, therefore, if a deed, or the contents thereof, be read or declared to a man that is to seal it; and he (being illiterate) doth deliver it to a stranger, and bid him examine it; and if it be so as it was read to him, then to deliver it as his deed, otherwise to redeliver it to him again that made it; in this case if the deed be in truth otherwise than it was read, and yet, notwithstanding, he, to whom it was delivered, doth deliver it to him to whom it was made, this delivery shall not avail; neither is the deed by this delivery become a good deed." Chap. 4, p. 57.

There cannot be the slightest imputation against the grantee. He fairly paid his money, and honestly thought that he had purchased this property. Willson, being one of the owners, by false statements induced Dunnington, the grantee, to believe that he represented the other owners, and was authorized to sell their interests. After he had induced Dunnington to advance to him the greater portion of the purchase money, he delivered to him this fraudulent deed, which had every indication of a genuine instrument, and he received the remainder of the price of the property.

Dunnington became the victim of a man in whom he placed an unmerited confidence. The appellees, with the exception of the infant, had no agency in misleading him. Dunnington dealt exclusively with Willson, without any communication whatever with the other owners of the property, and without any knowledge on their part of his proceedings. He paid Willson nearly one half of the purchase money before the date of the deed, and by far the greater portion of it before he received it. The decree must be affirmed.

Decree affirmed, with costs.

Mayor and City Council of BALTIMORE,
Appt.,
v.
Henry G. FLEDDERMAN.

1. **The courts have jurisdiction to hear and decide an appeal from the decision of a register of voters**, after the November election, when the appeal has been taken before such election.
2. The **jurisdiction** of the courts, having attached, will **not be ousted by lapse of time, except** by some express provision in the law or by the evident and unmistakable **intent of** the **Act** that it should **not continue beyond** the **day of election.**

(Decided March 17, 1887.)

APPEAL from a judgment of the Baltimore City Court, in favor of plaintiff in an action to recover sheriff's fees for the service of writs in certain appeals by petition from the decision of a register of voters. *Affirmed.*

Argued before Alvey, Ch. J., Miller, Irving, Bryan, Yellott and Stone, *JJ.*

The case is stated in the opinion.

Mr. **Bernard Carter,** for appellant:

By the express provision of section 22 of the Act of 1882, chap. 22, petitions of appeal from the registers of elections can only be filed "at any time before the time appointed by law for delivering the poll books or lists of qualified and registered voters, to the judges of election."

We submit, therefore, that the Legislature did not intend to confer and has not conferred upon the judge of the supreme bench any power to hear any petition after the time fixed by law for the delivery of said poll books to the judges of election; the time so fixed is the morning of election.

The logical result of the construction put upon this law by the judge of the supreme bench is that he is authorized to continue the hearing of petitions filed within the time above mentioned, until he has disposed of all of them, even though that might run up to, and indeed beyond, next September.

The agreed statement of facts shows that there are about a thousand of these petitions still unheard.

Against this construction, involving heavy costs to the taxpayers of Baltimore City, we respectfully contend:

1. The jurisdiction here conferred being a special statutory one, its existence must be affirmatively shown; and if the power claimed is not conferred, its acts and orders are absolutely void.

Cockney v. *Cole*, 28 Md. 283, 284; *Oler* v. *R. R. Co.* 41 Md. 590.

2. It is apparent, upon the whole Act of 1882, chap. 22, that the general duty of the proper registration of voters (inclusive and exclusive) is to be discharged by registers, appointed by the executive department of the State and not by the judicial department; and the interposition of the action of the courts is only exceptional.

3. If it was intended that the court should proceed to hear cases after the time fixed by law for the delivery of the poll books to the judges of election, what was the object in providing that the petitions must all be filed before that time? Is it not clear that the Legislature contemplated the correction of the lists, so far as the instrumentality of the courts is concerned, for the then approaching election alone?

Mr. **Jos. S. Heuisler,** for appellee.

Stone, *J.*, delivered the opinion of the court:

The sole question presented on this appeal is whether the circuit courts for the counties, or any one of the courts of Baltimore City, has jurisdiction to hear and determine an appeal from the decision of a register of voters, after the November election, when the appeal has been taken before such election. The whole matter depends upon the Act of 1882, chap. 22, providing for the registration of voters. It has been supposed that the courts have no such jurisdiction to hear and decide such appeal after the regular election in November because the Act of 1882 provides that such appeal must be taken before such election is held.

But to this it may be answered that in this State, and we believe we may safely say in this country, whenever an appeal is allowed to a higher court, some time is always fixed within which such appeal must be taken.

If the appellant does not take his appeal within the prescribed time, it will be dismissed. But, if taken in time and once properly before the appellate court, it is heard and tried according to the law rules governing the trial of such cases in that court, and without any reference to the time within which the appeal was required to be taken. This is undoubtedly the general rule; and the fact that the appeal in this case was required to be taken before the election would not, of itself, imperatively require the appellate court to try the case before the election.

But the appellant contends that, taking the whole law, it was its purpose and intent that the registration should be perfected before the election, and that upon the delivery of the lists to the judges of election (which is done on the morning of the election) the power of the courts to make corrections is at an end, until after the next annual sitting of the registers. To determine this question some reference to the object of the law and its provisions is necessary.

The general object of the registration law is to secure to every qualified voter the right to vote in his proper district and to prevent disqualified voters from voting. The Act of 1882 (chap. 22), the existing registration law, remedies a defect that had existed in the previous law. This law permits the duly qualified voter to apply to the register to have stricken from the lists the names of all persons disqualified to vote in any particular precinct or district and to appeal to the courts, if his application is refused by the register. While the duly qualified voter's ballot may be deposited and counted, his right to vote, so highly prized by the citizen, may be rendered comparatively valueless to him if his vote can be nullified by fraudulent voting.

It was to prevent this that the Act of 1882 gave to any qualified voter not only the right to have himself registered but to see that the lists were kept clean. An appeal is allowed, provided it is taken within the prescribed time, in all cases where a name is improperly put on or kept off the lists.

The appeal is taken by a petition to the court or judge stating the facts, etc., and if the petition shows a *prima facie* cause of complaint the judge or court orders a summons and proceeds to try the case.

The jurisdiction of the court attaches as soon as such petition is filed, within the prescribed time, and showing a *prima facie* case. The jurisdiction of the courts having attached will not be ousted by lapse of time, except by some express provision in the law, or the evident and unmistakable intent of the Act that it should not continue beyond the day of election. There is no such express provison, nor can we gather from the law that such was the intent of its framers.

It is apparent that the Act contemplated that these cases should be disposed of as soon as they possibly could. This is evident from the fact that the twenty-second section requires the summons to be issued forthwith upon the filing the petition and more strongly still by the general purpose of the law that every election should be fairly conducted. But the interest of the voter in a correct list is not confined to the one election immediately following the filing his petition. There may be a special election held before the next annual correction of the list. These special elections are provided for by sections 23 and 26 of the Act of 1882.

These sections provide that at such special elections, the list made at the previous October sittings of the registers as corrected by the judges shall be the list of the qualified voters. If for want of sufficient time the courts are unable to complete the correction of the lists before the annual November election, there can exist no reason, either in the language or policy of the law, why it should not be completed afterwards to be used in the event of a special election.

But it has been argued that there is no practical use in correcting the list after the annual November election, because before the next regular election the registers would again sit, and they could make the corrections. If we throw out of view entirely the contingency of a special election, still there will exist no valid reason why the correction should not be made after the annual election.

The Act of 1882, by prescribing a punishment for it, very clearly recognizes the possibility of fraud being practiced by the registers. In the event of such fraud being practiced, it would be very Utopian to expect the fraud to be remedied by him who perpetrated it. He could hardly be expected to undo one fall what he had purposely done the fall before. The appeal was given as well to correct and prevent fraud as to rectify mistakes; one method of perpetrating a fraud is to place and keep on the list the name of a disqualified voter and known to be such by the register. The only way to get such names off is by appeal. If the argument of the appellant is correct, and the power of the courts over the list ends with the annual election, then if a large number of fraudulent names are on the list, it is difficult to see how the fraud is ever to be remedied, without at least a change of the registration officer. The agreed statement of facts in this case shows that there are one thousand cases still unacted upon by the courts.

This fact demonstrates the impossibility of trying all the cases in the very limited time between the October sitting and the November election. These thousand cases may or may not be cases involving fraud. If fraudulent, are they to remain there until the next election and be voted again, and again escape striking off for want of time? Or did the Legislature intend the whole list to be purified by the courts, if the registers failed in their duty? We think there can be but one answer to this question.

It has been argued that the jurisdiction of the courts in this matter being a special statutory one, its existence must be shown, and many cases have been cited to sustain this proposition. To this we assent. But the existence of the jurisdiction in this case is affirmatively shown by the filing of the petition. The question here is not when the jurisdiction attaches, but when it ends. No case has been shown, or can be shown, holding that a court having once properly obtained jurisdiction of a case can lose it before the trial, without some positive law to that effect.

Nor can we consider the question of costs, pressed in the argument, as having any influence in the decision of this question. If the petitioners fail in their cases, like any other plaintiffs they are taxed with all the costs. If it is shown that the registers have acted in bad faith they alone are responsible for the costs. It is only in the event that the registers are mistaken that the costs are taxed to the city.

While it would be desirable in every case that as few burdens as possible should be thrown on the city, still the successful operation of so important a law should not be impaired or hindered by the possible contingency of some costs falling upon the Corporation.

Judgment affirmed.

John GLENN, Trustee of the National Express & Transportation Co., *Appt.*,
v.
William H. CLABAUGH.

1. The **insolvent laws of this State** discharge from all debts and contracts made before the filing of the insolvent's petition, but can **have effect only as between citizens** or residents **of this State.**
2. The **insolvent laws of one State cannot discharge** the **contracts of citizens of other States**; they have no extraterritorial operation; and it makes no difference that the action to enforce the contract is brought in a court of the State where the debtor resides and under whose insolvent laws he obtained his discharge.*
3. A discharge under the insolvent laws of this State is no defense to an action for an **assessment on the stock of a corporation of** the State of **Virginia.** The contract of subscription is governed by the laws of that State, and is to be performed there.

(Decided March 10, 1886.)

APPEAL from a judgment of the Court of Common Pleas, overruling a demurrer to a plea of insolvent's discharge in an action to recover an assessment on certain shares of stock in an insolvent corporation. *Reversed.*

Argued before Alvey, *Ch. J.*, Stone, Miller, Robinson, Ritchie and Bryan, *JJ.*

The case is sufficiently stated in the opinion.

Messrs. **John M. Glenn** and **Charles Marshall,** for appellant.

Messrs. **Sebastian Brown, Stewart Brown** and **J. Alexander Preston,** for appellee.

Alvey, *Ch. J.*, delivered the opinion of the court:

This case is in all respects similar to the cases of *Glenn* v. *Howard*, and *Glenn* v. *Savage*, 2 Cent. Rep. 648, except that instead of the defense of final discharge of the defendants under the Bankrupt Law of the United States, as in those cases, we have here the defense that the defendant had duly obtained a final discharge under the Insolvent Laws of this State, on the 15th of September, 1879, and that the alleged cause of action accrued before the filing of his petition. The plaintiff demurred to this plea, and the demurrer was overruled by the court below, and judgment was entered for the defendant.

The action being for a call upon stock, under the decree of the 14th of December, 1880, as set forth in the declaration, it would seem, upon reason and principle, that the same conclusion reached in the preceding cases should be maintained in this. But the Insolvent Law of this State, under which the defendant was discharged, makes no special provision for the character of debts to be proved, or as to the mode of proving debts or claims against the insolvent estate. Nor does it provide, as in the Bankrupt Law, that the discharge shall only operate upon such debts as were proved or were provable against the insolvent estate. But it provides in the most unqualified terms that the discharge shall be "from all debts and contracts made before the filing of his petition, and he shall be released from all such debts and contracts; and such discharge and release shall embrace all cases where he is indorser or surety," etc.

These terms are certainly very comprehensive, and anything that falls within the definition of debt or contract, would seem to be embraced by them; and in view of the decisions of the court in the cases of *Berry* v. *McLean*, 11 Md. 92; *State* v. *Cutler*, 18 Md. 419; and *Reynolds* v. *Mut. Fire Ins. Co.* 34 Md. 280, and especially the two latter cases, it would seem to be doubtful whether a contract of the nature sued on in this case is not embraced within the operation of a discharge under the Insolvent Law of the State.

But however this may be, it is very clear that the insolvent discharge can form no bar to the recovery in this case. Here the contract sued on was made with a corporation of the State of Virginia. That corporation derived all its powers of existence and its franchises from that State; and there it had its principal office and seat of its governing body. The contract of subscription to its capital stock was to be performed there, as and when required by the president and directors of the company. The law of the State, and of the creation of the corporation itself, fixed the terms of the contract of subscription; and the defendant is conclusively presumed to have contracted with reference to such law. He, therefore, impliedly subjected himself to such laws of that State as affected the powers and obligations of the corporation, and as prescribed the terms, and the manner of performance, of the contract made with such corporation. *Canada Southern R. R. Co.* v. *Gebhard*, 109 U. S. 527, 537-8 [Bk. 27, L. ed. 1020].

The plaintiff in this case was not a party to the contract, but is only an officer entrusted with executive powers under a decree of a competent court of Virginia, made to secure the performance of the obligations of the corporation, for which the defendant, as a stockholder, is in part bound; and it is not competent for him to invoke the Insolvent Laws of Maryland to discharge him from that obligation.

The Insolvent Laws of the State profess to operate upon all contracts, without regard to the residence of the creditors; but this general provision of the statute is necessarily qualified by the Constitution of the United States and by the decisions of the supreme court declaring the

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*See *Phelps* v. *Borland*, 5 Cent. Rep. (N. Y.) 421, and note.

meaning and effect of that Constitution upon the legislation of the several States.

The State possesses the unquestioned power of passing insolvent laws, if not in conflict with the legislation of Congress upon the subject; but insolvent laws passed by a State can have operation and effect only as between the citizens or residents of that State; and they can have no effect whatever to discharge contracts made with citizens or persons of other States. In other words, the insolvent laws of one State cannot discharge the contracts of citizens of other States, because such laws have no extra-territorial operation. And such being the case, it makes no difference whatever that the action for the enforcement of the contract is brought in a court of the State where the debtor resides, and under whose insolvent laws he has obtained his discharge. The contract not being subject to the operation of those laws, the defendant's discharge can furnish him no defense, no matter in what court the suit may be brought.

This is the clear purport of the decisions of this court, as it is of the decisions of the Supreme Court of the United States, made upon this subject; and it is therefore clear that the plea of the insolvent discharge forms no bar to this action, and the demurrer thereto should have been sustained. *Frey* v. *Kirk*, 4 Gill & J. 510; *Poe* v. *Duck*, 5 Md. 1; *Ogden* v. *Saunders*, 12 Wheat. 358 [25 U. S. bk. 6, L. ed. 656]; *Boyle* v. *Zacharie*, 6 Pet. 348 [31 U. S. bk. 8, L. ed. 423]; *Baldwin* v. *Hale*, and *Baldwin* v. *Bank of Newbury*, 1 Wall. 223, 234 [68 U. S. bk. 17, L. ed. 531, 534].

It follows that the judgment of the Court below must be reversed, and the cause remanded for a new trial.

Jules A. RANDLE, *Appt.*,
v.
Adrian L. MELLEN.

1. The proceeding by way of **attachment against a nonresident or absconding debtor** is regulated entirely by statute, and compliance with the statute is essential to the validity of the proceeding.
2. If the summons be returned *non est* and the defendant does not appear to the short note to contest the claim, nor give bond to dissolve, then **if the attachment be quashed** on motion or petition for defects apparent upon the face of the proceeding, or in any other mode, or for any other reason, it seems that **the whole** statutory **proceeding** and every part of it, **including** the **summons and short note, fall** with it and are forever out of court, unless the quashing order be reversed on appeal.
3. Hence it seems that **when an attachment** has been so **quashed** the short note case connected therewith is at an end, and the subsequent **return** of **non est to** an **alias summons** will be **of no avail** for any purpose whatever.
4. **When an attachment** issued against a defendant as an absconding debtor has been **quashed** for errors in the proceedings or for other cause which the attaching **creditor** thinks can be corrected, he may begin *de novo* and obtain another, but he **cannot** go on and **obtain successive attachments upon two returns of non est to** writs of **summons** issued in the same attachment proceeding. (Code, art. 10, § 25, construed.)

(Decided March 17, 1887.)

APPEAL by plaintiff from an order of the Court of Common Pleas of Baltimore City, quashing an attachment. *Affirmed.*

Argued before Alvey, *Ch. J.*, Miller, Robinson, Irving, Stone and Bryan, *JJ.*

The case is stated in the opinion.

Messrs. **Edward Otis Hinkley, Frederick W. Story** and **John Hinkley,** for appellant:

The appellant contends that there was error in striking out the judgment for attachment after two returns of *non est* in the manner stated.

1. It was a judgment of a court of competent jurisdiction, which could not be stricken out in this way.

2. If there was error, it was the subject of an appeal from that judgment.

3. Code, art. 10, § 21, does not apply to judgments for attachment after two returns of *non est.*

Campbell v. *Morris*, 3 Harr. & Mc H. 558.

The evidence given at trial is not the subject of inquiry after judgment, except on motion for new trial, and this is not such a case. It is a judgment and must stand.

The Code, § 25, says: "Upon proof of his claim," the judge must have had proof and it must have been satisfactory.

If any inquiry could be made the proceeding would be found to be conformable to law.

Section 25, says: "Proof of his claim as herein before required." This refers back to section 4, "unless there be an affidavit."

In the original Act of 1715, chap. 40, §§ 2, 3, it stood—"and making such proof of his action as the said respective courts shall see fit."

See Hinkley & Mayer, Attachment, chap. XXVI, p. 120 *et seq.* and chap. II, p. 8 *et seq.;* Poe, Pr. § 471, p. 571; Evans, Pr. pp. 94, 119, 120; *Burney* v. *Patterson*, 6 Harr. & J. 200.

The short note or declaration of the plaintiff against the defendant in every attachment is a distinct case, and leads to a different issue and judgment from the attachment itself, which last, when laid in hands of a garnishee, is a case between defendant as if another plaintiff against the garnishee; or this last, if property be taken, is a proceeding *in rem*, as to which claimants may come in.

That there are two cases in every attachment has often been held.

Barr v. *Perry*, 3 Gill, 322, 326; *Spear* v. *Griffin*, 23 Md. 428, 429; *Lambden* v. *Bowie*, 2 Md. 339, 340; *Hirsh* v. *Thurber*, 54 Md. 211; Locke, Foreign Attachment (79 Law Lib. 56).

Code, art. 10, § 10, expressly provides that "There shall be issued with every attachment a writ of summons against the defendant, and a declaration or short note."

Hinkley & Mayer, Attachment, chap. VIII, p. 29.

The short note will serve as a declaration; and no other need be filed.

Barr v. *Perry*, 3 Gill, 322; *Spear* v. *Griffin*, 23 Md. 428.

The affidavit was rightly made at the commencement of the action, as well by the practice of common law as under the Act of 1886, chap. 184; and no new affidavit is necessary after the second *non est*.

In Locke on Foreign Attachment, 79 Law Lib. pp. 1, 2, the origin of foreign attachment at common law is given. On p. 6, it is said that the common-law practice was to file an affidavit at the beginning of the suit.

The last chapter in Locke on Attachment, pages 68 *et seq.*, shows the practice in sequestration, as it is there called, being our present attachment in cases against absconding debtors.

See also Drake, Attachment, pp. 1, 2.

The common law is, by the Declaration of Rights, the law of Maryland, except so far as changed by statute.

Our attachment law is of common-law origin.

Barney v. *Patterson*, 6 Harr. & J. 200; *Turner* v. *Lytle*, 59 Md. 203.

It is true that it is said in several cases that the attachment law is of statutory origin, and must be construed strictly, because it is in derogation of the common law.

See *Boarman* v. *Israel*, 1 Gill, 381; *Risewick* v. *Davis*, and *McPherson* v. *Snowden*, 19 Md. 91, 233.

Mr. **Theo. B. Horwitz**, for appellee:

The obvious meaning of section 25, art. 10, *Attachments*, p. 50, Code, and the well established practice in all the law courts of the City of Baltimore, is that the affidavit required by section 4, page 45, must be made after the second summons has been returned *non est* against the absent defendant.

The order of July 12, 1886, is a printed order, and was signed by Judge Duffy without a moment's reflection, and, as he says, "as an order of course," and, therefore, improvidently.

Code, art. 10, § 25, p. 50; *Risewick* v. *Davis*, and *McPherson* v. *Snowden*, 19 Md. 91, 93, 233.

Miller, *J.*, delivered the opinion of the court:

This appeal is from an order quashing an attachment. The proceedings in the case must be stated with some particularity in order that it may be clearly seen how the questions to be disposed of arise.

It appears from the record that Randle procured an attachment or warrant to be issued out of the court of common pleas against Mellen as an absconding debtor. The evidence of debt produced before the magistrate was a draft for $1,219.50, drawn by Mellen at Monterey in Mexico, upon a New York firm, payable to the order of Randle and protested for nonpayment. The short note in the usual form declares upon this protested draft.

The writ of attachment and the usual summons, provided for in section 10, art. 10, of the Code, were issued on the 21st of May, 1886, returnable to the June rule day, which was the 14th of June. On the 11th of June, and before the return day, Mellen's son, in behalf of his father, filed a petition to the judge of the court, under section 21, art. 10, of the Code, praying that the writ of attachment be quashed and set aside. In this petition the son states, among other reasons why the writ should be quashed, that this draft was obtained from his father by Randle without any consideration and upon a threat. The judge thereupon, and on the same day (11th of June), and in compliance with the requirements of this section of the Code, ordered the sheriff to return the writ and the proceedings thereunder immediately before him, and set the petition down for hearing on the 19th of June. The sheriff then made his return in obedience to this order. The return to the summons was in the usual form "*non est*, and copy set up at the court house door," and to the attachment, "attached as per schedule," and laid in the hands of several garnishees.

The record then states that afterwards, on the 19th of June, "an *alias* writ of summons was issued in the usual form to the sheriff returnable to the July rule day" (which was the 12th of July) "and was by him duly returned *non est*." After this, on the 7th of July, a demurrer (as the record states) was made to the petition of Mellen's son, in open court; and the court overruled the same and quashed the attachment.

Notwithstanding the attachment was thus quashed on the 7th of July, Randle afterwards, on the 12th of the same month (the return day of the *alias* writ of summons) filed a petition in the case to the judge, setting forth that Mellen had been twice successively returned *non est* by the sheriff (the returns being these already mentioned), and praying judgment for the writ of attachment to issue against his lands, tenements, goods and chattels; and on the same day the judge ordered the writ to issue. This writ with the accompanying summons for Mellen was accordingly issued returnable to the August rule day, which was the 9th of that month.

On the 31st of July, and before the return day of this second writ Mellen's son in behalf of his father filed another petition (the averments of which it is not necessary to state) under the same section of the Code, praying that the order directing this attachment to issue be rescinded, and that this attachment be also quashed and set aside. The judge thereupon passed the son's order, and the same proceedings followed as in the case of the first attachment. Upon the first final hearing of this second petition which was, as the record states, after evidence had been taken for and against the same, the court, on the first of December, 1886, passed an order rescinding the order which had directed this second attachment to issue, and quashed the same and the proceedings thereunder. From this order Randle has taken the present appeal.

It is manifest that counsel for Randle, in conducting the case in the court of common pleas, proceeded upon the assumption that what is usually called the "Short Note Case," was not affected by the quashing of the attachment on the 7th of July. They also assumed that they had the right to order an *alias* summons on the 19th of June, after the one issued with the attachment had been returned *non est*, and to use these two returns in the short note case for the purpose of obtaining an attachment under section 25, article 10 of the Code.

But we do not so understand or interpret the attachment law. In our opinion neither of these assumptions is warranted by any provision of that law, nor by any established practice thereunder. The proceeding by way of attachment against a nonresident or absconding debtor is, in this State, regulated and governed entirely by statute. Although now in common and daily use it is still, nevertheless, regarded as an extraordinary proceeding, available only in those cases expressly provided for in the statutes authorizing it, and only then capable of being maintained by a substantial compliance with the statutory requirements apparent upon the face of the papers. The jurisdiction conferred upon the courts in such cases is uniformly held to be special and limited, distinct from and not embraced within their general jurisdiction, and cannot be legitimately exercised, unless the attaching creditor pursues the mode pointed out in the statute, and no intendment or presumption will be made in its support. 2 Poe, Pl. & Pr. § 502.

The mode of obtaining an attachment on warrant is familiar to the profession, and is clearly prescribed in the Code. One of these provisions is that "There shall be issued with every attachment a writ of summons against the defendant, and a declaration or short note expressing the plaintiff's cause of action shall be filed, and a copy thereof shall be sent with the writ to be set up at the court house door by the sheriff or other officer." Code, art. 10, § 10.

This is purely a statutory requirement, but compliance with it is essential to the validity of the attachment proceeding. If, however, it is complied with, the statute is gratified. If the summons is issued with the attachment, and the short note is filed, and a copy of it is sent with the writ, and this copy is set up at the court house door, nothing further is required to be done in order to give the defendant in the attachment notice of the proceeding. If the defendant be returned summoned, or if he voluntarily appears upon the return day of the writ and contests the claim of the attaching creditor, then it becomes a short note case which must be tried before that against the garnishee, or the property attached, for the simple reason that if in this trial the claim should be defeated there will no longer remain any ground upon which the attachment can rest, and quashing it will follow as a necessary consequence.

The defendant can also appear to the short note, and have the attachment dissolved by giving bond to satisfy any judgment that may be obtained against him in the case. Code, art. 10, § 20.

When this is done the short note case remains on the docket for trial, and the attachment is dissolved because the bond takes its place and secures to the plaintiff all he could obtain by its successful prosecution. But if the summons be returned *non est*, and the defendant does not appear to the short note to contest the claim, nor give bond to dissolve, then if the attachment be quashed on motion, or upon petition, as in this case, for defects apparent upon the face of the proceeding, or in any other mode or for any other reason, we think it quite clear that the whole statutory proceeding and every part of it, including the summons and the short note, fall with it, and are forever out of court unless the quashing order be reversed on appeal. When, therefore, this attachment was quashed, on the 7th of July, the short note case was at an end, and the subsequent return of *non est* to the *alias* summons was of no avail for any purpose whatever.

But, assuming that we are wrong in this: Do the two returns of *non est* to the two writs of summons issued in this attachment case, authorize another attachment to be issued under the twenty-fifth section of this 10th article of the Code? This question requires a construction of that section; and in this we discover no difficulty whatever. The previous sections point out the mode and prescribe the conditions, for obtaining an attachment on warrant. This section provides how an attachment which shall have the same effect may be obtained in a different mode, and without a warrant from a magistrate. It declares that "When two summons have been returned *non est* against the defendant, in any of the courts of law of this State, the plaintiff, upon proof of his claim as hereinbefore required, shall be entitled to an attachment; and the judge of the court where such action is pending shall order such attachment to issue, and the same proceedings shall be thereupon had as in attachments issued against absconding debtors."

The plain meaning of this is that when an action is pending in any court of law, which the court in the exercise of its general jurisdiction has the power to try and decide, provided jurisdiction over the person of the defendant be not obtained by service of the summons upon him, and in such a case there are two returns of *non est* to two successive writs of summons, then the judge is authorized to regard such returns as evidence that the defendant is a nonresident or absconding debtor; and if the plaintiff's cause of action be such as would entitle him to an attachment on warrant, the judge is authorized and directed to order the attachment to issue, provided the plaintiff produces before him the same proof of his claim that he would be required to produce before the magistrate in order to obtain his warrant to the clerk of the proper court to issue an attachment.

When the attachment is thus ordered by the judge it is subject to the same conditions, and the same proceedings must be had upon it as if it were an attachment on warrant, with the single exception that the order of the judge supersedes and takes the place of the warrant of the magistrate. But the court in executing this power can look only to the returns made to the writs of summons issued in the action then pending before it, which has been brought in the ordinary way, and which invokes the exercise of its general jurisdiction. It cannot look to returns made in an attachment proceeding under a special limited and statutory jurisdiction. This is not within the contemplation of this section of the Code nor within the plain meaning of the language used; and to allow it to be done would be to allow an unauthorized and oppressive use of the writ. If his first attachment be quashed for errors in the proceedings, or for any other cause which the attaching creditor thinks can be corrected, he may begin *de novo* and obtain another, but he cannot go on and obtain successive attachments upon two returns of *non est* to writs of summons issued in the same attachment proceeding.

In either view of the case, therefore, there was no error in the order appealed from and,

It must be affirmed.

Edwin BLEAKLY *et al.*, *Appts.*,
v.
Augusta E. BLEAKLY *et al.*, Exrs.

1. A **sale of real estate, under a power created by a will,** should not be set aside, if the trustee has exercised that care and caution which would be observed by a prudent owner in regard to a sale of his own property, and has obtained a good price.
2. **Lands lying about ten miles from Baltimore** and surrounded by other lands occupied and used for farming purposes may **properly** be **sold as a farm by** the **trustee,** although there is evidence from some of the witnesses that the land may, at some future day, become valuable for building purposes.

(Decided March 15, 1887.)

APPEAL from an order of the Orphan's Court for Baltimore County, overruling exceptions and ratifying and confirming an executor's sale of realty. *Affirmed.*

Argued before Alvey, *Ch. J.*, Stone, Robinson, Irving, Miller, Bryan and Yellott, *JJ.*

The facts appear from the opinion.

Messrs. **Randolph Barton, John I. Yellott** and **Milton W. Offutt,** for appellants.

Messrs. **Wm. S. Bryan, Jr., Jno. F. Gontrum** and **E. Swinney,** for appellees.

Yellott, *J.*, delivered the opinion of the court:

On the 17th day of August, 1885, Samuel H. Bleakly executed his last will and testament, which was admitted to probate on the 21st of October in the same year. The appellees, his executors, in conformity with the power conferred on them by the sixth clause of said will, proceeded to sell his real estate in separate parcels, and reported the sales thus made to the Orphans' Court of Baltimore County.

"The Grove Farm," containing fifty-eight acres and a fraction of an acre, was sold at public auction; the purchaser bidding for it $180 per acre. Exceptions to this sale having been filed, testimony was taken; and, after argument by counsel, the orphans' court, on the 26th day of October, 1886, passed an order overruling the exceptions and ratifying and confirming the sale. From this order an appeal has been taken.

The evidence shows that this property lies in a neighborhood about ten miles from the limits of Baltimore City and is surrounded by other lands occupied and used for farming purposes. The house is old, the barn has been burned down, and the land is unproductive in its present condition. Several of the witnesses estimated the value of the property at a price much above that for which it was actually sold; but, when cross examined, these witnesses admit that their estimates are based upon the supposition that the land may, at some future day, become valuable for building purposes. Most of these witnesses seem to be wealthy gentlemen, owning land in the neighborhood, which they are not compelled to sell and which they may, therefore, retain in their possession, and indulge in the pleasing anticipation of an increase of value at some future period.

But there is no proof in this cause tending to show that this property, at quite a distance from the city and very near the center of Baltimore County, is, at this time, in demand for building purposes. It is the duty of the executors to sell it now; they are compelled to sell it now, and must therefore sell it in its present condition as a farm. They cannot be permitted to wait for years, indulging in expectations which may never be realized. They have, therefore, sold it as a farm; and all the testimony, when carefully weighed and considered, tends to show that they have sold it at a fair price, after advertising in Baltimore, Carroll and Frederick Counties, and in Baltimore City. Everyone who wished to purchase had an opportunity to attend the sale, and no unfairness in any of these proceedings is established by the proof.

There is, certainly, a recognized distinction between a sale made under a decree and one made in pursuance of a power created by a deed or will. But in either case, if the trustee has exercised that care and caution which would be observed by a prudent owner in regard to the sale of his own property, and has obtained a good price, the sale ought not to be set aside. *Andrews* v. *Scotton*, 2 Bland, 638; *Gould* v. *Chappell*, 42 Md. 468.

A careful examination of the evidence in the record leads to the conclusion that the executors have fully and faithfully performed their duty and have made a sale which ought not to be set aside. The order appealed from should, therefore, be affirmed.

It might be seriously doubted whether this appeal was taken in time under the provisions of article 5, section 40 of the Code. But it is not necessary to determine this question, as the ruling of the court below will be affirmed on the merits as disclosed by the proof.

Order affirmed.

Frances M. COSTIGIN *et al.*, *Appts.*,
v.
Thomas BOND.

1. Under section 22, art. 4, of the Constitution, when a **trial** is conducted **by less than** the **whole number of** the **judges** of a circuit court, a party against whom a decision is made may have the point or **question reserved** for the consideration of the three judges in banc; and this decision will be conclusive.
2. The **motion for a reservation** of the point or question decided **must be entered** of record **during** the **sitting at** which the decision is made.
3. The word **"sitting" does not mean** the **term but only** the time **until** the **court adjourns for the day.** The exception should be taken as soon as the ruling is

made: but the party excepting has the whole sitting for the day to determine whether he will appeal to the court in banc or to the court of appeals.

4. Where the **motion is not entered** of record **during** the **sitting** at which the ruling was made, the **court in banc has no jurisdiction** of the appeal.

(Decided March 10, 1887.)

APPEAL from an order of the Circuit Court of St. Mary's County, overruling a motion to dismiss an appeal to the Court in banc. *Reversed.*

Argued before Alvey, *Ch. J.*, Robinson. Ritchie and Bryan, *JJ.*

This was an action of ejectment brought by the appellants against the appellee. At the trial in the court below, before a single judge, exceptions were taken to the ruling of the court on prayers offered for the instruction of the jury.

March 31, 1885, the jury rendered a verdict for plaintiffs. On April 2 following the defendant filed a motion for a new trial, which was overruled by the court, and defendant thereupon moved the court for an appeal to the court in banc, and on the same day filed a motion in arrest of judgment, which latter motion was that day overruled and an exception reserved by the defendant to the court in banc.

On the same day the defendant filed two bills of exception, in each of which it was stated that he appealed to the court in banc. Plaintiff moved to dismiss the appeal to the court in banc; which motion the court overruled, and reversed the judgment for error in granting the plaintiff's prayer, and ruled that on other points the judgment would have been affirmed, and ordered the case to be remanded for a new trial; whereupon, plaintiffs appealed to this court.

Mr. **Daniel R. Magruder,** for appellants.

Messrs. **Daniel C. Hammett** and **Benjamin G. Harris,** for appellee.

Bryan, *J.*, delivered the opinion of the court:

The twenty-second section of the fourth article of the Constitution gave a new right of appeal.

When a trial is conducted by less than the whole number of the judges of a circuit court, it is competent for a party against whom a decision is made to have the point or question reserved for the consideration of the three judges *in banc;* and their decision is to be conclusive against him. This proceeding is in substitution of an appeal to the court of appeals, and makes a considerable alteration in the law on this subject.

The change is not to be extended by construction beyond the terms of the Constitution. It is provided that the motion for a reservation of the point or question decided shall be entered of record during the sitting at which the decisions may be made. The word "*sitting*" is not synonymous with "*term*" of the court. The exception to a ruling must properly be taken as soon as the ruling is made; but this provision of the Constitution intended to give the party taking an exception the entire sitting of the court (that is the whole time until the court adjourned for the day) to determine whether he would have his appeal to the court in banc, or to the court of appeals.

It would be a very improvident construction of this section to hold that a party might have the whole term of the court to make up his mind; and we think it is not warranted by the plain meaning of the words. As the motion was not entered of record during the sitting at which the ruling was made, the court in banc had no jurisdiction of the appeal. As the ruling of the court in banc was made exclusively on the bills of exception, our decision refers only to them.

Order reversed.

BALTIMORE & OHIO R. R. CO., *Appt.*,
v.
William A. BRYDON, Use of Henry G. Davis & Co.

1. **Where** it is **stipulated** that an **article** to be furnished **shall,** unqualifiedly, **be satisfactory to** the **party to whom** it is to be **supplied,** the right to reject the article, as not being satisfactory, cannot be inquired into; but the party's own **determination** must be taken as final and **conclusive.**
2. The **court has no right** or power **to** dispense with the condition and **say** that the **article** was of a quality or character that **ought** in reason **to have been accepted** as satisfactory.
3. But **where** the **article** to be supplied **is to be approved** as satisfactory **by** some **third person,** although that person be the agent of one of the parties, if it be shown that the approval has been withheld from motives of selfish interest, bias, partiality, or corruption, the **party prejudiced** by such action **may,** notwithstanding the absence of such approval, **recover** on the contract **for** the **nonacceptance** of the article furnished.
4. **In** the **absence of fraud** or bad faith **in** the conduct of such **third person, in** respect to the fact of his approval or the withholding it, **his judgment is** to be accepted as final and **conclusive.** No mere error or mistake of judgment will vitiate his determination.
5. In order **that a party may recover under** such a **contract for articles rejected by an agent, he must show** to the satisfaction of the jury a want of firmness and good faith on the part of the agent in the disapproval of the article, or that it was rejected by the other party to the contract, notwithstanding its quality was in fact satisfactory to the agent.
6. Where there is evidence on this point from which the conclusion sought to be deduced may fairly be established, it is the imperative **duty of** the **court to submit** the **same to** the **jury.**

7. This court has no power, in a common-law action, to review **conflicting evidence** in order to determine whether the jury have made proper deductions from it.

8. A question of **motive or intent** is always one of fact for the jury.

9. The **rule of damages,** in an action for not accepting articles agreed to be delivered, is the profit which the one furnishing them would have made if they had been accepted and paid for.

10. **Evidence of** the knowledge and **experience of** the **agent** designated to accept the article is **admissible, to show** the **good faith** of the agent in rejecting it. Evidence of a decline of the price of the article is also admissible on that point.

11. **Declarations of** the **president of** the appellant, authorized to bind the **corporation** by contracts in its ordinary business, recognizing the contract as subsisting, and, as to what should be done in the matter, are **admissible** in evidence.

12. Where the appellant had sought to show the **unfitness of** the appellee's **coal for** the **use contemplated by** the **contract,** by showing that it contained red or rusty coal, it was competent for the appellee to show that the rust did not affect its steam generating power, and that the appellant in its subsequent purchase of coal for its engines, did not reject coal similarly affected.

(Decided June 24, 1886.)

MOTION for reargument of case reported in 3 Central Reporter, 213. *Overruled.*

Alvey, *Ch. J.*, delivered the following opinion:

When this case was decided, after full argument, I concurred with the other judges in the conclusion that the judgment of the court below ought to be affirmed. This was my conclusion upon full examination of the record; it appearing that the case had been carefully tried and fully submitted to the jury upon correct principles of law.

After the decision of the case in this court, there was a motion by the appellant for reargument; and, in support of that motion, quite an elaborate brief was filed, urging several matters and questions supposed to have been overlooked by the court, or not fully considered by it, in arriving at the conclusion announced in its opinion.

That motion has been considered and overruled by the court; and while I concur in overruling the motion for reargument, I deem it due to the reasons assigned in support of that motion, to state briefly the grounds of my judgment.

The contract, upon which the action was brought, contains the condition that the quantity of coal to be furnished, during the three years for which the contract was to run, was to be of such *quality* as should be *satisfactory* to the masters of transportation and of machinery, who were employees and agents of the appellant, and to be delivered into the tenders of the appellant's locomotive engines, at such times as the appellant might require, etc. The contract was dated the 17th of May, 1875, but was not to take effect until the 15th of July following. Coal had been delivered to the appellant by the appellee, from the same mine, from September, 1874, to the time when the contract went into operation, but only under special orders; and the appellant continued to receive coal from the appellee, from the same mine, and for the same purpose, that is, for generating steam for locomotive engines, until May the 6th, 1876, with occasional suspensions.

The appellee, in his declaration, assigned as breaches of the contract: 1, that the appellant improperly refused to receive the coal tendered by the appellee; and 2, that although the appellee was ready and willing to deliver to the appellant daily the stipulated quantity of coal, of such *quality* as was required by the contract, and which in fairness and truth was and should have been satisfactory to the masters of transportation and of machinery of the appellant, the latter *falsely pretended* that the coal thus offered to be delivered was not of the *quality* contemplated by the contract, and was not satisfactory to the masters of transportation and of machinery, and therefore refused to accept such coal of the appellee.

It was upon these alleged breaches of the contract that the issues were formed.

Such then being the issues for trial, one of the most prominent questions of fact presented for the determination of the jury was: At what particular time did the master of transportation and the master of machinery really determine to condemn the coal supplied under the contract, because it was not satisfactory to them?

On the part of the appellee it was contended, and sought to be maintained by his proof, that it was not until the 6th of May, 1876, that the appellant ceased accepting the coal *under the contract*, and that it was not then stopped because it was in truth unsatisfactory to the agents named, but because of the fall in price of a superior grade of coal, and because those agents were unduly influenced by, and yielded to, the dictation of their superior officers in the Corporation, in disapproving the coal, so that their determination, in condemning the coal, was not in fact fairly and *bona fide* made.

But while such was the contention on the part of the appellee, it was contended, and strongly supported by proof, on the part of the appellant, that the taking of the coal under the contract was stopped on the third of August, 1875, because it was in fact unsatisfactory to the agents designated by the contract to pass upon its quality; and that all the coal taken of the appellee *after* that date was taken, as had been all the coal furnished by the appellee prior to the 15th of July, 1875, only occasionally, under special and limited arrangements, and for purposes of making tests as to the feasibility of using the coal on the road. No coal was in fact taken after the 6th of May, 1876; and the appellee immediately thereafter ceased operation of his mine; but he says that was in consequence of the refusal of the appellant to proceed with the execution of the contract.

That term or condition of the contract which required the coal to be of a quality satisfactory to the agents designated, was certainly a leading and important one to the appellant, and was intended exclusively for its protection, and without which, we may suppose, the contract would never have been made. The appellant, therefore, had the right to insist that the condition should be allowed its full and complete effect, in determining the rights of the parties under the contract.

In cases where it is stipulated that an article to be furnished shall, unqualifiedly, be *satisfactory* to the party to whom it is to be supplied, the right to reject the article, as not being satisfactory, cannot be inquired into; but the party's own determination must be taken as final and conclusive. In such case it is supposed, and such is the construction, that the party has reserved to himself an unqualified option, and is not willing to leave his freedom of choice to any contention, or to be subject to any investigation whatever.

It is quite permissible to parties to enter into such contracts; and where the approval or satisfaction of the party is made a condition precedent to the right to receive compensation or the contract price for the article to be delivered, the court has no right or power to dispense with the condition, and say that the article was of a quality or character that ought in reason to have been accepted as satisfactory. If the plaintiff thinks proper to enter into such conditional contract, it is not for anyone else than the defendant himself to say that he ought to be satisfied; that is a matter expressly reserved to the defendant to decide for himself, and the reasons or motive for the decision, whether reasonable or unreasonable, good or bad, are placed by the contract beyond question or investigation. For instances of this class of contracts, and as illustrations of the application of the principle here stated, I may refer to the cases of *Andrews* v. *Belfield*, 2 C. B. N. S. 779; *McCarren* v. *McNulty*, 7 Gray, 139; *Brown* v. *Foster*, 113 Mass. 136; *Zaleski* v. *Clark*, 44 Conn. 218; *Rossiter* v. *Cooper*, 23 Vt. 522; *Hart* v. *Hart*, 22 Barb. 606; *Gibson* v. *Cranage*, 39 Mich. 49; *Wood Reaping & M. Machine Co.* v. *Smith*, 50 Mich 565; *S. C.* 45 Am. Rep. 57.

But this principle does not apply, in its unqualified form, in a case where the contracting parties have expressly stipulated that the article to be supplied shall be such, in respect to the quality or otherwise, as shall be approved by, or satisfactory to, some third person, though that third person may be an agent or an employee of one of the parties to the contract. In such case, though it be made a condition precedent that the article shall be approved by the party designated, yet if it can be shown that the approval has been withheld from motives of selfish interest, bias, partiality or corruption, the party prejudiced by such action may, notwithstanding the absence of such approval, recover on the contract for the nonacceptance of the article furnished. In such contracts it is an implied condition that the person designated to approve shall act with entire good faith to both of the contracting parties. Both parties have the right to insist upon such good faith, and the want of it will dispense with the condition requiring the approval.

The court will not allow a defendant to avail himself of the condition precedent to defeat the right of the plaintiff to recover for a violation of the contract, where there has been fraud or *mala fides* on the part of the person appointed to approve or disapprove. But, in the absence of fraud or bad faith in the conduct of such party, in respect to the fact of his approval or the withholding it, his judgment or determination is to be accepted as final and conclusive. No mere error or mistake of judgment will vitiate his determination. The very object of his appointment is to prevent and exclude contention and litigation; and hence, nothing short of fraud or *mala fides* in the exercise of his power to reject or approve the article contracted for, will dispense with the strict legal effect of the condition precedent. This is now the settled doctrine, in respect to this class of contracts, in the courts both of this country and of England. *Wilson* v. *Y. & Md. Line R. R. Co.* 11 Gill & J. 58; *Lynn* v. *Balto. & Ohio R. R. Co.* 60 Md. 404; *Sweeney* v. *United States*, 109 U. S. 618 [Bk. 27, L. ed. 1053]; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549 [Bk. 29, L. ed. 255]; *Sharpe* v. *San Paulo R. R. Co.* L. R. 8 Ch. App. 597.

And this principle, with the proper conditions under which it was applicable, and could be applied in the consideration of this case, appears to have been fully and clearly set forth in the hypothetical instructions given by the court to the jury.

Such then being the settled law, as applicable to this case, the principal question presented for investigation, under the issues framed, was one of fact purely; and that question was whether the rejection or disapproval of the appellee's coal by the masters of transportation and of machinery was *mala fide* and fraudulent, or otherwise.

To entitle the appellee to recover, it was incumbent upon him to establish to the satisfaction of the jury that there was want of fairness and good faith on the part of those agents in the disapproval or rejection of the coal, or that the coal was rejected by the appellant, notwithstanding its *quality* was in fact satisfactory to those agents. It was to this question that the greater part of the large mass of conflicting testimony, contained in the record, was directed. The evidence produced on the part of the appellee was all of an inferential character, merely; and most of it had but a remote and indirect bearing upon the question at issue.

The coal contracted to be supplied was of a well known grade or quality in the coal region. It was mined or to be mined from what is known as "the six foot vein," and is of a comparatively inferior grade of coal to that mined from what is known as "the big or fourteen foot vein," in the same region. Its grade and general characteristics were well known to the appellant's officers and agents, before the contract was made, and it was in fact contracted for as an inferior grade of coal, the price being less than that paid for the standard grade of coal obtained from the fourteen foot vein. In judging of its quality, therefore, it should be judged according to its grade and class, and not as of a superior grade.

It could not have been the understanding or the expectation of the parties to the contract that the coal to be furnished should be tested by the standard of the big vein coal; for to suppose such to have been the intention would make the act of entering into the contract one of utter futility; as all knew that the coal contracted for could not bear that test. It would not, therefore, have been fair or within the meaning or spirit of the contract to require that the coal furnished should come up to the standard of the big vein coal; and this is what the appellee contended, and sought to establish by his proof, was the test applied to his coal, and by which it was rejected. If, therefore, the coal was rejected because it did not come up to the standard of the big vein coal, or because of the fall in the price of the big vein coal, as sought to be shown by the appellee, or because of the opposition of the superior officers of the appellant to its use, and not because the two agents named were in fact dissatisfied with the coal offered to be delivered under the contract, then the rejection of the coal was not *bona fide*, and the appellee had just grounds of complaint. But if the agents who were to be satisfied with the coal, once determined *bona fide* that the coal was not satisfactory, that terminated the contract, and no subsequent tender of coal by the appellee could revive the obligation of the appellant to accept it.

The appellant, by its first four prayers to the court, sought to have the case withdrawn from the consideration of the jury, upon the ground that there was no evidence *legally sufficient* from which they could conclude that there was fraud or want of good faith on the part of the agents or officers of the appellant, in the disapproval or rejection of the coal; or that its rejection was obtained by the fraudulent procurement of the appellant or its officers. These prayers the court rejected; and I do not see, upon the whole evidence before it, that the court could have done otherwise.

In passing upon these prayers, it was no part of the duty of the court below, indeed, it was not within its province, to examine and determine upon the comparative weight of the evidence. It was called upon simply to determine the preliminary question, whether there was evidence *legally sufficient* to be submitted to the jury. In deciding that question, the court was not required to decide as to the weight of the evidence; but taking all the evidence as true, whether by inference or otherwise, that tended to prove the issue in behalf of the party against whom the court was asked to decide, the sole question for the court was, whether a rational mind could fairly deduce the conclusion sought to be established by the evidence. If the court could see that there was such evidence, it became its imperative duty to submit the case to the jury. It was not a question of the decided preponderance of evidence; for it often occurs that the judge may think the case a very plain one, on the weight of evidence, in favor of the one side or the other, and yet be required to submit the case to the jury for their determination. If this were not so, the jury system might be justly regarded as an unnecessary and useless appendage to the court.

The court and the jury are both constitutional agencies for the administration of justice, each having its own separate and peculiar sphere of action and responsibility, and it is not within the power of the one to encroach upon or restrict the legitimate sphere of the other. The law has provided a means of redress against erroneous or unjust verdicts, by motion for new trial, addressed to the court that heard the case; but with that this court has nothing to do. This court, clearly, has no power, in a common-law action, to review the evidence, in order to determine whether the jury have made proper deductions from the evidence before them, although the question be raised as a preliminary one and before the case is submitted to the jury.

I shall not attempt any analysis of the testimony, as that would extend this opinion very much beyond the limits assigned to it. The testimony was very conflicting in many of its details; but it was of a character that required the case to be submitted to the jury. Many of the circumstances proved were susceptible of different inferences, and such being the case, the jury alone were capable of saying what inference was proper to be made. And so the jury were the exclusive judges of the credibility of witnesses, and the court could properly grant no instruction upon the assumption of the untruthfulness of any witness, or that would require the jury to discredit a witness against their own judgment. *Morris* v. *Brickley & Caldwell*, 1 Harr. & G. 108.

And not only were questions of the conflict of testimony and the credibility of witnesses to be considered, but all the facts and circumstances attending and surrounding the entire transaction under investigation, that could in any manner reflect upon the motives and purposes of the officers and agents of the appellant, and particularly the two agents to whom the coal was to be satisfactory, were brought under examination and scrutiny. In such case, the nature of the inquiry itself would seem to make it necessary that the case should go to the jury, although the evidence might appear but slight.

A question of motive and intent is always one of fact, and peculiarly within the province of the jury. As was said by this court in *Turner* v. *Walker*, 3 Gill & J. 387, "Whether a party acted with a fair *bona fide* intention, or by what motive he was really actuated, is always a question purely for the consideration of the jury." I am, therefore, very clearly of opinion that the court below committed no error in allowing the case to be considered by the jury.

It is objected that in the opinion of this court heretofore filed, certain testimony given by the appellee, but admitted by the court below for the special purpose only of impeaching or contradicting opposing witnesses, has been treated as testimony in the case in proof of the issues on the part of the appellee. This objection is, I think, well founded; for it does appear that testimony, in regard to certain declarations, admitted in rebuttal and restricted by the court below to the single purpose of impeachment, has been referred to and relied on in the opinion, as if such testimony had been admitted generally and without any restriction as to its use.

It is only necessary to refer to the eleventh prayer of the appellant, which was granted, to see how such testimony was restricted, and for what purpose it was allowed to be considered by the jury. Neither that prayer nor the evidence therein referred to was before this court; and consequently that evidence must have been inadvertently referred to in the opinion. But, while I think the text of the opinion ought to be modified so as to avoid making reference to evidence not before this court, I am of opinion that the general conclusion arrived at is in no manner dependent upon the consideration of that evidence, and that the result must be the same irrespective of the evidence improperly referred to in the opinion.

It is also urged, as a ground for reargument, that there was error in granting the third prayer of the appellee, in respect to the measure of damages, and that this court has failed in its opinion to advert to that instruction at all. It is said that the court ought to have directed the jury to deduct the amount of profit to the appellee, whatever it was, on the coal delivered to the appellant by the appellee, under the contract, and which had been paid for, so that such profit should not be included in the general estimate of the damages.

That such profit was not proper to be included in the verdict is certainly true; and there is nothing in the third prayer that justifies us in assuming that it was included. That instruction did not require the jury so to find and estimate the damages; but it only stated the rule or principle upon which the damages were to be ascertained. The court simply instructed the jury that the measure of damages was the profit which they should find the appellee would have made, if the contract had been fully performed.

That was the correct general rule, applicable to the case, according to the principle enunciated in *Phila. etc. R. R. Co.* v. *Howard*, 13 How. 307, 344 [54 U. S. bk. 14, L. ed. 157, 178]; and we are not to suppose or conjecture that the jury included profits that had been already received by the appellee. If the instruction, while stating a correct general rule, was supposed by the appellant not to be sufficiently explicit in reference to a matter of abatement, it should have asked an instruction by which its rights would have been more fully and clearly guarded. Failing to do this, I do not think it can now object to the court's instruction, which, as a general proposition, was clearly correct.

Then again; in the reasons assigned for reargument it is insisted that some, at least, of the numerous exceptions taken to the admissibility of evidence were well taken, and that they have not been fully considered in the opinion of this court. It is true, all that is said in the opinion, in respect to these exceptions, is that "After a careful examination of these exceptions we discover no error." It would certainly have been more satisfactory that some reasons, however brief, should have been assigned for this general conclusion. The important question, however, is: Was the court right in its conclusion in regard to these exceptions?

I shall not attempt a detailed consideration of these numerous exceptions to evidence. Many of them present the same class of facts or offers of facts, and substantially the same general question as to their admissibility. The first fifteen of these exceptions were taken to the overruling of objections to offers, and to the admission of evidence, consisting of acts and declarations (oral and written) of the officers and agents of the appellant, in the exercise of their employment, and of all the circumstances that preceded and led to the making of the contract of the 17th of May, 1875; and which were offered and admitted for the purpose of showing knowledge by those officers and agents, of the nature and qualities of the coal, and the inducements to the making of the contract, as those circumstances might reflect upon the *bona fides* of the two agents named, in the subsequent disapproval or rejection of the coal, as not being satisfactory to them.

The question, we must bear in mind, was not as to the interpretation of the terms of the contract, but as to the good faith of the agents of the appellant in repudiating the coal furnished under it; and, as bearing upon that question, any circumstance, though slight in itself, was admissible. It was material to the inquiry that the jury should be informed as to the extent of the knowledge and practical experience of the officers and agents of the appellant, in the use of the coal (and especially those agents intrusted with the power of rejection) prior to the date of the contract, and under what inducements the contract was made, as those circumstances might, to some extent, aid the jury in determining the question of good faith. I think, therefore, there was no error in the rulings upon these exceptions.

The sixteenth exception does not appear to be relied upon by the appellant, and clearly it is not tenable. The seventeenth and eighteenth exceptions were taken to the admission of evidence to prove the price of the big vein coal at the date of the contract, or the time when it went into operation, and the subsequent decline of that price. The object of this evidence was to show a motive in the appellant's officers and agents for rejecting the appellee's inferior grade of coal. This evidence would appear, clearly, to have been admissible, and the court, therefore, committed no error in allowing it to be given.

The nineteenth exception has not been pressed; but the twentieth, twenty-second, twenty-third, twenty-sixth and twenty-seventh exceptions have been strongly pressed upon the attention of the court, in the reasons assigned for reargument.

With respect to the twentieth exception, the question thereby presented is not, in my judgment, altogether free from doubt. I think, however, upon the best reflection that I have been able to give the matter, the ruling of the court below ought to be sustained.

The appellee's contention was that the contract was still existing and operative at the time of the conversation referred to, and therefore any act or admission of the appellant by those authorized to act for it, whereby the contract was recognized as still open and subsisting, would appear to be admissible, under the restrictions imposed by the court below. Such ruling would seem to be within the principle of the case of *Chicago* v. *Greer*, 9 Wall. 733 [76 U. S. bk. 19, L. ed. 769].

Mr. Garrett was the president and chief executive officer of the appellant; and as such he was authorized to bind the corporation by dealing or contracting in reference to matters arising in the ordinary course of its business. It was competent to him, acting for the appellant, to direct the presumption of the receipt of coal under the contract, although it had been previously suspended by subordinate officers and agents of the company. It is true, he was to have been furnished with a statement from the appellee as to what had occurred in respect to the previous use and suspension of the use of the coal, by the officers of the appellant, which was never supplied; but still, his declaration as to what should be done in the matter was a circumstance to be considered by the jury, in connection with the other circumstances of the case.

In regard to the twenty-second exception, I do not think there is any good ground for reversal shown to exist there. When the witness stated that he had no knowledge whatever as to whether the Clearfield coal had ever been used in locomotive engines, his previous statement in regard to that coal became wholly immaterial, and it is not perceived how the appellant could have been injured by it. And in regard to the proof excepted to in the twenty-third exception, the fact sought to be excluded was afterwards, in the course of the trial, fully proved as part of the appellant's own evidence, in the examination of Mr. King, who had been the vice president of the appellant, and with whom the contract in question had been made.

With respect to the twenty-sixth and twenty-seventh exceptions, I do not think they present any matter for reversal. The appellant had, by cross examination, and by examination in chief, sought to disparage, and to show the utter unfitness of the appellee's coal for the use contemplated by the contract, by showing that it contained red or rusty coal; and the testimony excepted to was offered to show that the appellant, in its subsequent purchases of coal supply for its engines, did not reject coal similarly affected.

It was certainly competent to the appellee, by way of answer to the objection taken to his coal, to show that the rust did not affect its steam generating power; and the object of the proof excepted to, as I understand it, was to show that fact, but in the indirect and inferential way stated in the exception.

Upon review of the whole case, as presented to this court, I do not find any sufficient ground for such doubt of the correctness of the conclusion heretofore announced, as to require a reargument; and *I therefore concur with the other judges in overruling the motion for a reargument, made by the appellant.*

Bryan, *J.*, filed the following opinion, November 19, 1886:

In looking over the advance sheets of 65 Maryland Reports a few days ago, I saw the opinion of the Chief Justice on this motion. *Ante*, 397.

I had no knowledge of its existence before this time. Immediately after this motion was overruled, the court took a recess of some weeks. It is unusual to file opinions when such motions are disposed of, and none was filed at the time. This one embodying the individual views of the Chief Justice was filed sometime afterwards; it was never read to the court, and my attention was not called to it. The occasion requires that I should state my reasons for adhering in all respects to the opinion of the court originally delivered; and the circumstances which I have mentioned will account for my delay in doing so.

In this case there are thirty bills of exception, and the record comprises 397 large folio pages of printed matter. I made a careful, minute and laborious investigation of every question, and of every phase of every question presented in the case. The amount involved was very large, and the responsibility of the decision was felt to be very great. The labor of considering the immense mass of matter contained in the record was cheerfully performed, with an earnest and anxious desire to do equal and exact justice between the parties according to law; and when the learned counsel filed their able argument for a rehearing, it received from me the careful and respectful consideration which it merited. If there be errors in my opinion they are not the result of carelessness, or inadvertence or design; but are due to infirmity of judgment.

The great question in the case was whether the rejection of the coal by the master of transportation and master of machinery was made in good faith or in fraud. The object of the opinion which I delivered was to group together the facts and circumstances in evidence, which it was competent for the jury to consider in the determination of this question. It was not my purpose (neither was it my duty) to give a detail of the proceedings in the court below, and to show what portions of the testimony were offered in chief, and what other portions in rebuttal. I have always supposed that the jury were obliged to consider all competent testimony, whensoever and howsoever it might be offered. The experience of many practitioners will recall instances where the plaintiff's case has been established by testimony offered by the defendant.

It is the function of the court to instruct the jury as to the questions in the cause to which the evidence is to be applied; and this duty extends to all the evidence; as much to that offered in rebuttal as to any other, but no more. The testimony of the plaintiff mentioned in my opinion, as to the alleged conversations with Sharp and Davis, was offered to contradict their testimony, wherein they denied that such conversations had taken place. It is difficult to see how it could contradict them, except by proving that such conversations actually occurred. And if the jury believed that these men really made the statements attributed to them, confessing such unworthy motives in rejecting the coal, they were bound to give some effect to these facts. What inferences did they authorize the jury to draw? For what purposes was it competent to consider them? To give a satisfactory answer to these inquiries we must turn our attention to the incidents of the trial.

According to the contract, Brydon was bound to furnish coal of quality satisfactory to the masters of machinery and transportation every day for three years after the 15th day of July, 1875. In deciding upon the merits of the coal, they were bound to exercise an honest judgment. There is no obscurity about the terms of the contract. It was Brydon's right during the whole term of three years to furnish coal of the prescribed quality; and he could not be deprived of this right, except by his own default. During all this time (if not in default himself) he had a right to demand the judgment of these arbiters on the quality of his coal. If their judgment was fairly and honestly rendered, it was conclusive upon him; but if fraudulent, it was of no effect.

Now let us observe that it was alleged that these conversations occurred in August and September, 1875, within the period embraced by the contract, and of course, during the time when the arbiters were bound to exercise their functions as judges of the coal. Now it cannot be denied that these statements, if really made by Sharp and Davis, were the most overwhelming impeachment of their integrity in making the decision which rejected the coal. It is, of course, well settled that when a witness on cross examination denies having made a statement, proof from the adverse party that he did make it is not to be taken as evidence of the truth of the matters stated. But the question here is not whether matters alleged to have been stated by Sharp and Davis were true; but simply whether they actually made the statements. If they made the controverted statements, they acknowledged grievous misbehavior in their capacity as arbiters; and most certainly the jury had a right to take into consideration their own self-accusations.

It has, however, been supposed that the learned court below decided that these conversations were not evidence of fraud in the arbiters. Let us consider this question. There were two leading questions considered by the learned judge, when he granted the prayers of the respective parties. They were closely allied to each other; yet they were distinct propositions, and were so stated to the jury. One of these questions was whether the plaintiff's coal was satisfactory to the masters of machinery and transportation; and the other was whether the rejection of it was fraudulent.

By the plaintiff's first prayer the jury were required to find "That the plaintiff was ready and willing, and did offer to deliver during the period of time covered by said contract, coal, daily, in quantities and of the quality contemplated by the contract;" and further, that "The master of machinery and master of transportation of the defendant rejected said coal as not satisfactory to them, and that said rejection was not *bona fide*."

The defendant's prayers drew the distinction between these questions still more definitely. Let us look at its seventh prayer. It is in these words:

"The defendant prays the court to instruct the jury that, under the third count of the plaintiff's declaration, the burden of proof is on the plaintiff to satisfy the jury;

"1. That the coal which the plaintiff tendered, and was ready and willing to deliver to the defendant, was of such quality as was satisfactory to both the masters of transportation and machinery of the defendant.

"2. That the defendant falsely pretended that said coal was not of the quality contemplated by the agreement between plaintiff and defendant, offered in evidence, and was not satisfactory to its masters of transportation and machinery, although in fairness and in truth the same was satisfactory both to its said master of transportation and its said master of machinery."

The eighth is as follows:

"That the burden of proof is upon the plaintiff, to satisfy the jury by the evidence that the coal which he was ready and willing to furnish to the defendant, or which he tendered and offered to defendant, was of such a quality as was satisfactory to both the master of transportation and the master of machinery of the defendant; and if he fails so to satisfy the jury, the plaintiff is not entitled to recover, unless he shall further prove to the satisfaction of the jury that the approval of the quality of his coal was withheld or refused by said officers, fraudulently or in bad faith, or by the fraudulent procurement of the defendant or its officers."

Now the eleventh prayer of the defendant instructed the jury that the testimony of Brydon, as to these conversations of Sharp and Davis, was not evidence of the existence of the facts stated in said alleged conversations, and that it was not to be regarded as proof that said coal was satisfactory to said Sharp, and to said Davis; but the court did not say that they were not to be considered by the jury in determining the question of fraud.

I have mentioned the ruling of the court in granting the eleventh prayer of the defendant, because it has been made the subject of considerable discussion; but it is by no means to be supposed that it is binding on us. The legitimate questions before us are those embraced by the defendant's exceptions. If we think the court below was right in its rulings on these questions, we are obliged to affirm; and we are not required to assume that the court was right in other rulings, favorable to the defendant, which are not brought before us by exception. We could not, for instance, reverse the judgment because the court refused to take the case from the jury, if we found that the evidence which had been admitted was sufficient for their consideration, even if the court had erroneously instructed the jury, at the instance of the defendant, to disregard essential and indispensable portions of the proof. It would be a great abuse of justice to reverse a correct ruling because a mistake had been made in the process by which the result was reached.

As a matter of course, I have confined this discussion to the questions of law arising on this record. It has been my duty to consider the purposes for which the jury were required to consider the evidence. The law does not permit me to express any opinion on the credibility of the witnesses, or on the correctness of the verdict.

My effort has been to perform the full measure of my duty, and to avoid transgressing its limits by a hair's breadth. There was other evidence on the part of the plaintiff which would have taken the case to the jury, and it may consequently be thought that this discussion of the competency of the alleged conversations was unnecessary. It is true that the result in this court is not affected by the decision of the question; it must, nevertheless, be admitted that it is very important that the judgments of the appellate court should not only be correct, but that they should also be grounded on sound principles.

The questions arising on many of the exceptions are settled by what was said in the opinion originally delivered. With respect to those not settled in this way, although they were fully considered, inasmuch as their importance was limited to this particular case, I did not think it necessary to insert a detailed discussion of them in the opinion.

Robert GARRETT, *Appt.*,
v.
Henry JANES.

1. The **power to regulate porches,** etc. **in Mount Vernon Place,** given to the mayor and city council of **Baltimore** by the Act of 1833, chap. 180, is not taken away by the Act of 1854, chap. 9, nor by ordinance No. 36 of 1874. The later Act was intended to apply to that portion of the city for which no such power had been given, and was not intended to embrace Mount Vernon Place.
2. If the **Ordinance of 1858** forbidding any person to erect any portico, etc., in Mount Vernon Place a greater distance into the Place than nine feet, is repealed by the Ordinance of 1874, it is **revived by** re-enactment in the adoption of the **City Code** of 1879.
3. A municipal legislature may, by a single ordinance, declare any **compilation of ordinances,** or proposed ordinances, to be in force, unless prohibited by statute.
4. A **later statute** or ordinance of a general nature does **not effect** the **repeal of a special one, unless** direct reference is made to the latter with that intent, or in terms they are so irreconcilable that a repeal by implication is manifest.
5. The **ordinance allowing steps,** porticos or any other ornamental structure **to extend** nine feet **into Mount Vernon Place** is a valid and reasonable exercise of the power derived from the Act of 1854, even if that Act repealed that of 1833.
6. An **ornamental** inclosed **porch,** extending less than nine feet from the front of defendant's house in Mount Vernon Place, *held*, **lawful** and permissible under the ordinance, although it had other subsidiary uses.
7. Even if some measure of obstruction to plaintiff's light, or other injury, is consequent upon the erection of the porch, he is not entitled to relief; such damage is **damnum absque injuria.**
8. For mere **interference with prospect,** it not being an incident of the estate, no remedy lies apart from contract.

(Decided April 9, 1886.)

APPEAL from a decree of the Circuit Court of Baltimore City, in favor of complainant in a bill in equity for an injunction to restrain the erection of a house alleged to be in violation of law. *Reversed.*

Argued before Alvey, *Ch. J.*, Miller, Robinson, Ritchie and Bryan, *JJ.*

The bill alleged that the defendant was engaged in erecting his house on Mt. Vernon Place in violation of law, in that the entrance thereto extended on the pavement in front thereof beyond the distance prescribed by law. The answer alleged that the erection of the portico or ornamental structure in front of defendant's building was within the distance prescribed by the Ordinance of June 5, 1858, of the City of Baltimore, passed under special authority of the Act of 1833, chap. 180. Further allegations of the bill and answer appear from the opinion.

The case was heard in the court below before Duffy, *J.*, who decreed that the entire structure complained of should be abated; and the defendant appealed to this court.

Messrs. **E. J. D. Cross,** and **John K. Cowen,** for appellant.

Messrs. **J. Southgate Lemon,** and **John Henry Keene, Jr.,** for appellee.

Ritchie, *J.*, delivered the opinion of the court:

The controlling question in this case, and the only one, after full consideration, which we deem it necessary to dwell upon is whether the structure complained of is in respect of the distance it projects upon the sidewalk, and of its architectural character, authorized by an ordinance of Baltimore City.

The Act of 1833, chap. 180, empowered the mayor and city council to pass ordinances regulating the limits within which it should be lawful to erect *steps, porticos or porches or other architectural ornaments* to houses fronting on *Mount Vernon or Washington Place.*

The first ordinance passed in pursuance of this Act was No. 55, of 1850; and the same regulations contained therein were re-enacted in 1858, and numbered 59 in the volume of Revised Ordinances of that year; the difference between the latter and that of 1850 being merely in the preambles, but in which they both refer to the Act of 1833 as their authority. The enacting provision of the Ordinance of 1858 is:

"It shall not be lawful for any person to erect or set up *any portico, steps or any other ornamental structure whatever* on Mount Vernon Place a greater distance into the *Place* than nine feet, measuring from the building line thereof."

The width of Mount Vernon Place is 200 feet, and of its sidewalks, eighteen feet.

It is contended by the appellee that this municipal permission to encroach with any portico, steps or any other ornamental structure upon Mount Vernon Place nine feet, which is half the width of the pavement, has been repealed by the Act of 1854, chap. 9, and the Ordinance No. 36, of 1874, adopted thereafter.

This Act of 1854 conferred on the mayor and city council the power of regulating the limits within which it should be lawful to erect *steps,* porticos, bay windows or other architectural ornaments to houses fronting on *any of the streets, lanes or alleys* of the city. This Act is codified as section 864 of article 4, of Public Local Laws. The Ordinance of 1874 fixes the limit that any steps, porch or portico may encroach from the building line upon any of the streets or alleys at *one third* the width of the foot way; and repeals all "inconsistent ordinances."

The operation of the Act of 1854 did not, we think, take away the power conferred by the Act of 1833. It simply enlarged the power already bestowed as to a part of the city to embrace the whole of it. The power having already been given to regulate porches, etc., in Mount Vernon Place, a fair presumption is that this later Act was intended to apply to that portion of the city for which no such power had been given; and that hence, the use of the words "streets, lanes and alleys" was not meant to embrace the thoroughfares of Mount Vernon Place, already provided for. Indeed, the designation of Mount Vernon Place as a "place" tends to support this contradistinction. It is a locality of unusually spacious dimensions, and having special requirements as the site of the Washington Monument.

The same observations are equally applicable to the Ordinance of 1874, founded upon the statute.

But whatever might be the true construction of the Ordinance of 1874, if it were the last act of municipal legislation on the subject to which it relates, or even assuming that it operated a repeal of the Ordinance of 1858, this latter ordinance was revived by reënactment in the adoption of the City Code of 1879. Both these ordinances are embodied in this Code; and all the ordinances therein set out, were by a special and comprehensive ordinance enacted to be valid and operative as such.

That it is competent for a municipal Legislature by a single ordinance to declare any compilation of ordinances or proposed ordinances in force, in the absence of a statutory prohibition, we do not doubt. Such a power has been too generally exercised, with implied if not express recognition by the courts, to be now questioned.

The Baltimore City Code of 1879 has been recognized as the repository of the ordinances, valid at its adoption, in the subsequent city legislation, and has been cited by parties and relied on by this court in numerous cases as of undoubted authority. To deny the operative effect of a comprehensive ordinance of this kind, would practically be to deprive a city of the great utility of a Code.

That the Code of 1879 was duly adopted is apparent from the ordinances published with it. Section 48 of article 87, Public General Laws, provides that the ordinances and resolutions of the mayor and city council of Baltimore, may be read in evidence from the printed volumes published by the authority of said corporation. That the "printed volumes" are published by authority we think it competent to gather from the volumes as they appear in print; the object of the law being to remove the delay and expense incident to the production of manuscript originals, where the published volumes purport to be authoritative.

There is no specific reference to the ordinance allowing "any portico, steps, or any other ornamental structure whatever," to extend nine feet into Mount Vernon Place, in that clause of the Ordinance of 1874 which repeals "inconsistent ordinances;" and regarding the former as a special and the latter as a general ordinance, they should be considered as *in pari materia*. They are not inherently incompatible. The general rule in the construction of statutes (applicable alike to the Act of 1854 and the Ordinance of 1874) is that a later one of a general nature does not effect the repeal of a special one, unless direct reference is made to the latter with that intent, or in terms they are so irreconcilable that a repeal by implication is manifest.

Sedgwick, Stat. & Const. Law, 2d ed. p. 87, etc., thus states the rule:

"In regard to the mode in which laws may be repealed by subsequent legislation, it is laid down as a rule, that a general statute without negative words, will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent, as for instance, the Statute 5 Elizabeth, chap. 4, that none shall use a trade without being an apprentice, did not take away the previous Statute 4 and 5 Philip and Mary, chap. 5, declaring that *no weaver* shall use, etc. The reason and philosophy of the rule is that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner, and not expressly contradicting the original Act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter Act such a construction in order that its words shall have any meaning at all. So when an Act of Parliament had authorized individuals to inclose and embank portions of the soil under the River Thames, and had declared that such land should be free from all taxes and assessments whatsoever, the Land Tax Act, subsequently passed, by general words embraced all the lands in the kingdom; and the question came before the King's Bench, whether the land mentioned in the former Act had been legally taxed, and it was held that the tax was illegal."

We see no difficulty in the standing together of a special ordinance adapted to a particular locality, such as Mount Vernon Place, and a general one applicable to the streets and alleys of the city at large. The need of such discrimination is apparent. The necessities of thoroughfares such as Baltimore or Pratt Street, for instance, or of those adjacent to markets or wharves devoted to business and thronged with pedestrians, and of streets and alleys as generally used, are not similar to those of places or squares set apart for ornament and relief from the crowds and activities of commerce. As to the former, facility of passage along the sidewalks is a paramount requirement; while as to the latter, it is in furtherance of the purpose to render them attractive, to give more freedom to the exercise of private taste for adornment in their vicinity.

In a city noted for its monuments, municipal legislation peculiar to their neighborhood would seem indispensable; and we regard the ordinance allowing steps, porticos or any other ornamental structure to extend nine feet into Mount Vernon Place a valid and reasonable exercise of statutory power, derivable from the Act of 1854, even if we assume it to have repealed that of 1833.

Regarding this ordinance of the City Code of 1879 as in force, the next inquiry is whether the structure in front of appellant's building line on Mount Vernon Place is within its terms.

This structure extends within a fraction of nine feet from the front or building line of appellant's house, is rectangular or nearly so in shape, has an elevation of about twenty-two feet from the ground, with a balustrade of two feet additional, the whole being about the height of the first story, with a length of some twenty-two feet, and ending on the side of plaintiff's house, nearly nine feet from the dividing line between him and defendant, and about eleven feet and a half from plaintiff's window.

The approach is by steps at the east end, and through it an entrance is gained to the main hall, with which it corresponds in width, through three arcades or doorways, set in the wall on the building line of the house, and susceptible of being left open or closed by doors or hangings. It is built of brownstone, as the house is, and inclosed, having two stained glass windows and an ornamental panel in front, and another stained glass window in the west end. While some other and more customary mode of entrance and one uninclosed, could have been selected, this is the main entrance way to defendant's house, adopted as such; and while, from being inclosed, the doorways or arches through which visitors or inmates pass from this entrance way into the hall or building proper may remain open, its primary use and purpose is a means of access to the building through the three doorways which are abreast of and command the hall; and thus is essentially an inclosed porch or portico for that purpose.

That the hall of a house should be constructed with three doorways, commanding its entire breadth, instead of one, is simply a matter of choice in the builder, and is not prohibited; and there is no requirement that they shall be exposed to view, nor is it forbidden that they may be protected by inclosing the platform or porch by which access to them is reached. That such a structure is permissible is clear from its not transcending the limit of nine feet from the building line, and falling within the terms of "portico, steps or any other ornamental structure." From the use of these words, no limitations seem to be imposed upon the preference or taste of the builder, except that in the mode of providing an entrance to his house he shall not erect what will offend the eye, but so construct it that it shall be architecturally an ornament, and thus contribute to enhance the beauty of the neighborhood and city. To impose no restrictions but the standard of adornment was a wise latitude, looking to the changes in tastes and architectural modes and styles that time might be expected to bring.

The testimony is conclusive as to the essential character of the structure being that of an entrance way, and as to its ornamental effect. A number of architects were examined on both sides, and the tenor of their opinions as experts was the same:

Wyatt, one of the witnesses, says: "The most accurate designation for it, I should consider, would be an inclosed porch or vestibule. I consider it highly ornamental."

Niernsee, another, says: "It would certainly come under the term ornamental structure."

Wilson says: "I should call it an inclosed porch. It harmonizes perfectly in detail and style."

Pennington says: "The projection I consider a feature, forming the main entrance way to the house, and would term it an inclosed porch, forming on the inside a vestibule to the main hall. I consider the design of the porch in harmony with the rest of the building."

Architects from New York testify to the same effect. Cady says: "The projection is designated in New York as a stoop, in some other places as a porch. The porch is to make an effective and ornamental entrance to the building and to protect the steps and entrance from the weather. It seems to harmonize perfectly with the design of the said building. I have seen many residences in New York with similar projections."

Haight says: "The projection appears to be an inclosed porch. The purpose is to give access to and adorn the building. It seems to be in harmony with the architecture of the building, and I know of residences in New York and elsewhere having similar projections."

Post says: "It is an inclosed porch, it is an entrance to the house and a protection to the doorway. It also emphasizes the main entrance of the house. I think it harmonizes thoroughly with the design, and is a very handsome feature."

Robertson says: "I should term the projection an inclosed porch. Its use is to give a covered entrance to the house, and its purpose is to serve as an ornamental structure. I should say that in the main it harmonizes with the design and is not out of proportion to the general mass of the front."

It is true that some of the plaintiff's witnesses called it a vestibule; but others term it an inclosed porch, while its ornamental character is generally conceded. We do not concur in the idea that the ordinance, from using the descriptive terms, "portico, steps," etc., and not mentioning porch, meant to forbid the erection of porches, or used "portico" in a technical sense, as distinguishing it from porch, piazza, verandah or any other equivalent mode of entrance, but in a generic sense and as synonymous. Besides, the words, or "any other ornamental structure," would include a porch, if handsome, whether inclosed or uninclosed, if not implied in the word portico.

Its primary character being an inclosed porch, we do not think its subsidiary uses can destroy its essential nature. The inclosing of a portico or porch is not forbidden. An inclosed one has advantages in respect of the weather and certain forms of embellishments, and admits of the doorways to the building proper being left open, and of freer access between the hall and the porch, than would be possible if the latter were left exposed to the weather. But being inclosed does not render it any less the main entrance way.

And so in regard to its projection; being lawful to extend it as the means of entrance nine feet into the sidewalk, its foundation is lawful to support it that distance from the building line; and when laid for that purpose, such purpose is not affected by the incident of the walls being either built entirely solid, or having windows cut in them to secure a subsidiary use inside. We do not think it would remain a porch if the foundation walls were left solid and become a bay window if light were let through apertures made therein; provided the harmonious character and use of the structure as a porch were not altered thereby. The subordinate uses which may be made of a structure will not supersede its essential character. The incidental or inferior features will not of necessity be inconsistent with the maintenance of its dominating and original impress.

This porch being, therefore, in its extent from the building line, and in its ornamental effect, a lawful structure, it follows that the plaintiff (even if some measure of obstruction to his light, or other injury, is consequent upon its erection) is not entitled to relief; such damage is *damnum absque injuria*. The inconvenience suffered is that incident to residing in a city, where houses are necessarily close together; and the legitimate use of his property by a neighbor will unavoidably often cause discomfort, and where he in turn will suffer inconvenience from the same cause.

It often occurs that it would be more agreeable if next door there were not a tree, or an awning or a signboard, to obstruct the light; but where such obstructions rightfully exist, they afford no ground for legal redress.

As to any interruption of the plaintiff's facilities of outlook in the sense of view merely, it has been long ago decided that for mere interference with prospect, it not being an incident of the estate, no remedy lies apart from contract. *Aldred's Case*, 5 Coke, pt. 9, p. 102; *Butt* v. *Imperial Gas Co*. L. R. 2 Ch. App. 160.

Decree reversed, and bill dismissed.

Bryan, *J.*, dissented.

STATE of Maryland, *Plff. in Err.*,
v.
George W. BOWERS.

1. **Rule 28** requiring that in **criminal cases** an **appeal or writ of error** shall be taken without delay makes no distinction between an appeal or writ of error taken by the State and one taken by the accused.
2. **What will amount to delay** within the rule must be determined by the character of each case as it arises. A delay of twenty-one days in a simple case where the petition could easily be prepared in less than an hour, *held*, an infraction of the rule, and the appeal dismissed.

(Decided May 28, 1886.)

MOTION to dismiss a writ of error, to review a judgment of the Circuit Court of Frederick County, sustaining a demurrer and quashing an indictment for violating an Act prohibiting the sale of intoxicating liquors in a certain locality. *Writ dismissed.*

Argued before Alvey, *Ch. J.*, Yellott, Stone, Miller, Robinson, Ritchie and Bryan, *JJ.*

The case is stated in the opinion.

Mr. **Frank C. Norwood,** *State's Attorney for Frederick County*, for the State.

Mr. **Milton G. Urner,** for defendant in error.

Miller, *J.*, delivered the opinion of the court:

George W. Bowers was indicted for violating the Act of 1864, chap. 184, a local law which prohibits the sale of intoxicating liquors within three miles of either of the churches in the Village of Myersville, in Frederick County. He demurred to the indictment and the court sustained his demurrer and quashed the indictment. This judgment was rendered on the 10th of March, 1886, and on the first of April following, the State sued out a writ of error to bring the case to this court for review. The defendant in error has now moved to dismiss the writ upon the ground that it was not taken "without delay," under Rule 28, Relating to Appeals.

The preceding Rule 27 requires appeals in civil cases to be taken within two months from the date of the judgment; but this Rule 28 provides that "The aforegoing rule shall not apply to criminal cases; but in all such cases the appeal or writ of error allowed by law shall be taken *without delay*, and the transcript of the record shall forthwith, or as soon as the same can be made out, be transmitted to the court of appeals."

It is very desirable, and for obvious reasons, that criminal cases should be disposed of as speedily as possible after trial, and that no unnecessary delays should be interposed by appeals or writs of error. Hence the Legislature (when by the Act of 1872, chap. 316, it allowed exceptions to the rulings of the court in criminal cases and an appeal as in civil cases) was careful to provide that such appeals "shall be heard by the court of appeals at the earliest convenient day after the same shall have been transmitted to said court."

It was to carry out this purpose of preventing delay that the rule in question was adopted. It prescribes no precise time within which an appeal or writ of error shall be taken after the ruling or judgment complained of is rendered, but requires it to be taken without delay and the record transmitted as soon as it can be made out, and makes no distinction between an appeal or writ of error taken by the State and one taken by the accused.

What will amount to delay within the rule must be determined by the character of each case as it arises. A longer time will be allowed where the exceptions are numerous, or where the case is such that time is required for preparing the petition for a writ of error. But in a simple case like this, where the petition could easily be prepared in less than an hour, a delay of twenty-one days is unquestionably an infraction of the rule and the motion to dismiss must prevail.

Writ of error dismissed.

STATE of Maryland, *Plff. in Err.*,
v.
Albert LONG.

Where a judgment sustaining a demurrer to an indictment was given March 10, and a writ of error was applied for by the State on the 17th of April following, *held*, that a **longer period** intervened **between the judgment and** the **application for** the **writ than is allowed by Rule 28, relating to appeals,** which requires the appeal or writ of error to be taken in criminal cases without delay, and the **writ of errror dismissed.**

(Decided May 28, 1886.)

MOTION to dismiss a writ of error to the Circuit Court for Frederick County, sustaining a demurrer to an indictment for violating an Act prohibiting the sale of intoxicating liquors in a certain locality. *Writ dismissed.*

Argued before Alvey, *Ch. J.*, Yellott, Stone, Miller, Robinson, Irving, Ritchie and Bryan, *JJ.*

The case is stated in the opinion.

Mr. **Frank C. Norwood,** *State's Attorney for Frederick County*, for the State.

Mr. **Milton G. Urner,** for defendant in error.

Miller, *J.*, delivered the opinion of the court:

The motion to dismiss made in this case must be sustained for the reasons stated in the case of *State* v. *Bowers*, just decided [*Ante*, 405].

The defendant in error was indicted under the Act of 1866, chap. 104, a local law which prohibits the sale of spirituous or fermented liquors within three miles of either of the churches in the Village of Wolfsville, in Frederick County. He demurred to the indictment and the court gave judgment sustaining the demurrer on the 10th of March, 1886, but the writ of error was not applied for until the 17th of April, following. A longer period of time intervened between the judgment and the application for the writ than occurred in the case of *State* v. *Bowers*, and all that was said in that case applies, therefore, *a fortiori*, to this.

Writ of error dismissed.

Thomas OWINGS, Trustee, *Appt.*,
v.
Charles C. RHODES.

1. **On a bill for interpleader there must be a preliminary decree,** so that the codefendants may properly present their conflicting claims and support them by evidence as a foundation for a final decree determining their rights.
2. The court **cannot determine** the **validity of** the **claims** in controversy by **final** decree **before** all the **evidence** in their support has been **adduced** and considered.
3. The **person holding** the **property in controversy in** a proceeding by **interpleader** has no interest in the issue and cannot be affected by the final decree.
4. Where the rights of the parties have been settled by final decree the **determination of** the **court** may be **enforced by new proceedings** bringing in other persons not parties to the former suit, as the person holding the property in controversy, who may be compelled to pay the money in accordance with the final decree.
5. Where there has been an **unauthorized payment of funds** held **in a fiduciary capacity,** the loss must fall upon him who thus makes the payment and not upon an innocent party.
6. **Courts of equity** exercise discretionary **power as to costs;** and if a decree is in other respects right, it will not be disturbed, even if, in the judgment of this court, there was an improper direction as to the party or fund charged with their payment.

(Decided June 22, 1886.)

APPEAL from a decree of the Circuit Court of Baltimore City, in favor of complainants in a bill in equity to enforce payment of a certain sum of money held by defendant as trustee. *Affirmed.*

Argued before Alvey, *Ch. J.*, Yellott, Robinson and Bryan, *JJ.*

The case is stated in the opinion.

Mr. **Charles J. Bonaparte,** for appellant:

The decree of December 9, 1882, is a final decree so far as the $4,000 was concerned. It directed the executor to pay that sum to the trustee; directed the trustee what to do with the income and the principal; determined who should share in the enjoyment of either, and left absolutely nothing undecided as to this subject matter. It referred to the auditor the questions only of what balance remained after such payment in the hands of the executor, and how that balance should be distributed among the various claimants.

This decree, if erroneous, was subject to appeal; if improvidently passed, it could be corrected during the term, upon petition. After the term it became enrolled and beyond the control of the court, except through a bill of review or original bill for fraud, or malpractice; and, until so corrected, it determined absolutely the rights of all the parties to the cause as to its subject matter.

Thruston v. *Devecmon*, 30 Md. 210, 217; *Downes* v. *Friel*, 57 Md. 531, 534, 535; *Trayhern* v. *Mechanics Bank*, 57 Md. 590, 598.

Such being the effect of the decree, the auditor's expression of opinion, made as to a matter not referred to him and after the term in which the decree was passed, could have no possible efficacy, either to determine its construction or to modify its effects. The auditor is a mere ministerial officer, without any judicial functions.

Dorsey v. *Hammond*, 1 Bland, 469; *Field* v. *Holland*, 6 Cranch, 21 (10 U. S. bk. 3, L. ed. 140).

Mr. **George R. Gott,** for appellee.

Yellott, *J.*, delivered the opinion of the court:

This is an appeal from a decree passed by the Circuit Court of Baltimore City. As disclosed by the record, one Fayette Plummer, by his last will and testament, did "give and devise" to his wife, Josephine Plummer, the income from $4,000 during her life, and after her death, the principal is to be divided among certain charitable institutions in said will designated. There are several legacies bequeathed to other parties, and then all the residue of the estate, real and personal, is given to the said Josephine. Of this will, George W. Lindsay was appointed executor, with power "to sell all and any" of said property.

The widow of the testator, being indebted to one Frank Welsh to the amount of $700, executed a mortgage of all her interest in the estate of the testator; and Welsh assigned this mortgage to Charles C. Rhodes. The validity of this mortgage being subsequently disputed, and there being other claims against the said Josephine, the executor filed his bill of complaint, alleging that the orphans' court had decided that it had no jurisdiction to determine the matters in controversy, and asking that the parties be decreed to interplead, so that their respective rights might be heard and determined.

The proper pleadings were then filed in regular procedure; and by a decree, passed on the 9th of December, 1882, the court appointed the appellant, Thomas Owings, Trustee, to receive from the said executor the sum of $4,000, with interest, to be securely invested in conformity with the provisions of the will. The decree also directed the executor to pay over the said sum of $4,000 with interest, to the Trustee thus appointed, and referred the claims of all the contesting parties to the auditor, with directions to state an account.

An account was stated by the auditor in accordance with these directions, and was on the 7th of March, 1883, finally ratified and confirmed. The auditor's account, which was thus finally ratified and confirmed, adjusted the matters in controversy between the litigating parties and allowed the claim of the appellee.

It is manifest that the decree passed on the 9th of December, 1882, was merely interlocutory. It must be borne in mind that the property was in the hands of an executor; that the orphans' court had determined that it had no jurisdiction; and that the interposition of a court of equity had been invoked so that it might be decreed that the parties to the controversy should interplead. The bill for an interpleader was filed on the 14th of January, 1882, and the parties defendant having subsequently answered, the court, on the 9th of December, in the same year, passed the decree in question.

This decree was necessarily interlocutory because, from the very nature of the procedure, there must be a preliminary decree so that the codefendants may have an opportunity to properly present their conflicting claims and support them by the introduction of evidence which may form the foundation for the final determination of the court in regard to their respective rights; this being the relief which the plaintiff, who has no pecuniary interest in the contest, asks for in his bill for an interpleader. To this relief he is clearly entitled; and, therefore, it becomes the duty of the court to pass a preliminary decree.

As was said by *Lord* Loughborough in *Langston* v. *Boylston*, 2 Ves. Jr. 108, 109: "A party claiming no right in the subject is doubly vexed by having two legal processes in the names of different persons going on against him at the same time. He comes upon the most obvious equity to insist that those persons claiming that to which he makes no claim should settle that contest among themselves, and not with him."

The court by its preliminary decree substituted its own trustee in the place of the executor, and thus assumed control by ordering a transfer of a portion of the property in dispute. It could not undertake to determine the validity of the claims in controversy before all the evidence in support of those claims had even been adduced and considered; and any construction of the peculiar phraseology of a portion of this decree which tends to give it a different effect and operation must be rejected.

The court referred the claims of the codefendants to the auditor, with directions to take testimony, and on the 23d of February, 1883, the auditor filed his report and account, in which, among other claims, he allowed that of the assignee of the mortgage. On the 7th of March, 1883, the court finally ratified and confirmed the report and account, and the order then passed was undoubtedly a decretal order and operated as a final adjudication, and a determination of the questions involved in the litigation then pending as, under the pleadings and issue, it was impossible for the parties interested to carry the controversy any farther in that court. *Contee* v. *Dawson*, 2 Bland, 264; *Lee* v. *Admrs. of Boteler*, 12 Gill & J. 323.

The passage of this order had the effect of a final decree, and determined the rights of the respective parties. But the appellant in the pending appeal was no party to that cause. The funds in dispute had been placed in his hands by the passage of the interlocutory decree. When the procedure is by interpleader, the person holding the property in controversy has been aptly compared to a stakeholder. He has not, and cannot properly have, any interest in the issue, whatever it may be, and having no interest cannot be affected by the final decree. *Langston* v. *Boylston*, 2 Ves. Jr. 109; *Bedell* v. *Hoffman*, 2 Paige, 199.

But when the rights of the parties to a suit which had its inception in a bill for an interpleader have been determined by a final decree, it may, at some period subsequent to the passage of the decree, become necessary to enforce the determination of the court; and this may be done by the institution of new proceedings growing out of the original suit which has been ended. And it is evident that the institution of these proceedings cannot be prevented by the enrollment of the decree in the original suit, as persons who were not parties to the former suit may be brought in and be affected by the new proceedings. It was said by *Lord* Cranworth in *Lyne* v. *Pennell*, 1 Simons, N. S. 113, that "As a defendant to an interpleading suit stood, after a decree, in the anomalous situation of plaintiff as well as defendant, he might file a supplemental bill for the purpose of bringing a new defendant before the court, without making the other parties to the original suit parties to it, as a plaintiff in an ordinary suit might do."

The right of the appellee to a certain sum of money had been determined by the court; but this money was not in the hands of any of his codefendants. It was in the hands of the appellant, who was no party to the proceedings which were terminated by the final decree. The appellee certainly had the right to institute proceedings to obtain the benefit of this decree. A course of procedure analogous to that indicated by the vice chancellor in *Lyne* v. *Pennell*, was, therefore, proper and expedient; and this course has been pursued by the appellee, and was the most effectual remedy which he could have invoked, as the stakeholder having the funds in his possession was the trustee of the court and subject to its supervision and control.

The appellee filed his petition on the 28th of October, 1884, and in it refers to the action of the court in ratifying the auditor's account, which allowed his claim as assignee of the mortgage, and avers that there is an unpaid balance which the appellant has refused to pay. This petition is answered by the appellant, who, in his answer, denies the right of the appellee to the sum claimed by him; and avers that he, the said appellant, has paid over the whole of the income, received by him, in manner and form as directed by the decree appointing him trustee. He avers and contends that the rights of all parties to the cause, and the duties and liabilities of the trustee, were finally fixed and determined, so far as the fund of $4,000 and the income and proceeds thereof are concerned, by the decree of the 9th day of December, 1882.

Now, as was decided by this court in *Barth* v. *Rosenfeld*, 36 Md. 604, "A decree passed upon the filing of a bill of interpleader, ordering the complainant to pay the money into court, and requiring the defendants to interplead and answer, is interlocutory, settling the rights of no party, and is at all times prior to a final decree, subject to revision and alteration, being merely auxiliary to further proceedings, and does not require a bill of review to vacate, amend or rescind the same."

The decree in question did not, as has already been intimated, determine any of the rights involved in litigation; and that portion of it which is supposed to be a clerical error is a mere copy or reproduction of the provisions of the will, and was inserted because the sum due the assignee of the mortgage was to be paid out of the income arising from the fund of $4,000 placed in the hands of the Trustee who was, after satisfaction of the mortgage, to pay the income to Josephine Plummer until her death, when he was to distribute the principal among the recipients of the testator's bounty, just as the executor had been required to do, and in whose place the Trustee had been substituted. But surely the trustee ought to have known that when the court had finally ratified and confirmed the auditor's report and account, which allowed the claim of the appellee, he was not authorized to pay the income to anyone else until that claim had been satisfied.

The rule is well settled, in this State and in England, that when there has been an unauthorized payment of funds held in a fiduciary capacity, the loss must fall on him who thus makes the payment, and not on an innocent party. Referring to such payments made by executors, *Lord* Redesdale said:

"I have no doubt the executors meant to act fairly and honestly, but they were misadvised; and the court must proceed, not upon the improper advice under which an executor has acted, but upon the acts he has done. If, under the best advice he could procure, he acts wrong, it is his misfortune; but public policy requires that he should be the person to suffer." *Doyle* v. *Blake*, 2 Schoales & L. 248.

This rule has received the sanction of the courts of equity in Maryland, and numbers of cases might be cited in which it has been rigidly enforced. *Green* v. *Putney*, 1 Md. Ch. Dec. 262; *Murray* v. *Feinour*, 2 Md. Ch. Dec. 418.

The decree of October 27, 1885, from which this appeal has been taken, adopted the former determination of the court; and it is manifest that the nature of the questions involved in this controversy constrained the learned judge who passed this decree to refer to the former adjudication. The Trustee, who was not a party interested in the former suit, but a mere stakeholder with respect to the funds, having refused to pay the money found to be due to the assignee of the mortgage, the subsequent proceedings were instituted to enforce payment. The court decreed that this money should be paid by the appellant to the appellee. There was no error in this determination.

The court also made an adjustment of the costs; and the appellant urges that there is error in imposing on himself certain costs growing out of these proceedings, and contends that this is also a good ground for a reversal of the decree. But it has been decided by this court that "Courts of equity in this State always exercise a discretionary power upon the subject of costs; and if the decree is, in other respects right, it will not be disturbed even if, in the judgment of this court, there was an improper direction as to the party or fund charged with their payment." *Hamilton* v. *Schwehr*, 34 Md. 117; *Columbian Build. Asso. No.* 4 v. *Crump*, 42 Md. 195.

From what has been said, it follows that the decree of the court below should not be disturbed.

Decree affirmed, with costs to the appellee.

James KENNEDY *et al.*, *Appts.*,
v.
MAYOR and City Council OF CUMBERLAND.

1. The fact that an **individual lays out a street** through his land **and dedicates it to the public use** does not impose upon the county or municipality the **duty of** improving or **keeping it in repair.** There must be an acceptance of the dedication before this duty can arise.
2. An uninterrupted use of a street by the public for at least twenty years is necessary to establish a **public highway by user.** Such use for any less period will not suffice.
3. The fact that vacant land within the city limits laid out by the owner into lots and streets is assessed by the city as "Shriver's Addition," is of no weight in determining this **question of acceptance;** nor is any weight to be attached to the fact that the city had repaired other streets in this addition which were laid out and opened at the same time.
4. The acceptance by the **City of Cumberland** of its amended charter of 1848 did not operate as an **acceptance** or adoption **of streets** previously laid out

within the city limits and dedicated to the public by the owners.

5. **That** about a month after the accident for which a recovery is sought in this action the **city** council **appropriated** a sum of **money to** the **repair** of and which was subsequently expended in repairing a **street, is not sufficient to make** the **city liable for** such **injury** occurring by the street being out of repair and unsafe.
6. The **question whether** the **dedication of a street is complete,** as against the owners of the soil, is one for the jury; but where the facts are undisputed, their sufficiency to warrant the conclusion that the street was adopted as a public highway is a question of law.

(Decided June 23, 1886.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Allegany County, on a verdict for defendant in an action to recover for damages sustained from the falling of a defective foot bridge. *Affirmed.*

Argued before Alvey, *Ch. J.*, Yellott, Stone, Miller and Bryan, *JJ.*

The following prayers offered by plaintiffs at the trial were rejected by the court:

1. That if the jury find from the evidence that Shriver's addition to Cumberland was laid out by Henry Shriver in 1871, and that Lee Street (mentioned in the plaintiffs' declaration) was then laid out as one of the streets in said addition, and that in 1873 said street was opened for public travel, and ever since has been used by the public as a common highway, and that about the year 1873 several houses were built along said street, and that defendant assessed the lots in said addition, including those bounding on said Lee Street, and described them in its assessment books as lots in Shriver's addition, and that other streets in said addition laid out and opened at the same time have been repaired by the city from time to time for several years; and if they further find that said street was laid out and opened at and before the 5th day of April, 1878, and that the amended charter of said City, passed at the session of 1878 of the General Assembly of Maryland, was accepted by the defendant; and that said Lee Street was within the corporate limits of said city as established prior to said 5th of April, 1878; and that the City Council of Cumberland, at a meeting held the 5th of October, 1885, passed the order, offered in evidence, appropriating $75 for the repair of said street; and that said order was approved by the Mayor; and that in pursuance thereof said street was in October, 1885, repaired by the defendant at the place where the accident in this case is alleged to have occurred—then from said facts taken collectively, they are at liberty to find that Lee Street is one of the public streets or highways of said city, laid out and dedicated to public use and accepted by the city, and was such at the time of the accident in this case.

2. That if the jury find from the evidence in the case (under the preceding instruction of the court) that Lee Street, at the time of the alleged accident to the plaintiff, Mrs. Kennedy, was one of the public streets or highways of the City of Cumberland; and if they further find that on or about the 14th day of September last said plaintiff, Mrs. Kennedy, while passing over said street, fell and was injured, and that said accident was occasioned by the defective and dangerous condition of said street, and that at the time of said accident she was using due care on her part—then the plaintiffs are entitled to recover, *provided* the jury find that the defendant or its proper agents, for the purpose of keeping its streets in repair, knew of such unsafe condition of said Lee Street (or might have known the same by the use of due diligence) for such length of time before said accident that the same might have been remedied before said accident occurred.

The following prayers of the defendant were granted by the court:

1. That if the jury find from the evidence that Lee Street (so-called) was laid out by one Shriver, in or about the year 1871, upon a piece of ground having a natural surface drain or water course, which crossed said so-called street, and which received and carried off the surface water from the adjoining property in rainy seasons, and that there had been no change in the condition of said so-called street and drain, and that the defendant had not, before or at the time of the happening of the accident complained of in this case, either actually or impliedly accepted or adopted said so-called street as one of the public streets or highways of the defendant, that is to say, by formal resolution, order or ordinance, or by any acts of repair or recognition of said street as a street in the appropriation of money for or expenditure of money thereon, or by any work or labor thereon of it or its agents or servants, with its approval or acquiescence, then the plaintiffs cannot recover under the pleadings in this case, although the jury may further find that said street so-called was used by persons passing on foot over it in going to or from their respective homes or places of business; and this although the jury may further find that one Chase, about seven years ago, voluntarily, for his own convenience but without authority from the defendant or its agents, placed a part of the deck of a canal boat across said drain, thereby making a temporary bridge across the same, and which was afterwards crossed by such persons as had occasion to use said street in crossing said drain, and that the plaintiff, Margaret Kennedy, while using due care and caution on her part in the act of crossing said temporary bridge, sustained the injuries complained of in this case.

2. That it is necessary for the plaintiffs to prove to the satisfaction of the jury in this case before they can find for them, that Lee Street was not only laid out as a public street, but also that said street was either actually or impliedly accepted and adopted by the defendant before the alleged injuries occurred to Margaret Kennedy; and although they may find that the order was presented to the City Council of the defendant, prior to the accident as offered in evidence, and also the other order presented to the said City Council after the accident and adopted by the defendant, and said street thereafter repaired and that the property in Shriver's addition and lots in said addition were assessed by the defendant as offered in evidence, and

that other streets in said addition were repaired both before and after said accident, and that the several deeds offered in evidence from Shriver and Henderson were executed, and the plat of Shriver's addition made as offered in evidence, and that said Lee Street was used as a street, as offered in evidence, by the public from the time it was opened as such in the year 1873 or 1874 by the said Shriver—such facts do not amount to an acceptance or adoption of said street by the defendant.

Further facts appear from the opinion.

Messrs. **Brace & Richmond,** for appellants:

Acts of the city, subsequent to the accident, in repairing the defective bridge, are admissible on the question of adoption of the highway.

Manderschid v. *Dubuque*, 29 Iowa, 73; 2 Dill. Mun. Corp. § 642, note 2; *Sewell* v. *Cohoes*, 11 Hun, 631; affd. 75 N. Y. 45; *Folsom* v. *Town of Underhill*, 36 Vt. 580.

The act of the city in accepting an amended charter including within the city limits "Shriver's addition" also show an adoption by the city.

Des Moines v. *Hall*, 24 Iowa, 242; *Requa* v. *Rochester*, 45 N. Y. 129.

The fact that "Shriver's addition," laid out in 1871, was immediately thrown open to the public, and Lee Street, together with the other streets, has been used ever since by the public generally, is sufficient to show an adoption by the city.

Rex v. *Inhab. of Leeds*, 4 Barn. & Ad. 248; *Guthrie* v. *New Haven*, 31 Conn. 308; 2 Thomp. Neg. 759–760.

Mr. **William J. Read,** for appellee:

As against the proprietor of land there may be a dedication binding him when there has not been a sufficient acceptance by the municipality to make it liable for injuries occasioned by defects in the highway.

2 Dill. Mun. Corp. § 642; *McCormick* v. *Baltimore*, 45 Md. 524.

In Maryland, by analogy to the Statute of Limitations, the period fixed for the establishment of a public way by user by the public is twenty years.

Thomas v. *Ford*, 63 Md. 351; *Day* v. *Allender*, 22 Md. 511; *Browne* v. *M. E. Church*, 37 Md. 108.

The cases of *Manderschid* v. *Dubuque*, 29 Iowa, 73, and *Sewell* v. *Cohoes*, 75 N.Y. 45, only hold that repairs made upon a street after the happening of an accident are sufficient to establish the fact of an acceptance of the street prior to the accident, where accompanied by facts prior to the accident showing a prior acceptance.

In the case of *Manderschid* v. *Dubuque* there was a public user for more than ten years, which, under the decisions in Iowa, was a sufficient length of time to raise a presumption of dedication.

Miller, *J.*, delivered the opinion of the court:

Mrs. Margaret Kennedy was injured on the 14th of September, 1885, by the falling of a bridge over which she was walking. This bridge was a portion of the deck of a canal boat thrown over a gully, which ran across an alleged street, in the City of Cumberland, called Lee Street. The accident was caused by the unsafe condition of the bridge, and she and her husband brought this suit against the city to recover damages for the injury.

The declaration alleges that this was a public street or highway, which it was the duty of the city to keep in repair; and the action was defended, upon the ground of a denial of this allegation. It is plain that to sustain the action it was incumbent upon the plaintiffs to establish the fact that this street or bridge was, at the time of the accident, a highway or bridge, which the city was bound to repair; and the sole question in the case is, Has this been shown by any proof legally sufficient to support that conclusion?

The facts, all of which are undisputed, and which were received by the court, subject to exception, are substantially as follows:

In 1871 Henry Shriver, being the owner of vacant land within the city limits, laid it off into a number of town lots by a plat upon which three or four streets and lanes were designated, and one of them was called Lee Street, and the whole was called "Shriver's Addition to Cumberland." Between 1871 and 1873 he sold some of these lots, and the deeds called for these streets, including Lee Street. This street was opened up for public travel in 1873, by the owners of the adjacent lots, and was by them dedicated to the public, and has ever since been used by the public as a common highway, although the travel thereon was principally by foot passengers, because the gully above mentioned made it difficult for wagons to cross over. Several houses were built along this street in 1873, or prior thereto. The lots, including those on Lee Street, were assessed to their several owners in the assessment books of the city as lots in "Shriver's addition." Other streets in this addition, laid out and opened at the same time, were repaired from time to time by the city for several years past. At a meeting of the City Council held on the 7th of September, 1885, an order was offered by one of the members instructing the superintendent of streets to repair Lee Street at a cost not exceeding $75; but it was not passed because it did not receive the requisite number of votes. At the next meeting, which was held on the 5th of October following, the same order was again offered, and it was then passed, and was approved by the Mayor on the 10th of October, which was nearly a month after the accident. Very soon after this the street was repaired by the city, out of the money so appropriated; and these repairs included the removal of the bridge on which Mrs. Kennedy was hurt, and the building of a new one. The bridge on which the accident happened was placed over the gully by one Chase, a volunteer, for his own accommodation, about eight years ago, and was since used by the public as a footway over the gully when using the street. This gully was a natural water way or drain for surface water from adjacent lands and hills, and was about two or three feet wide and fourteen inches deep. Since the street was laid out and opened there had been no change in the condition of its surface, except that both sides of it had been fenced, one the whole length, and the other the greater part thereof. There was no evidence of any repairs by the city made on this street prior to the accident, nor of any formal resolution, order or ordinance accepting the same.

From these facts a dedication of the bed of this street to the public, by Shriver and his grantees, is no doubt established; but it requires something more to create the privileges and duties belonging to a public highway. Any individual may lay out a thoroughfare through his lands; but such dedication does not impose upon the county or municipality the duty of improving or keeping it in repair. There must be an acceptance of the dedication before this duty can arise. The law on this subject is thus stated by *Judge* Dillon:

"As against the proprietors a dedication of land for streets and highways may be complete without any act or acceptance on the part of the public; but in order to charge the municipality or local district with the duty to repair, or to make it liable for injuries for suffering the street or highway to be or remain defective, there must be an acceptance of the dedication, and this acceptance must be by the proper or authorized local public authorities. It may be express and appear of record, or it may be implied from repairs made and ordered, or knowingly paid for by the authority which has the legal power to adopt the street or highway, or from long user by the public." 2 Dill. Mun. Corp. § 642.

The doctrine that such acceptance is necessary in such cases was recognized by this court in *McCormick* v. *Mayor etc. of Baltimore*, 45 Md. 524.

The question then is, Do the facts above stated show such an acceptance by the city authorities before the happening of the injury sued for, of the dedication by the proprietors of the bed of this street, or is there anything in them upon which a jury could be instructed or allowed to infer such acceptance?

The user by the public set out in this statement of facts is wholly insufficient to make this street a public highway; for it has been repeatedly decided by this court, as the law of this State, that where user or prescription is relied on to establish a public highway, there must be an uninterrupted user by the public for at least twenty years; and such user for any less period of time will not suffice. *Day* v. *Allender*, 22 Md. 511; *Browne* v. *Trustees of M. E. Church*, 37 Md. 108; *Thomas* v. *Ford*, 63 Md. 352.

The fact that the lots were assessed in the assessment books of the city as lots in "Shriver's addition," is, in our opinion, entitled to no weight whatever in determining this question of acceptance. This was simply the recording of the description of the lots for the purpose of taxation, as the owners themselves had chosen to describe them in their deeds, and in order to distinguish and identify the property assessed and taxed. Nor is any greater weight to be attached to the fact that the city had repaired other streets in this addition which were laid out and opened at the same time. It was perfectly competent for, and within the absolute discretion of, the city authorities to accept some of these streets and refuse to accept others; and the fact that they did repair others and did not repair this one tends rather to show that they had determined, and for good reasons, not to incur the expense of grading and repairing it, and not to accept its dedication.

The acceptance by the city of the Act of 1878, chap. 484, amending its charter, has also been relied on by counsel for the appellants. But this Act made no change in the city limits. The land embracing this so-called addition, and which was thus platted and laid out by Shriver into lots with intersecting streets and lanes, was within the original limits of the city. If the amended charter had, for the first time, brought the land so platted within the city limits, and it had been accepted by the city, a different question would have been presented. In that case there would have been some ground for contending that the acceptance of the amended charter operated an acceptance or adoption of the streets so laid out and dedicated to the public by the owners.

One of the sections of the amended charter requires the city authorities, as soon as practicable, to provide by ordinance for a survey and map of the city limits, and for the location upon the map "of the streets and alleys already laid out and opened," but no such ordinance has as yet been passed. Besides, this section makes no mention of the streets in question, nor of any particular street; and the terms "streets and alleys already laid out, and opened," in the connection in which they are used, evidently mean the streets and alleys which the city itself had laid out and opened, or which had then become public streets, and not those which had been simply dedicated to the public by private individuals.

This leaves for consideration the single fact that about a month after the accident the City Council appropriated a sum of money to the repair of this street, which was subsequently expended in repairing it. It has been earnestly argued by counsel for the appellants, that this fact should have been submitted to the jury upon the question of acceptance or adoption, not as of itself amounting to a recognition or adoption by a retrospective effect, but as an act tending to show that the city had previously recognized and adopted the street.

A decision to the effect that such evidence was admissible upon this ground was made by a majority of the court in the case of *Manderschid* v. *City of Dubuque*, 29 Iowa, 73; but, in the opinion of the judge who dissented, this point is met by the remark that such evidence might perhaps bind the city in the future, but to hold that it "would create a retrospective liability would be to hold that present acts of adoption tend to prove a prior adoption; and it is needless to combat such a proposition."

No doubt there are cases in which such evidence is properly admissible, as in *Folsom* v. *Town of Underhill*, 36 Vt. 580, where several years prior to the accident the selectmen of the town directed the highway surveyor to expend money on the road, and he did so, and where other surveyors had also previous to the accident worked out a portion of the highway taxes on the same road, but without any express direction from the selectmen on the subject. The court in that case held that the work first done under the direction of the selectmen was clearly an act tending to show a recognition or adoption of the road by them, and that the working out of taxes by other surveyors prior to the accident without instructions by the selectmen was proper to be considered in connection with any prior act of theirs recognizing the road as a public highway, or with any evidence that such work was known to and not disapproved by them. And in connection with these facts the court further held that the act of the selectmen in directing repairs immediately after the accident was also admissible as an act tending to show that they had previously recognized and adopted the road. There were therefore some acts of repair proved in that case, tending to establish the fact of adoption or acceptance of the road by the proper authorities prior to the accident, which the subsequent acts of repair could throw light upon, emphasize or explain; and a careful reading of the opinion shows, we think, that that was the ground upon which they were admitted in evidence. The subsequent repairs did not stand, as in the case before us, as the only, solitary and isolated acts of repair ever done upon the road.

The case of *Sewell* v. *Cohoes*, 11 Hun, 626, (affirmed in 75 N. Y. 45) has also been referred to by counsel for the appellants. In that case the accident was caused by the fact that a tramway or bridge over the street, which had been erected by the owners of a coal yard, was too low. There was evidence tending to show that the land upon which the street was located belonged to the State, and not to the city; and the latter sought to exempt itself from liability for the injury, upon the ground that it had no title to the street, and as a consequence had no right to remove the bridge built by others. The city, however, long prior to the accident, had appropriated the land, and had graded and paved the street, and put down a sidewalk upon it, and had thus by these acts held it out to the public as a public street, and had thereby invited the public to travel upon it, and use it as a public highway. After the accident the city council passed a resolution directing the removal of the tramway or bridge, and it was removed without complaint from any one. This resolution was offered in evidence, and the court held that as it had been thus successfully carried out, such exercise of control over the bridge, even though exercised after the injury, was some evidence of the "power and authority" of the city to remove it before the accident; and that the fact of such removal tended to repel the defense set up by the city that it should not be held negligent in a matter which it had no power to prevent. This is the effect of the decision in that case, and it is obvious that it has very little bearing upon the point presented in this. It is also to be observed that both the cases referred to, the one in Iowa and the other in New York, rest for authority upon the decision in *Folsom* v. *Town of Underhill*, which we have already explained.

In this case it is conceded that the city had never at any time prior to the accident made any repairs upon this street, or passed any resolution, order or ordinance accepting it as a public street. The surface of the ground had never been disturbed; the bridge over the gully or drain, the defective condition of which was the cause of the injury, was placed there by a volunteer and for his own accommodation as a footwalk; and the City Council had in fact done no act whatever which could by possibility be construed into an invitation by them to the public to travel upon it, or use it in any way as a public street.

To allow then this single act of subsequent repair to be used against the city for the purpose of making it liable for this injury (and it could be used for no other purpose) would be to give it the effect of creating a retrospective liability. Whatever effect, therefore, this act may have upon the liability of the city for future accidents and injuries, we entirely concur with the court below in refusing to admit it as evidence in this case.

The court below, in its rulings upon the prayers, instructed the jury as to what facts it was necessary for them to find in order to entitle the plaintiffs to recover. In other words, the court treated the question of acceptance of the street by the city as a question of law; and in this we find no error.

This point has not hitherto been directly presented to this court, but the ruling is sustained by our decisions in numerous analogous cases which it is unnecessary to cite. In the case however of *Folsom* v. *Town of Underhill*, so much relied on by appellants' counsel for another point, the question did arise, and while the court held that the question whether the *dedication* was complete as against the owners of the soil, was a conclusion of fact to be drawn by the jury from the circumstances of the particular case, they yet expressly decided that where the facts are undisputed, their sufficiency to warrant the conclusion that the road was *adopted* as a public highway, would be a question of law; and they answered the objection that the trial court had not, in that case, instructed the jury what facts would constitute such adoption, by construing the instruction as telling the jury in effect, that if they found that the town did the acts relied upon as proof of the adoption of the road with the intention to regard and treat it as an existing highway, then it thereby became a highway adopted by the town, which the town was liable to keep in repair.

This is quite in accord with the practice in this State, in similar cases where the facts are controverted or in dispute. The court in such cases leaves the finding of the facts to the jury, with appropriate instructions as to their legal effect, according as the jury may find them to be. And there is good reason why this rule should be applied in cases like the present, for if the question of acceptance or adoption *vel non* should be left broadly to the finding of the jury, it would follow that the liability of a county or municipality would be left in uncertainty, depending upon the varying verdicts of different juries upon the same state of facts, instead of being, as it should be, settled and fixed by the law as declared by the courts.

But the facts in this case, as we have said, are undisputed, and we have shown they are not legally sufficient to make the city liable for the injury sued for. It would, therefore, have been proper for the court to so instruct the jury in direct terms. This being so, it follows that there can be no error prejudicial to the appellants in the rulings upon the prayers, and,

The judgment must be affirmed.

Mary J. PFISTERER, *Appt.*,
v.
William PFISTERER.

1. In an action for divorce, **adultery must** ordinarily **be established by circumstantial evidence**, which must be affirmatively convincing to justify a court in dissolving the marriage tie.
2. **Every such case must depend upon its own** peculiar **circumstances**; and the same or similar facts will not always warrant the same conclusion.
3. *Held*, in this case, that the **proof justified** the decree **dissolving** the **marriage** bond.

(Decided March 16, 1887.)

APPEAL from a decree of the Circuit Court of Baltimore City, granting a divorce *a vinculo* to defendant in a cross bill to a bill for a divorce *a mensa*, for cruelty, etc. *Affirmed.*

Argued before Alvey, *Ch. J.*, Miller, Bryan, Yellott, Stone and Irving, *JJ.*

The case is stated in the opinion.

Mr. **Thomas Hughes**, for appellant.

Messrs. **J. H. Keene, Jr.**, and **Leigh Bonsal**, for appellee.

Irving, *J.*, delivered the opinion of the court:

The appellant filed a bill in the Circuit Court for Baltimore City for divorce *a mensa et thoro*, and for alimony. The grounds alleged were neglect, desertion and cruelty.

The appellee answered, denying the plaintiff's allegations, and, making his answer a cross bill, asked for divorce *a vinculo matrimonii*. Issue was made on the several questions, and proof was taken, upon which the court dismissed appellant's bill, and passed a decree divorcing the parties *a vinculo*.

From that decree the appellant took her appeal; and upon it she only asks a review of the proof upon which the charge against her was sustained by the court below. The only question, therefore, before us is whether the proof justified the decree dissolving the marriage bond.

The offense of which the appellant has been found, by the circuit court, to be guilty is one of "darkness and secrecy." Parties are rarely surprised in it; and so it not only may, but ordinarily must, be established by circumstantial evidence. As nothing short of its actual consummation is sufficient to lay the foundation for absolute divorce, the evidence must be affirmatively convincing to justify a court in dissolving the marriage tie. Bishop, Mar. & Div. § 618.

Every case must depend upon its own peculiar circumstances, and the same or similar facts will not always warrant the same conclusion, for the modes of life, habits and rank of the parties, and of the community in which they live, may require more charitable views of freedom in conduct than would be accorded under different conditions. *Id.* § 631; *Kremelberg's Case*, 52 Md. 555.

Giving the parties implicated the full benefit of all the considerations suggested above, we are constrained to think that the circuit court was right in its finding on the facts. Acts of a criminal nature are charged to have been committed with two persons, but proof tending to sustain the charge has been offered as to one person only. Three offenses with one James Gaily are charged, but evidence as to two occasions only has been produced.

If the evidence respecting the Cambridge trip and the conduct of the parties then stood alone, we would not have felt justified in sustaining the charge. But those facts which are conceded about that trip reflect some light on the conduct of the parties implicated generally, and aid in reaching a conclusion upon the facts testified to by Caroline Lang and James Gaily touching the night of the 4th of July, 1876. Caroline Lang at that date was a domestic servant in the appellant's house. If her testimony is to be credited in all its particulars, the inference of guilt is very strong, notwithstanding Gaily's sworn denial. She has not been discredited in any way. The circumstances are such as to have naturally impressed themselves strongly on her mind.

It is true it is a long time to remember so circumstantially; but she seems to be very certain of the facts she details. Gaily, who is charged with the offense, admits that he was at the house and staid all night on the 4th of July, 1876. He admits the absence of the husband in Philadelphia. He says he staid because he was sick, but he denies absolutely having violated his friend's bed. That he would admit the act could hardly be expected of him, according to the usually but unjustifiably obtaining view among dissolute men, of the obligation of a man who has been admitted to such privileges. The denial, therefore, cannot go for much when the facts tend to show it is untrue.

His fondness for the appellant and his frequent attentions to her were the subject of comment, while her apparent pleasure in receiving such attentions was also the subject of remark and censure of neighbors or associates. The husband seemed to have confidence in his wife, and permitted her to be escorted about by other men, seeming to have felt it a relief to be excused from going, and under such circumstances, if it were possible to escape the inference of criminality, from the facts testified to by Caroline Lang, we should regard the appellant's conduct as only indiscreet and unbecoming, and nothing more.

On this 4th of July, 1876, however, we find a man, particularly fond of a woman, availing himself of the absence of her husband to spend the night in her house. During the night, about 2 o'clock, the witness Lang supposed she heard a noise, which induced her to get up and go to Mrs. Pfisterer's door. Supposing the voice she heard was that of Mr. Pfisterer talking to his wife, and that he had returned in the night from Philadelphia, she returned to her bed and there remained until morning. At an early hour of the morning, Mrs. Pfisterer awoke the witness and sent her to market a long distance away for some lemons. When she returned she found that Mrs. Pfisterer, contrary to her habit, had prepared breakfast herself, and the table had been set for two persons and breakfast was over. The appellant told witness that a young man had taken breakfast with her. The witness did not know that Gaily had staid there all night. She knew that Gaily and another man were there when she retired, but did not know that he remained. Subsequently, during the day, while the appellant was away, a man called at the door and inquired if Gaily had staid all night at the house, saying he would give her as much money as she wanted if she would tell him. She replied she did not know; for she adds she could not say, as she had not seen him. When the appellant came home she told her of the man's inquiry.

That night Mr. Pfisterer came home. The next morning he brought her a message that his wife wanted her upstairs. She went, and Mrs. Pfisterer asked her not to tell her husband what the man had asked her; and when she got up for breakfast, she told her a woman, whom she did not know, had told her on the street that witness had criminally known her father. She thought she told her that to alarm her, and to make her keep silent and tell nothing. As we have already said, assuming the truth of these statements, but one inference can be drawn, and that is of guilt.

It is true that Gaily says he told Mr. Pfisterer of his having staid at his house on the night of the 4th of July, 1876; but the way in which he says it shows that he thought it needed explanation. He says he made it his business to see him and tell him and explain the reasons for so doing. He knew that it needed explanation, and he said that Mr. Pfisterer accepted it as satisfactory. He says he was sick, yet the servant was not called to go for a doctor. There was another man there whom he overstayed, and then left in the morning after the servant had gone away on a concocted errand. He was sick enough to stay, yet he says he left without eating a mouthful of breakfast next morning. His statements are unlikely and we must credit Caroline Lang, who seems to have no motive for prevarications.

The decree must be affirmed.

STATE of Maryland, *Plff. in Err.*,
v.
Thomas F. NICHOLSON.

1. The **Act of 1872,** chap. 329, which provides that if any **collector** shall **willfully detain** in his possession **taxes** collected by him for six months, etc., he shall be deemed a defaulter, and upon conviction shall be imprisoned, etc., is **not in conflict with** the **Constitution** of this State **which abolishes imprisonment for debt.**
2. Nor is it any objection to the **statute** that it **provides, upon** the **payment** of the money for which he is in default, either before or after conviction, that such **collector** shall be **discharged.**
3. The **court will presume in favor of** the **pleader** every proposition which by reasonable intendment is impliedly included in the pleading, although not expressed.
4. It is **not necessary to aver in** the **indictment** that the **money** is still **detained.** If the money has been paid, that is matter of defense.
5. It is not necessary to charge in the **indictment** that defendant was duly appointed collector, nor that the taxes were duly levied, nor that they were placed in his hands for collection. It is **sufficient** if it avers that he was collector of the state and county taxes for the county and, as such, collected the taxes for the year.

(Decided March 15, 1887.)

ERROR to the Circuit Court for Charles County, to review a judgment in favor of defendant on demurrer to an indictment under the Act of 1872, chap. 329, for not paying over to the State taxes collected. *Reversed.*

Argued before Alvey, *Ch. J.*, Miller, Irving, Bryan, Yellott and Robinson, *JJ.*

The case is stated in the opinion.

Messrs. Atty-Gen. **Roberts, L. A. Wilmer** and **John H. Mitchell,** for the State, plaintiff in error.

Messrs. **R. H. Edelan, Sidney E. Mudd** and **D. R. Magruder,** for defendant in error.

Robinson, *J.*, delivered the opinion of the court:

The traverser, collector of state and county taxes for Charles County, was indicted under the Act of 1872, chap. 329, which provides that if any collector shall willfully detain in his possession taxes collected by him, and neglect to pay the same into the treasury of the State, for more than sixty days after the day upon which it is made his duty to pay the same (or, if no particular day be appointed, shall neglect to pay the same for the space of six months), he shall be deemed to be a defaulter, and upon conviction shall be imprisoned in the penitentiary etc., "unless the amount for which he is a defaulter be sooner paid."

In support of the demurrer it is argued in the first place that the Act is in conflict with the Constitution of this State, which abolishes imprisonment for debt. There is, however, a broad distinction between imprisonment for debt, within the meaning of the Constitution, and imprisonment for a breach of duty on the part of a public officer, although such breach of duty may be the neglect or refusal on his part to pay money received by him for the use of the State.

Public officers were by the common law indictable for malfeasance or misfeasance in office; and although the Constitution abolishes imprisonment for debt, this in no manner interferes with the power of the Legislature to punish such offenses by imprisonment or otherwise, as the public interests may require. A collector of taxes is a public officer, whose duty it is to collect the taxes and pay the same into the treasury of the State or to the parties entitled, and if he neglects to discharge this duty and appropriates to his own use the money thus received by him as collector, the Legislature has the power to declare such acts of commission or omission to be an offense punishable in such manner as it may deem proper. Any other construction would deprive the Legislature of all power to punish defaulting officials for the appropriation by them of money received and held in trust for the State.

Nor is it any objection to the statute that it provides, upon the payment of the money for which he is in default, either before or after conviction, that such collector shall be discharged, for the reason that the Legislature has the right to prescribe the terms and conditions upon which the punishment shall be imposed.

Passing then from these objections to the statute, we come to the indictment; and this is said to be fatally defective, because it does not charge that the traverser detained the money six months after the same was collected by him. According to our rendering of the indictment this is charged in plain and explicit terms. It avers that on the second of April, 1884, the traverser, as collector, received the sum of $1,400 on account of taxes due the State, and that he did then and there unlawfully and willfully detained the said sum in his possession, etc., and unlawfully, etc., did neglect to pay said sum into the treasury of the State, for the space of "six months after he, the said Thomas F. Nicholson, had so as aforesaid collected and received the said amount," etc.

Here is an express averment that the traverser did detain, in his possession, the money so collected by him for six months after it had been so collected. Now certainty to a certain intent in general is all that is required in indictments; that is to say, the court will presume in favor of the pleader every proposition which by reasonable intendment is impliedly included in the pleading though not expressed. Archbold, Crim. Pl. § 44.

Then again; it is said that there is no averment that the money is still detained. This it was unnecessary to charge, for the reason that if the money had been paid before or after the finding of the indictment this was matter to be set up by way of defense.

"It is a good general rule," says Hawkins, Pleas, Vol. 2, part 2, chap. 25, § 112, p. 355, "that every indictment must bring the defendant within all the descriptions mentioned in the body of the Act, except they are such as carry with them the bare denial of a matter, the affirmation whereof is a proper and natural plea for the defendant, as where it is enacted 'That all persons having no reasonable excuse to be absent, shall go to their parish church,' etc., in which case it is said that it is not necessary to show that the defendant had no reasonable excuse, for this will come most properly in question from the plea of the defendant."

The rule thus laid down is fully sustained in *Rex* v. *Baxter*, 5 Term Rep. 83; *Rex* v. *Pollard*, 2 L. Raym. 1370; 2 Leonard, 5.

So here, if the traverser had paid the money, and it was no longer detained by him, this was matter of defense, and not necessary therefore to be set forth in the indictment.

The further objection that it does not aver that the traverser was duly appointed collector is equally untenable. It does charge in express terms that he was collector of state and county taxes for Charles County, and as such did collect the sum of $1,400 on account of taxes due the State. This is all that is necessary.

In *Rex* v. *Holland*, 5 Term Rep. 607, where the defendant was tried for malfeasance in office, as one of the counselors of the East India Company, the information charged that the defendant was one of said counselors, and acted as such. On demurrer it was argued in that case, as this, that the information ought to have averred that the defendant was duly appointed counselor, but *Lord* Kenyon held that it was sufficient to state generally that he was counselor, and the objection was overruled.

For the same reason it was quite unnecessary to charge that the taxes were levied by the county commissioners, or that the taxes were placed in the hands of the traverser for collection. The averment that he was collector of taxes, and as collector collected the taxes for the year 1883, fairly implies that the taxes were duly levied and placed in his hands for collection.

For these reasons the pro forma *judgment on the demurrer will be reversed and cause remanded.*

John Benjamin BISCOE, *Appt.*,
v.
STATE of Maryland. *

1. Where a **prisoner in custody** was several times **pressed by** the **magistrate to make a confession** and each time denied his guilt, but, when told by the magistrate that it would be better for him to tell the truth and have no more trouble about it, confessed, *held*, that the **confession,** thus obtained, **was inadmissible in evidence against** him, although he was told at the same time that the magistrate could make no promises.
2. Where the **prisoner before** the **confession is received,** offers to **prove that** prior to the interview at which the confession was made the **magistrate held out inducements** to him to confess, the court should permit him to do so; for the confession, once in, may, although subsequently stricken out, influence the jury.
3. The preliminary question as to the **admissibility of a confession** should in all cases be decided by the court, before it is permitted to go to the jury.

(Decided March 15, 1887.)

APPEAL from a judgment of the Circuit Court for Charles County, on conviction of defendant on trial for murder. *Reversed.*

Argued before Alvey, *Ch. J.*, Miller, Bryan, Irving, and Robinson, *JJ.*

The case is stated in the opinion.

Messrs. **D. R. Magruder** and **B. H. Camalier,** for appellants.

Messrs. Atty-Gen. **Roberts, L. A. Wilmer,** and **D. C. Hammett,** for the State.

Robinson, *J.*, delivered the opinion of the court:

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* See People v. Mondon (N. Y.), 4 Cent. Rep. 357; People v. McCallam (N. Y.), 5 Cent. Rep. 511.

The confession made by the prisoner to Morgan, the committing magistrate, was not a free and voluntary confession, and it ought not therefore to have been permitted to go to the jury. The confession was made under the following circumstances:

The prisoner was committed to jail for the murder of Captain Dixin, and the magistrate seemed to think it was his duty to get from the prisoner an admission or confession of some kind as to his guilt. For this purpose he went to see the prisoner no less than five times, and at each of these interviews the prisoner denied that he had anything to do with the killing of the deceased. Finally, at the fifth interview, Morgan said that he had read a statement in a newspaper "that a Captain Evans had seen the deceased on his vessel on the trip on which he was killed, and that there was only one other man on board." Upon making this statement the prisoner seemed to hesitate, and Morgan then said to him "that it would be better for him to tell the truth and have no more trouble about it," and thereupon the prisoner made the confession which was offered in evidence. Mr. Morgan further says that in all these interviews, he told the prisoner he could make him no promises.

Now all agree that a confession is not admissible in evidence against the prisoner, unless it was freely and voluntarily made. There is no difficulty in regard to the rule itself, the trouble is in the application of the rule to the facts of each particular case, that is, whether it was a free and voluntary confession, or whether it was procured by the influence of another under a hope of favor or advantage if made, or fear of harm or disadvantage of some kind if withheld. It is not of course an easy matter to measure in all cases the force of the influence used, or to decide as to its precise effect upon the mind of the prisoner. Much, very much, we may add depends upon the age, the experience, the intelligence and character of the prisoner. And it may be that courts, leaning to the side of mercy, have in some cases excluded confessions, when it is difficult to see how the alleged inducement had any influence on the mind of the prisoner.

As was said by *Baron* Parke in *Reg.* v. *Baldry*, 2 Denison, C. C. 430; "The rule has been extended quite too far, and justice and common sense have too frequently been sacrificed at the shrine of mercy."

We have no disposition to extend the rule beyond the sound and well established principles on which it is founded; and, tested by these principles, the confession in this case is we think clearly inadmissible. The prisoner was in the custody of the law, and although pressed time and again to make a confession, and pressed too by one in authority, he persisted in denying his guilt; and it was not until he was told that it would be better for him to tell the truth and have no more trouble about it, that the confession was made. Here then was an inducement, and one too of the strongest kind, held out to him. The witness it is true says he told the prisoner he could make no promises; but what does this amount to, when, in the next breath, we find him saying to the prisoner that it would be better for him to tell the truth, and thereby have no more trouble about the matter? It was in fact saying to the prisoner: If you will tell me the truth it will not only be better for you, but you shall have no more trouble about the matter.

In *Reg.* v. *Garner*, 2 Carr. & K. 920, the witness told the prisoner that it would be better for her to tell the truth. Patteson, *J.*, before whom the case was tried, after conferring with Lord Denman, *C. J.*, held the confession to be admissible, and upon the conviction of the prisoner the question was reserved for the consideration of all the judges. After full argument of the case, Pollock, *C. B.*, said "When a prisoner has been told that he had better tell the truth, and these expressions are used by or in the presence of a person in authority, I always reject the evidence."

Maule, *J.*: "That the expression 'You had better tell the truth,' coming from a person in competent authority, excludes what is said by the prisoner afterwards, has been decided in more than a hundred instances." Erle, *J.*, was of the same opinion, and Patteson, *J.*, before whom the case had been tried, was of opinion that he had erred in admitting the confession, and as there was no other evidence he said he "ought to have directed an acquittal."

In *Rex* v. *Kingston*, 4 Carr. & P. 387, the prisoner was indicted for administering arsenic to one Eliza Bates with intent to murder. The surgeon who was called in saw the prisoner and said to him: "You are under suspicion of this, and you had better tell all you know." *Mr. Justice* Parke, having conferred with *Mr. Justice* Littledale, held the confession made by the prisoner to be inadmissible.

So again in *Rex* v. *Partridge*, 7 Carr & P. 551, the prisoner being in the custody of a constable, the latter said to Mr. Marling, the prosecutor, "you must not use any threat or promise to the prisoner;" and immediately afterwards Marling said to the prisoner: "I should be obliged to you, if you would tell us what you know about it. If you will not, we of course can do nothing. I shall be glad if you will." *Mr. Justice* Patteson held this to be a promise. "What could the prosecutor mean" says the court, "by saying that if the prisoner would not tell they could do nothing, but that if the prisoner would tell they would do something for him?"

The whole question was fully considered in the latter case of *Reg.* v. *Baldry*, 2 Denison, C. C. 430, by *Lord* Campbell, *C. J.*, Pollock, *C. B.*, Parke, *B.*, and Erle and Williams, *JJ.*

Pollock, *C. B.*, said: "A simple caution to the accused to tell the truth, if he says anything," the statement may be given in evidence; "but where the admonition to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession was not receivable, the objectionable words being that it would be better to speak the truth, because they import that it would be better for him to say something."

Now Morgan, the magistrate, having told the prisoner that it would be better for him to tell the truth, and have no more trouble about it, the confession thereupon made by the prisoner is, according to all the decisions, inadmissible, and the court ought to have excluded it from the jury.

The prisoner also offered to prove by other witnesses that prior to the interview at which the confession was made, Morgán had held out inducements to the prisoner to confess, and also what was said by Morgan at the time. This offer the court refused, saying at the time that if it should appear in the subsequent progress of the trial that inducements were in fact held out to the prisoner, and that the confession was made in consequence of such inducements, the court would direct the confession to be stricken out. This was not we think the proper practice. Before permitting the witness to testify in regard to the confession, the court ought to have ascertained: first, whether any inducements at the time or prior thereto had been held out to the prisoner, and in the next place, whether he was influenced by such inducements in making the confession. The court may, it is true, rule out a confession, even after it has been admitted in evidence, if satisfied in the subsequent progress of the case that it was not a free and voluntary confession, and may instruct the jury that it is not to be considered by them in determining the question as to the guilt or innocence of the prisoner; but once in, it may have an influence more or less prejudicial against the prisoner. The preliminary question, therefore, as to its admissibility, is one which ought in all cases to be decided by the court, before it is permitted to go before the jury. *Nicholson* v. *State*, 38 Md. 140.

For these reasons the rulings below must be reversed, and a new trial awarded.

John C. SHIPLEY *et al.*, Exrs., *Appts.*,
v.
William SHILLING.

1. When the **new promise** relied upon **to remove** the bar of the **Statute of Limitations** is sought to be deduced from a general indefinite acknowledgment of indebtedness, within the period of limitation, it is for the jury to determine whether or not such acknowledgment applies to the original demand sued on.
2. The **jury must find to what debt** or claim such **general acknowledgment referred**; and if the plaintiff shows but a single indebtedness, it may apply to that, or, if the demand sued for be an account of several items, it may apply to any part thereof, according to the evidence and the finding of the jury; and in such case, if the debtor alleges that there was a different account or demand to which the acknowledgment referred, the *onus* of proving that fact rests upon him, as matter of defense.
3. In an action against executors to recover for goods, etc., furnished to their testator, *held*, that a **too general instruction,** to the effect that the plaintiff was entitled to recover if the jury should find the account to be established, and admitted by the testator within three years before suit brought, was **cured by a subsequent instruction** to the effect that the plaintiff could not recover unless the jury should also find that such admission applied to the account in suit.
4. A **prayer to instruct** the jury "that on the pleadings and all the evidence in the cause their verdict ought to be for the defendants," is **too general and should be rejected.**

(Decided February 11, 1887.)

APPEAL from a judgment of the Circuit Court for Carroll County, in favor of plaintiff in an action of assumpsit to recover for work and labor, articles furnished and money paid for defendant's testator. *Affirmed.*

Argued before Alvey, *Ch. J.*, Miller, Ritchie, Stone and Bryan, *JJ.*

The court rejected the following prayer offered by defendants:

"1. The defendants, by their counsel, pray the court to instruct the jury that on the pleadings and all the evidence in the cause, their verdict ought to be for the defendants."

The other prayers and facts material to the questions decided appear from the opinion.

Messrs. **Chas. T. Reifsnider, Chas. E. Fink** and **James A. C. Bond,** for appellants:

An acknowledgment may be indefinite in respect to the intended application of it to a particular debt; and it ought clearly to appear in all cases that it relates to the identical debt which is sought to be recovered upon the strength of it. In such cases it should be left to the jury to decide as to the intention.

2 Greenl. Ev. § 440; Angell, Limitations, § 238.

According to *Bell* v. *Morrison*, 1 Pet. 351 (26 U. S. bk. 7, L. ed. 174), it is indispensable for the plaintiff to establish by independent evidence the extent of the balance due him, before there can arise any promise to pay it as a subsisting debt.

An admission that something is due or some balance accruing cannot be justly construed into a promise to pay any debt or balance which the party may assert or prove before a jury.

Bell v. *Morrison, supra;* Angell, Limitations, § 239.

Messrs. **William L. Seabrook** and **Charles B. Roberts,** for appellee:

The acknowledgment of a debt, of unascertained amount, entitles a plaintiff to recover so much as he can satisfy a jury is really due him.

Peterson v. *Ellicott*, 9 Md. 62; *Quynn* v. *Carroll*, 10 Md. 208.

The plea of limitations is not a plea to the merits: *Kunkel* v. *Spooner*, 9 Md. 472; *Lamott* v. *McLaughlin*, 3 Harr. & McH. 324; and is not favored in the law; *Farmers Bank* v. *Sprigg*, 11 Md. 398; and it has been uniformly held by this court that any acknowledgment of a present subsisting debt or liability will remove the bar of the statute.

Sprogle v. *Allen*, 38 Md. 336; *Oliver* v. *Gray*, 1 Harr. & G. 204; *Beltzhoover* v. *Yewell*, 11 Gill & J. 212; *Buffington* v. *Davis*, 33 Md. 511; *Knight* v. *House*, 29 Md. 200.

It is for the court to determine what kind of promise or acknowledgment is sufficient to remove the bar of the Statute of Limitations; and the evidence offered to prove such promise or acknowledgment is proper to be submitted to the jury as in other cases under the direction of the court.

Oliver v. *Gray*, *supra*.

The jury must find to what debt the acknowledgment related; and if only one indebtedness was shown, the subsequent acknowledgment could apply to none other than that, unless the defendants could show by independent testimony on their part not only some other indebtedness to which the acknowledgment might apply; but if they allege that there was a different indebtedness to which it might apply, the *onus* of proving that it did apply to the other indebtedness rests with them.

Guy v. *Tams*, *Peterson* v. *Ellicott*, and *Quynn* v. *Carroll*, *supra*; *Whitney* v. *Bigelow*, 4 Pick. 110; *Stafford* v. *Bryan**, 3 Wend. 582, cited in 21 Pick. 323.

Alvey, *Ch. J.*, delivered the opinion of the court:

This was an action of assumpsit brought by the appellee against the appellants as executors of Elias Brothers, deceased. The claim sued on was for work and labor performed, articles furnished, and money paid for the appellants' testator in his lifetime. Among other defenses made to the action, the Statute of Limitations was pleaded; and it is under that plea that the questions arise that are presented on this appeal.

At the trial in the court below the appellee offered evidence in support of his claim sued for, and also evidence of certain statements or acknowledgments of the appellants' testator, made within three years of the bringing of the action, whereby, as it is contended by the appellee, the bar of the Statute of Limitations was removed. Both parties offered prayers for instructions to the jury; and it is from the ruling of the court upon those prayers that this appeal is taken. By the exception taken two questions are presented: first, whether the evidence offered to remove the bar of the Statute of Limitations was legally sufficient for that purpose, if believed by the jury; and second, whether the instructions given were sufficiently definite, in requiring the jury to find that the acknowledgments testified to, if found to have been made by the testator, were made with reference to the claim sued for, and none other.

1. With respect to the first question, we are of opinion that the admissions or acknowledgments of the testator, as testified to by the witnesses Benson and Hull, if believed by the jury, were legally sufficient to remove the bar of the statute; and therefore the court below was right in rejecting the third prayer of the appellants.

The testimony of Benson is explicit to the fact that the testator admitted that the appellee had an account against him, the testator; and Hull testifies that he heard the testator say that he owed the appellee an account; although on neither occasion of making these admissions was there any account exhibited, or specially mentioned. Such statements, it is true, are very indefinite in their nature, and do not prove or tend to prove the items charged in any particular account. But after the correctness of the account sued on is otherwise proved, according to the requirements of the law, such general acknowledgments, if it be found that they were intended to apply to the account so proved, will be deemed sufficient to remove the bar of the statute; for the principle is now well settled, in this State at least, that where a debt is admitted to be due, the law raises by implication a promise to pay it; and it is therefore immaterial whether the promise be made in express terms, or be deduced from an acknowledgment as a legal implication; as, in either case, the effect is the removal of the bar of the statute, and the restoration of the remedy upon the original demand. *Ellicott* v. *Nichols*, 7 Gill, 96.

But when the new promise is sought to be deduced from a general indefinite acknowledgment, such as is relied on in this case, the question is one for the jury to determine, whether the acknowledgment of the debtor, within the period of limitation, applies to the original demand sued on or not. The jury must find to what debt or claim the admission or general acknowledgment referred; and if the plaintiff shows but a single indebtedness, it may apply to that; or if the demand sued for be an account of several items, it may apply to any part thereof, according to the evidence and the finding of the jury. And in such case, if the debtor alleges that there was a different account or demand to which the general acknowledgment referred, the *onus* of proving that fact rests upon him, as matter of defense. This is the settled doctrine in this State and. as it would appear from an approved text writer, is the settled doctrine in many of the other States of the Union. *Guy* v. *Tams*, 6 Gill, 82; *Coates* v. *Sangston*, 5 Md. 132; *Peterson* v. *Ellicott*, 9 Md. 63; *Quynn* v. *Carroll*, 10 Md. 208; 2 Greenl. Ev. § 441 and cases there cited.

2. As to the second question; that depends upon the construction of the prayers granted by the court. By the first prayer of the appellee the jury were instructed that if they found the account to be established by the proof before them, and further, that the testator of the appellants, within three years before suit brought, admitted that he was indebted to the appellee on account, then the appellee was entitled to recover the value of the work and labor, and goods and materials, which the jury might find the appellee had performed for and furnished to the said testator, in his lifetime.

This instruction, as it will be perceived, omitted to require the jury to find that the general acknowledgments testified to by the witnesses did in fact refer to the account sued on, and none other; and in this respect it would seem to be defective. Nor was the defect cured by the appellee's second prayer, which was also granted by the court. But, by the second prayer of the appellants, which was granted, the jury were fully and correctly instructed as to the whole inquiry before them. By that instruction, the jury were directed that although they might find that the appellee rendered the services, furnished the materials, and laid out and expended the money, for the appellants' testator in his lifetime, as testified to by the witnesses, still the appellee was not entitled to recover for the same, if they should find that such services were rendered, materials furnished, and money expended, more than three years before action brought, unless they should further find from the evidence an assumption or promise by the appellants' testator, within three years of the time of bringing the suit, to pay for the same.

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*See note to this case. Lawyers' edition. [Ed.]

This instruction embraced the whole inquiry, and precluded the right to recover, except upon the condition that the admissions or general acknowledgments, stated in the evidence, were found to have been made within three years of the time of suit brought, and that they applied to the account for which the appellee had sued. And having obtained this instruction, the appellants were fully protected against the possible misleading effect of the appellee's prayers; and therefore they have no good ground of objection to the rulings of the court on the prayers, when those prayers are read together and taken as an entire instruction upon the questions presented.

The first prayer of the appellants, as settled by repeated decisions of this court since the Act of 1825, chap. 117, was entirely too general, and was therefore properly rejected by the court below. And, as we have already stated, the appellants' third prayer was properly rejected, because, if the general admissions or acknowledgments therein referred to were found by the jury, they were sufficient to remove the bar of the statute.

Finding no such error in the rulings of the court below as to require the reversal of the judgment appealed from, that judgment must be affirmed.

Christian F. RAPPANIER, *Appt.*,
v.
Michael BANNON.

SAME, *Appt.*,
v.
Nathan PUMPHREY.

John JENKINS *et al.*, *Appts.*,
v.
Christian F. RAPPANIER.

Nathan PUMPHREY, *Appt.*,
v.
Christian F. RAPPANIER.

1. A **petition by one not entitled to come in as complainant** or to continue the issue, filed in a suit which had come to an end fifteen years before, **against one not a party** to, and who has not been appointed trustee in, the suit, and who has no court funds in his hands, **charging him to be a self constituted trustee** of certain funds in his hands, **cannot be maintained,** to make him account for his misdoings in regard to such funds and to bring them into court for distribution, the suit **having been** instituted for an entirely different purpose.
2. The cases relied on and cited as entertaining **interlocutory petitions** in **cases for** the **distribution of funds,** or the sales of property, have no analogy to this case, and do not afford support to the application.
3. Although a man may so conduct himself with reference to property or money as to **bind himself in equity as a trustee,** he cannot be pursued by the petitioner in the method here adopted, by interjecting into an **ended case** something entirely foreign to its object and subject matter; but it must be done by **a new** and independent **proceeding.**
4. **Specific execution** will not be decreed, of an unperfected agreement, in favor of one who was no party to it, in the face of the denial of its existence by one of the alleged contracting parties and in the absence of any proof that the other party asserts any rights under it.
5. In order **to claim** the **benefit of a mutual agreement** from the opposite party, a party must show that his part of the agreement has been performed or that he is ready and willing to perform it.
6. The burden of proving **usury** is always on the party asserting it to have been charged.
7. Where **one party** to a contract is **dead,** the **testimony of the other** party to it who is a party to the suit, in regard to it, must be **excluded.**
8. Where a **trustee** has inexcusably delayed accounting for trust money in his hands and has used it as his own, he will be **charged with interest** upon it.
9. When the circuit court appoints **a trustee,** provision is usually made in the decree for his **commissions.** They are not a matter of right in the absence of such provision.
10. The **burden** of proof is **on** the **mortgagee to establish** the **priority of** the allowances which he claims, for **taxes,** etc., **paid** by him on a foreclosure sale.

(Decided February 18, 1887.)

FOUR appeals in one record from the Circuit Court for Anne Arundel County, in equity. *Affirmed.*

Argued before Alvey, *Ch. J.*, Robinson, Stone, Bryan and Irving, *JJ.*

The nature of the cases and facts and questions raised appear from the opinion.

Messrs. **James Mackubin** and **Frank H. Stockett,** for appellants.

Messrs. **James Revell, Michael Bannon** and **J. J. Alexander,** for appellees.

Irving, *J.*, delivered the opinion of the court:

There are four appeals in this record which will be disposed of in one opinion. They are so inseparably connected by the facts upon which each depends that we shall consider them together. The cases are singularly complicated by an unusual combination of circumstances; and the real questions presented for decision cannot be understood without a clear statement of the facts which have given rise to the controversies now before us for final adjudication.

By the will of Wm. Jenkins, who died in August, 1866, all his estate, real and personal, except a few pecuniary legacies, was devised to his wife, Anne Jenkins, for life, with remainder to his son, Daniel A. Jenkins, whom he left executor. Mrs. Anne Jenkins owned in her own right a tract of land called Griffith's lot, containing about 175 acres, which was devised to her by her father. The land of Wm. Jenkins which was devised to his wife Anne Jenkins for life, and then to his son Daniel A. Jenkins, contained about 160 acres, and is described by the names "Pinkstone's Fancy" and "Trusty Friend."

On the 10th of November, 1866, Anne Jenkins and her son, Daniel A. Jenkins, and wife, executed a mortgage to Nathan Pumphrey for $5,000, evidenced by their notes aggregating that sum, and all to be paid three years after date, with interest payable annually; and notes therefor for $300 for each of said three years were given and recited in the mortgage as thereby secured, as well as the principal sum of $5,000. The mortgage was upon Griffith's lot which belonged to Mrs. Jenkins absolutely, and also upon "Pinkstone's Fancy" and "Trusty Friend" which the mortgagors acquired by the will of William Jenkins. In the event of default in paying the principal sum when due on the promissory notes for the interest, the mortgagee "Pumphrey, his heirs, assigns etc.," were clothed with power "to sell the said mortgaged premises at public sale, at such time and place as he or they may think fit, agreeably to the provisions of article 64 of the Maryland Code of Public General Laws," "the purchase money to be paid in cash, having given at least twenty days public notice by advertisement in some newspaper published in Baltimore City, and such other notice as may be deemed necessary, of the time, place, manner and terms of sale; and in the event of a sale under the power hereby granted, the proceeds shall be applied to the payment of all claims of the said mortgagee, his representatives or assigns under this mortgage, whether the same have matured or not." Until default the mortgagors are to remain in possession and receive the rents and profits and pay taxes, including tax on the mortgage debt. This mortgage was duly executed, acknowledged, and recorded.

On the 11th day of March, 1867, Anne Jenkins and Daniel A. Jenkins executed a mortgage to Thomas Cottingham upon the same property included in Pumphrey's mortgage, to secure a note of Daniel A. Jenkins for $1,200, with interest from date, and dated same day as the mortgage. A power of sale in the event of default was also given to the mortgagee and there was a covenant to keep the property's improvements insured for the benefit and aditional security of the mortgage. This deed was also duly acknowledged and recorded, and an affidavit of consideration was appended to this and the Pumphrey mortgage.

On the 7th of May 1868, Daniel Jenkins and wife mortgaged the same property, which was conveyed by the previous mortgages, to Samuel S. Linthicum to secure $2,000 and interest thereon in one year from date, with like power of sale as in the former mortgages. This mortgage was duly executed and affidavit of consideration was duly made; but the mortgage does not appear to have been recorded until the 28th day of May; and in the meantime, on the 9th day of May, 1868, Daniel A. Jenkins and wife executed another mortgage upon the same property to Thomas Cottingham, Nathan Pumphrey, and Christian F. Rappanier to secure to each of those persons the sum of $1,000, with interest annually, two years from date; a note for $1,000 being executed to each of said persons and recited in the mortgage. In this mortgage the property is divided up into eight lots described by courses and distances, the number of acres included in each being mentioned. A like power of sale to that in the others was put into this; and the mortgage was duly executed and recorded on the 13th of May, 1868.

On the first day of August, 1868, another mortgage, and the last one involved in this suit, was executed by the same grantors as in the last two mortgages to Horatio G. Laurence, to secure $3,000 two years after date, with interest notes, four in number of $90 each, falling due in six, twelve, eighteen and twenty-four months after date. This mortgage not only included the property described in the first preceding mortgage to Thomas Cottingham, but also all the grantors' right to a farm called the "Chaney farm," and further described in the mortgage.

There was a power of sale in the event of default, and a covenant to keep buildings insured for mortgagor's further protection. This mortgage was also duly executed, with affidavit of consideration appended, and was recorded within two days after execution. Some time in 1867 Anne Jenkins, the widow of William Jenkins and life tenant of his real estate under his will, died intestate, leaving Daniel A. Jenkins, her son, and three grandsons, John T. Jenkins, William Jenkins and James Mordecai Jenkins, the children of a deceased son, her only heirs at law, so that on her death Daniel A. Jenkins became one half owner of "Griffith's lot," and his nephews above mentioned owned the other half, by descent from Anne Jenkins.

After all these mortgages had been executed it transpired that William Jenkins died indebted to one Hercules R. W. Andrews in a large sum of money, being the balance due upon a promissory note for $15,000, dated the first day of April, 1864, payable to the order of Jenkins & Williams three years after date, with legal interest from date, which was by the firm of Jenkins & Williams indorsed in the lifetime of William Jenkins to Hercules R. W. Andrews. On the 21st day of April, 1869, Andrews, by Thales A. Linthicum and J. I. Alexander, his solicitors, filed his bill in equity in the Circuit Court for Anne Arundel County, as a creditor of William Jenkins, against the heirs at law of William Jenkins, asking for sale of the real estate of William Jenkins for the payment of his debt, and that of any other creditor who would come in and contribute to the payment of the costs of suit, the personal estate being alleged to be exhausted.

This bill set out the several mortgages executed by D. A. Jenkins and his mother after the death of William Jenkins, and made the several mortgagees hereinbefore named parties defendant to his suit. The bill also averred the balance due on the note upon the 19th of August, 1868, to be $7,196.97 after deducting credits, with interest from that day. Upon the same day that the bill was filed Michael Bannon filed a written order in the case directing his name to be entered as solicitor for all the defendants except Daniel A. Jenkins and wife, which appearance was accordingly entered without subpena actually issuing for them. Subpena did go for D. A. Jenkins and wife and was returned summoned, and Judge Tuck afterwards appeared as their solicitor. Beyond the simple filing of his bill the complainant took no further proceeding in his suit by way of pressing the same.

On the second day of October, 1869, an agreement was filed in the cause by which it appeared that the complainant's claim was provided for satisfactorily to him and the suit was no longer to be continued. The agreement is dated the 19th day of August, 1869, and is signed by Thales A. Linthicum as solicitor for complainant and by Michael Bannon as solicitor for all the "defendants, including Daniel A. Jenkins and wife." That agreement recites in substance that *whereas*, the complainant Andrews had filed his bill against Daniel A. Jenkins, sole devisee of William Jenkins, the heirs at law of William Jenkins and the incumbrancers of the property, for the sale of the real estate of William Jenkins for the payment of complainant's claim against William Jenkins, for which the land of William Jenkins was liable to him in priority of the defendants' incumbrancers; that *whereas*, on the 22d day of June, 1869, Daniel A. Jenkins and wife, William A. Jenkins, John T. Jenkins and James Mordecai Jenkins had sold and conveyed to a certain Helena Hoover, wife of George W. Hoover, for the sum of $11,000, a part of the real estate of William Jenkins, deceased, and a part of the real estate of Anne Jenkins, deceased, devised to her by her father, and to which the grantors were entitled as her heirs at law, that for the purpose of paying the claim of said Andrews it was agreed:

1. That we and each of us shall and do hereby release and waive every and all of our liens and incumbrances and claims upon the parcels of said property hereinbefore mentioned as granted and conveyed to said Helena Hoover by the said Daniel A. Jenkins and others, to the intent and purpose and upon the express understanding and agreement that the purchase money to be paid by the said Helena Hoover for the lands so as aforesaid sold and conveyed to her shall, in the first place, be applied or secured to be applied to payment of the said debt of the complainant, and that the residue of said purchase money after the said claim of the complainant has been fully paid as aforesaid shall be paid to such one of us as shall hereafter be agreed upon by us, or in case of our failure to agrée as to the disposition of such surplus or residue then amongst those of us who are incumbrancers, according to our priorities by law.

2. It is further agreed that the terms upon which the said property was sold by the grantors in said deed to the —— Helena Hoover are hereby approved and ratified, namely: that so much of the purchase money therefor as shall be equal to the debt or claim of the complainant shall be secured to be paid to the said Daniel A. Jenkins and others, grantors in said deed by the sealed bill of the said George W. Hoover and Helena Hoover, and a mortgage on the property so conveyed to the said Helena Hoover, in which her husband shall unite for more effectually assuring the same within a term of six years from the delivery of the possession of said property to said Helena Hoover, interest thereon to be paid semi-annually, accounting from said day.

3. It is further agreed, however, that the said sealed bill and mortgage so to — made by the said Helena Hoover and George W. Hoover as aforesaid to the said Daniel A. Jenkins and others, grantors in said deed, shall be made directly to the said Hercules R. W. Andrews, instead of the said Daniel A. Jenkins and others as aforesaid, for the account of his claim appearing to be due as of this day, and costs amounting as per computation to the sum of $7,675.22, the said sum of money due said Andrews as aforesaid, and to be secured by said mortgage and sealed bill, to remain upon a credit of six years from the delivery of the possession of said property to the said Helena Hoover; which said date of the delivery of said possession is fixed as of the day of the date of this agreement, interest thereon to be paid to the said Hercules R. W. Andrews, or his assigns, semi-annually, accounting from said day.

The fourth clause provided for the insertion in the mortgage of a covenant to pay the debt and for a power of sale by the mortgagee, Andrews, in the event of default. The fifth clause of the agreement is as follows:

"And it is further agreed that so soon as the aforesaid mortgage shall have been made, executed and delivered unto the said Hercules R. W. Andrews and the residue of said purchase money over and above the amount so as aforesaid due to the said complainant shall have been paid or secured to be paid unto such one of us as shall be agreed upon as aforesaid, or shall have been paid to us according to our respective priorities as aforesaid, in case of our failure to agree upon one of us to receive the same, she, the said Helena Hoover, shall hold the said property free, clear and discharged of all claims, liens or incumbrances thereon, of us or any of us, or any person or persons claiming under us or any of us."

The sixth clause of the agreement provided that Andrews, upon having his claim secured by the mortgage and sealed bill provided for in the agreement, so that he should be secured in his claim against all other liens as before stated, thereby waived his claim against any other part of William Jenkins' real estate.

The seventh and last clause provided for the execution of any further instrument that might be necessary to carry into full effect the agreement thus made.

Upon the 5th of October, 1869, George W. Hoover and Helena Hoover, his wife, executed a mortgage to Hercules R. W. Andrews in pursuance of the agreement hereinbefore recited, in which the terms of said agreement were recited, and the execution of the mortgage stated to be in accordance with it. The mortgage was properly acknowledged, the affidavit of consideration by mortgagee, Andrews, was appended and was recorded on the 8th day of October.

The claim of the complainant, Andrews, in the equity suit mentioned, being thus secured, and he having agreed to waive claim on any other lands, on the 8th day of October, 1869, Daniel A. Jenkins, the executor of his father, William Jenkins, filed a petition in the equity suit instituted by Andrews, setting out that he was executor of his father, and that by an agreement filed in the cause the suit had been discontinued, and asking leave of the court to withdraw the cause of action, "for the purpose of obtaining reimbursement from other parties liable to him in respect thereof."

The prayer of the petitioner was assented to in writing, by Andrews' solicitor and the court passed an order for the surrender to the petitioner, Daniel A. Jenkins, "of the original promissory note upon which the suit was brought, upon leaving with the clerk a true copy thereof to be placed among the proceedings." Thereupon, the note was withdrawn and a statement and calculation thereon, showing the balance due on the 19th of August, 1868, was left in its stead.

On the same day that Hoover and wife executed the mortgage to Andrews for the amount of his claim against William Jenkins, they executed to Michael Bannon a mortgage for $3,324.78, payable in three years from date, with the interest payable annually. This mortgage, although executed on the day of its date before a justice, was not recorded until the 15th of August, 1871. The amount secured to Bannon by this mortgage was the precise balance of the purchase money of the land sold to Mrs. Hoover for $11,000, after deducting the Andrews claim.

The next thing to be mentioned in chronological order is that on the 13th of November, 1869, according to the docket entries in No. 107 of the chancery docket of the Circuit Court, for Anne Arundel County, Nathan Pumphrey filed his mortgage and a bond for the purpose of making sale under the power in his mortgage herein before set out; and on the 23d day of October, 1869, he advertised in *The Baltimore American* the sale of the property mentioned in his mortgage to be sold on the 15th of November, 1869.

The same docket entries show that a sale was reported the 16th of January, 1871, and an order *nisi* was passed the same day; that on the 14th of March, 1871, a certificate of the publication of the order *nisi* was filed, and that the sale was finally ratified on the 21st of April, 1871. All the papers in this case are said to be lost; but the proof in the cause shows that Pumphrey purchased at his own sale for $9,000, and afterwards sold and conveyed the property to Bannon for the sum of $9,000, this deed being dated the third day of November, 1873.

We now come to the judicial proceedings to which these transactions already recited gave rise, and in which the action of the circuit court was taken which has induced these appeals. On the 11th of December, 1884, Christian F. Rappanier filed his petition in No. 107 of the equity docket of Anne Arundel Circuit Court, alleging that Michael Bannon had instituted proceedings for the sale by Nathan Pumphrey, under the power of sale contained in his mortgage from Daniel A. Jenkins and wife, and that a sale was reported which was ratified on the 21st of April, 1871; that in the summer of 1882 these facts were disclosed to the petitioner by the docket entries, and he had never heard or known of any such proceedings before; that he had caused diligent search for the original papers, but they could not be found; that the most diligent search had disclosed only two mortgages from Jenkins and wife to Pumphrey, one dated November 10, 1866, in which Anne Jenkins unites, for $5,000; and the other to Nathan Pumphrey, Thomas Cottingham and the petitioner, dated the 9th of May, 1868, to secure to each of the mortgagees $1,000 each with interest thereon. It then charges that the land sold was that thereby mortgaged, less 125 acres previously sold to Mrs. Helena Hoover, wife of George W. Hoover "under an agreement filed in cause No. 60, equity, in this court, in which Hercules R. W. Andrews was complainant and Daniel A. Jenkins and S. Caroline Jenkins, Nathan Pumphrey and others were defendants; and that the said Nathan Pumphrey was himself the purchaser at his said sale, but that he has never accounted therefor," and that petitioner was "entitled to have him account for the same under the direction of the court and according to its usual practice."

The petition further averred that the full amount due the petitioner under the last mentioned mortgage was still due and unpaid, with interest on the same, except $20 paid on the first year's interest, and that, until about the first of November preceding, he did not know what it was Pumphrey sold, or to whom or at what price; and to rebut the influence of laches from lapse of time, he refers to his petition filed in cause No. 60 of same docket in the same court. The petition asked for an account, and for an order requiring Pumphrey to answer by a certain day. The court passed such an order, and Pumphrey answered. The answer admits the sale as charged in the petition, and avers that over twenty days' notice thereof was given by newspaper advertisement, extensively circulated hand bills in Anne Arundel, Howard and Baltimore Counties. He admits the purchase by himself of the property for $9,000. He admits that he had only the two mortgages mentioned, the first of which he avers on the day of sale amounted to $6,260; but he avers that between that mortgage and the other mortgage, there was a mortgage to Thomas Cottingham, which with interest on the day of sale amounted to $1,477, which two sums overdue taxes and expenses of sale, were paid out of the purchase money, and a small balance was applied to the overdue mortgage of respondent and Thomas Cottingham; the petitioner having agreed to take the Chaney farm situated in the fourth district of Anne Arundel County, in payment in full of his mortgage debt and interest, at the time of the Andrews settlement; in consideration of which agreement on his part the respondent with Cottingham and Linthicum agreed to waive their claims on the part sold to Mrs. Helena Hoover.

Respondent denies that he never accounted for the purchase money, but avers that he did do so, and subsequently sold the property to Michael Bannon for the same price as he gave. He denies that the petitioner is entitled to any part thereof, because he took the Chaney farm instead. He denies that petitioner did not know of the sale and to whom it was sold, averring that it was matter of public notoriety. He also pleads limitations to the petitioner's claim. General replication was filed.

Simultaneously with these proceedings in 107, the same petitioner filed a petition against Michael Bannon in No. 60. That petition, in substance, sets out the filing of the bill in the cause for the sale of William Jenkins' real estate in aid of the personalty for the payment of his debts; it sets out the several mortgages upon the real estate which came to the mortgagors from Wm. Jenkins by his will, and upon the real estate of Anne Jenkins in her own right; it avers the death of Anne Jenkins, and that upon her death intestate her real estate descended to Daniel A. Jenkins, her son, and her three grandsons parties to the bill; that is to say one half to Daniel A. Jenkins and the other half to the grandsons. It also avers that by the bill the sale of Anne Jenkins' land was also asked for as necessary to the full adjustment of the rights of all said parties; it also states the order for and appearance of Michael Bannon for all the defendants except Daniel A. Jenkins and wife, for whom the late Wm. H. Tuck appeared, and that no subpena was ever issued for petitioner or any of the mortgagees. It then charges that by the account filed in the cause on the second day of October, 1869, and signed by Michael Bannon for all the defendants, 125 acres of the land was to be sold to Mrs. Hoover, wife of George W. Hoover, for $11,000, out of which the complainant was to be paid in full by a first mortgage on the land sold, and the residue was to be paid in cash and applied to the payment of such of the parties interested as they might all agree upon, and in default of such agreement then according to their priorities by law.

The petition then alleges the delivery of the deed to Mrs. Helena Hoover in execution of the terms of the agreement, averring the deed in fact to have been executed on the 22d day of June, 1869, and held as an escrow to await the consummation of the agreement then pending; and that simultaneously with the delivery of the deed to Mrs. Hoover, she and her husband executed a mortgage to Andrews of said land, for $7,675.22, and one to Bannon for $3,324.78, the residue of the $11,000 purchase money; that the Andrews mortgage was recorded promptly, but Bannon's was not recorded until the 15th of August, 1871.

The petition then charges as follows: "That said $3,324.78 passed into the hands of the said Bannon, as a self constituted trustee in this case, on the 5th of October, 1869, to be applied as set forth in said paper filed of the second of that month; that it has never been so applied, but has been retained and used by him all the while for his own individual gain; that your petitioner never knew anything of this suit until the summer of 1882, or of the matters disclosed, except as will be hereinafter set forth; that he never authorized said Bannon nor anyone else, to appear thereto for him, or to enter into any agreement growing out of it, and especially that he never assented to or agreed or authorized any one else to assent to or agree for him to any application of the fund or any part thereof arising from said sale to Mrs. Hoover; that while willing to abide by said sale and the concession so made of the complainant's entire demand your petitioner claims and insists that the said sum of $3,324.78 with interest thereon from said 5th day of October, 1869, the time when it was so received by the said Bannon, be applied under the direction of the court to the payment of the several parties who may appear to be entitled thereto according to their respective legal priorities in equity, and to that end that said Bannon should be required to bring the same into this court forthwith to be so applied; that although your petitioner was informed in the summer of 1882 of this suit, he did not know until near the first of November of this year, that said sum of $3,324.78 had never been applied by said Bannon in fulfillment of the trusts on which he received it; and further to exclude any inference, from the lapse of time, of laches on the part of your petitioner in filing this his petition, further represents, that for the last twenty years or more said Bannon has been engaged in the business of a lawyer and real estate agent combined, and for several years before May, 1868, had charge of several similar business matters for your petitioner, and had then several in charge, and so possessed the entire trust and confidence of your petitioner that, at the instance of said Bannon about the first of May, 1868, your petitioner intrusted to him the sum of $1,000 for investment, upon his representation that it was to be a part of $3,000, whereof the remainder would be supplied by two others of $1,000 each and loaned to Daniel A. Jenkins upon his promissory note to each of them, further secured by a first mortgage on said unincumbered real estate belonging to said Jenkins situated in Anne Arundel County, near the residence of said Bannon, in the neighborhood of Jessup's Cut, containing more than 300 acres of land, and then worth $15,000; that your petitioner received from said Bannon the promissory note of said Jenkins for the $1,000, bearing interest payable annually, and was informed that the mortgage had been sent to Annapolis for record."

The petitioner then proceeds to charge that two years or more afterwards, not receiving his interest as it was due, he directed Bannon to foreclose, and was informed by him that the mortgaged property had been consumed by a claim upon a note for $15,000, which had come to light after the mortgage had been taken, being a note of the father of David A. Jenkins, (from whom David A. Jenkins had acquired the land), of which there was no record, and which could only be known to the holder of it; that he thus persuaded the petitioner that he was blameless, and he retained his confidence;

but that his whole claim except $20 on the first year's interest was still due, and unpaid.

Subsequently, it is averred, circumstances transpired which aroused suspicion, and he caused investigation and learned of the sale by Pumphrey under the power in his mortgage, and his reputed sale, the loss or disappearance of the papers in the case from the court; that Daniel A. Jenkins had passed no administration account; that the Linthicum mortgage was entered of record as assigned to Bannon on the 11th of November, 1868, for full face value; that the mortgage debts to Cottingham, who was then dead, had been presumably satisfied, although no release was entered record; and that all of the mortgaged property had passed into the possession and apparent ownership of Bannon, but no record could be found of the conveyance thereof to him.

The petitioner further states that promptly upon such disclosure he sued Bannon for negligence and failure to exercise proper skill in the attention to the business intrusted to him, and was met with a plea of not guilty and limitations; that replication was made to the plea of limitations that he had fraudulently concealed from your petitioner his right of action until within three years before suit was entered, and that your petitioner could not by the exercise of the usual and ordinary diligence have sooner discovered it; that issue was joined, and trial finally procured before the court without the intervention of a jury, and resulted in a verdict for Bannon on the issue made on the plea of limitations, that the petitioner could have discovered the fraud by proper diligence, but the court expressed no opinion on the other questions involved.

The petitioner further charges that at the trial he first learned from the testimony of Bannon that the $3,324.78 had not been applied by him as required by the trusts under which he received the same, and that at the sale made by Nathan Pumphrey all the property save the property sold to Mrs. Hoover was sold; that Pumphrey was the purchaser, at $9,000, and that both Pumphrey and Cottingham had been satisfied, and that all the papers were lost or could not be found.

The petition then prays that Bannon might be required to bring the $3,324.78, into court with interest thereon "to be applied under the direction of this court, according to the terms of the said agreement, filed in this cause, and under which he received the same" and for such other relief as equity would allow. The petition asked that Bannon be required to answer. An order was passed so requiring him by a certain day.

On the 19th of January, 1885, Bannon answered in substance as follows: he admits the filing of Andrews' bill for the sale of the real estate of William Jenkins and his appearance for all the defendants, including petitioner Rappanier, except Jenkins and wife. He denies that authority was not given him by petitioner to appear for him but avers that he was fully authorized; he admits that no subpenas were issued for respondents; he admits Anne Jenkins' death in 1867, and the incumbering of the property by mortgages by her and her son Daniel in her lifetime, and by Daniel A. Jenkins after her death as alleged; he admits signing the agreement filed in the cause, as solicitor for all the defendants, and denies that petitioner gave him no authority to do so for him, but avers that he signed the same by his full authority and assent for him; he denies that petitioner was ignorant of the writ, the agreement and its provisions; he admits the sale to Mrs. Hoover of part of the land for $11,000, and that Andrews was to be paid in full from the purchase money, in priority of all others, and that the residue of the purchase money was to be applied to the payment of such parties as might be agreed on, or in case of no agreement then according to their priorities; he avers there was no cash payment made and that it was agreed between all parties that when the same was paid it should be applied to the payment of Horatio Laurence's mortgage for $3,000, and interest, and that petitioner was a party to that agreement and was fully aware thereof; he avers that Mrs. Hoover put securities in his hands for collection, and when collected to be applied to the Laurence mortgage, and as by the agreement she was bound to pay the Laurence mortgage out of the balance of purchase money, that she executed the mortgage to him for that balance, and avers that all these transactions were fully known and assented to by the petitioner; he denies that the sum of $3,324.78, ever passed into his hands as a self constituted trustee in this case and to be applied by him as set forth in the agreement, or that that sum or any sum has been retained by him for his own gain; he denies that petitioner intrusted $1,000 to him to loan to Jenkins as a part of $3,000, the other $2,000 to be furnished by other persons and the whole to be secured by a mortgage on unincumbered real estate; denies that he got the note from him, but avers he got it from Jenkins and fully knew Jenkins' responsibility and value of his lands; he denies that he was required to foreclose the mortgage securing this $1,000; he admits that he informed Rappanier of the $15,000 note of William Jenkins, but not when and as charged, but that he did so as soon as discovered and explained the whole thing to him; but denies that the information was imparted to persuade the petitioner that he, Bannon, was entirely blameless; he avers that petitioner knew then and knows now that he was blameless, and avers that it was not from additional knowledge which the defendant acquired that he changed his mind, for he had known all about it for years that he knows now; he denies that any circumstances transpired in 1882 to lead the petitioner to think there was anything wrong; and he denies that petitioner had never been paid more than $20 on his note, and denies that petitioner had been put off from time to time about his money, as he alleges, by the respondent; he admits the sale by Pumphrey under his mortgage and the purchase thereof by Pumphrey at $9,000; he admits the payment of Pumphrey and Cottingham from the proceeds of sale, and that the Linthicum mortgage has been assigned to the respondent, and that all the property has passed into the hands of respondent except the Andrews mortgage which was assigned by Andrews in his lifetime to Mrs. Bannon; he admits that the papers in the Pumphrey trust sale are lost or mislaid, and that respondent had caused diligent search for them without avail.

He cannot admit or deny whether petitioner caused a letter to be written to the respondent, but avers that no answer was ever sent, and that there was nothing for adjustment between the respondent and petitioner, except what was due the respondent for unpaid professional service rendered the petitioner.

He admits the suit at law by the petitioner against the respondent and its result, as charged by the petitioner; and he pleads that finding and result, and the judgment thereon, as a bar to the present claim of the petitioner.

He admits the sale by Pumphrey to him of the property he bought at his own sale for $9,000—and that respondent gave the same amount for it, and that it was applied to paying Pumphrey and Cottingham their prior mortgages and the residue on Pumphrey and Cottingham's other mortgage claim; he denies there are any moneys in his hands which he ought to bring into court. He also pleads the Statute of Limitations against the petitioner's demand, and prays that his petition may be dismissed.

To this answer a general replication was filed on the 30th of February, 1885. On the 4th of February, 1885, upon the application of Rappanier, stating that there was in fact but one matter of controversy involved in the petition filed in No. 60 and that filed in No. 107, and asking for their consolidation, the court passed an order consolidating them and directing that thereafter they proceed as one case. A mass of testimony was taken and the case finally came to a hearing, at which the respondent Bannon excepted to the jurisdiction of the court to entertain the petition of Rappanier in No. 60.

The circuit court in an elaborate opinion decided that the petition of Rappanier should be dismissed; and that Pumphrey should be held to an account as to the proceeds of his sale under his mortgage; and accordingly so decreed, and referred the case to the auditor to state an account on the pleadings and proofs already before the court, or which might be produced before him. From so much of this order as dismissed Rappanier's petition in No. 60 he at once appealed, and we will dispose of the question raised on this appeal, before stating the grounds of the subsequent appeals which were taken after the decision of the court on the exceptions to the auditor's report made in the cause, pursuant to the court's order.

In the view we entertain, the petition of Rappanier was so clearly unmaintainable in the cause in which it was filed, for reasons other than those assigned by the circuit court, that we rest our decision in affirming the court's order dismissing the petition solely on the reasons now assigned.

The bill was filed by a creditor of William Jenkins, for the sale of his real estate in aid of the personalty, for the payment of the complainant's claim against him. It was a creditor's bill; and although it does not appear that he owed anybody else, it was filed for other creditors (if there were such) who would come in and contribute to the payment of the costs of the suit. The incumbrancers, who were made defendants, were not his creditors. They were creditors of Anne Jenkins and Daniel A. Jenkins, his devisees, who had mortgaged the land to them for their debts (and not the debt of William Jenkins) after William Jenkins' death. The bill was not filed to sell Anne Jenkins' real estate also, as stated in the petition. No such application is found in the bill; and the plaintiff had no right to claim a sale of her land. He had no possible claim on that, or the mortgages because of it. Had the case proceeded to a decree for the sale of William Jenkins' land, and it had been sold, the petitioner, as a mortgagee of the devisees thereof, and a defendant, might have had standing in court to see that the fund was not appropriated in prejudice of his rights. Beyond that he would seem to have no interest.

After the institution of the suit by Andrews, arrangements were made by the devisees of the land of William Jenkins, and other persons in interest, for the full extinguishment of his claim against William Jenkins. A part of the land of William Jenkins devised to Anne Jenkins and Daniel Jenkins, and a part of Anne Jenkins' land, inherited by Daniel Jenkins and his nephews from her, was by them sold and conveyed to Mrs. Helena Hoover for $11,000, and by agreement entirely satisfactory to Andrews his claim was secured by a first mortgage from Mrs. Hoover. This he accepted in full payment of his claim, and he waived his claim on all the residue of the land of William Jenkins.

There was an entire novation, and, as against William Jenkins' heirs at law and devisees, and the land of William Jenkins which had been bound for it, he no longer had any claim; and his suit, based on it, was at an end. He could no longer maintain it, and no decree could ever be obtained upon his bill of complaint. An agreement so settling was filed.

After the agreement was filed in the cause, and after the execution of the mortgage to the complainant therein, which the agreement provided for, Daniel A. Jenkins filed his petition setting forth the fact that the suit was instituted to secure the payment of the debt of William Jenkins to the complainant, and that by the agreement filed in the case the suit had been discontinued; and that he, executor of his father, the debtor, needed the note for the purpose of obtaining reimbursement from other parties in respect thereto, and asking to withdraw the cause of action the complainant had filed with his bill; and by order of court the same was delivered up to him. Thus, the executor of the debtor who was, as such, first liable for its payment, and one of the heirs at law, and defendants in the suit upon it, was allowed possession of the note because it had been paid.

The suit had thus come to an end fifteen years before Rappanier's petition was filed. He was not a creditor of William Jenkins so as to be entitled to come in as a complainant, at any time, and continue the issue. He does not profess to do that, however, but files a petition in it against Michael Bannon, who is not a party to the suit either as plaintiff or defendant; and who has not been appointed trustee in the cause by the court for any purpose; and who clearly has no court funds in his hands. It charges him to be a self constituted trustee of certain funds alleged to be in his hands. But the funds alleged to have passed into his hands are not the proceeds of any of William Jenkins' real estate sold by the court order, or over which it has acquired control. The agreement referred to, in the execution of which they have arisen, did not design them to be accounted for in court in that case. It was designed to put an end to that suit by paying the debt, which it was brought to recover.

The agreement provides, in express terms, that the balance of the purchase money, after paying Andrews, should be paid by her (Mrs. Hoover) to the person who should be agreed on to receive it, or to incumbrancers, according to priorities. To that extent, therefore, she would be regarded in the light of a trustee; but even she would not be answerable in this proceeding, if she had been made a party to it by Rappanier's petition, as she was not. It is averred that Bannon has received that money from her and that he is answerable, in this case, as a "self constituted trustee" of the funds. The fund arose in part from Anne Jenkins' real estate sold to Mrs. Hoover; such part of the same as represented her estate, could, certainly, under no theory be answerable for William Jenkins' debt, or be brought under the court's control in that case, for that purpose. It was therefore an application on the part of the petitioner to bring Michael Bannon to account, in equity, for alleged rights and demands which the petitioner had against him, for his misdoings in regard to certain trust moneys to the petitioner's injury, in a case where suit had been instituted, for an entirely different purpose, more than fifteen years before, and which had been ended for that period. It was certainly interjecting into that case a controversy entirely foreign to it, and sanctioned by no practice that has ever obtained the approval of this court. The cases relied upon and cited as recognizing the practice of entertaining interlocutory petitions in cases for the distribution of funds, or the sales of property, have no analogy to this case, and do not afford the slightest support to this application.

The case of *Griffith* v. *Parks*, 32 Md. 1, upon which the petitioner relies as supporting his right to intervene in this way, does not bear the slightest resemblance to the case under consideration. There the court had a fund before it for distribution, and all the parties interested in it were parties and before the court, and the court sustained an interlocutory application with reference to it. In this case there is no fund in court, or which was designed to be brought into court, for the purposes of that suit. But the effort is to get the court to bring a fund into the court, for distribution, in a case where the only creditor is paid and his suit ended. The fund has not arisen out of any action or order giving the court control over it. The court is asked to treat it as if proceeds of a sale ordered by it when the court could not have passed such order on that bill.

As to the merits of the petitioner's claim against Mr. Bannon, we are called on to express no opinion, in the view we take of the case. There can be no doubt that a man may so conduct himself with reference to property or money as to bind himself in equity as a trustee. *Diffenderffer* v. *Winder*, 3 Gill & J. 311, cited by the appellant, fully establishes that proposition; but because Bannon may have so conducted himself as to become answerable as a trustee (which we do not decide), it does not follow that he may be pursued, by the petitioner, in the method adopted, and in this case. It was certainly interjecting, into an ended case, something entirely foreign to its object and subject matter.

Assuming that the petitioner has good ground of complaint against the respondent, a new and independent proceeding was necessary; and it would be setting an unwarranted and pernicious precedent to sustain that petition. We find no occasion to consider the question raised by the defense of *res judicata* in the proceeding at law against Bannon. There was abundant justification for dismissing the petition in No. 60, and we fully approve the court's action in that regard.

Under the order of the court referring the case of Pumphrey to an auditor, and ordering an account between Pumphrey and the proceeds of the sale he made under his mortgage, the auditor took much testimony, and stated accounts upon it which came up for ratification; and the court on exceptions rejected all the accounts and ordered a new account in conformity with its views; which account being made the court overruled the exceptions thereto and ratified the same; and thereupon several appeals were taken to the order rejecting the first audits, and ordering a new one, and to the final order of ratification of the audit made in conformity with the court's last opinion and order.

Upon the proofs before him the auditor stated these accounts (*a b* and *c*) in all of which he allowed Pumphrey commissions for making the sale, expenses and cost of suit in No. 107 up to the ratification of the sale. Accounts *a* and *b* deduct a bonus of 4 per cent from all claimants, including Pumphrey. Account *c* deducts a bonus from no claimant but Rappanier, and allows certain taxes for 1868 and 1869, claimed to have been paid by Pumphrey.

Rappanier excepted to accounts *a* and *b*, 1, because Pumphrey is only charged simple interest to sale; whereas, it ought to have been brought to sale and compounded on annual rests; 2, because commissions and costs are allowed; 3, because Pumphrey's whole claim is allowed, whereas, the first two interest notes are not produced, and 4, because Cottingham's claim is allowed without production of the note.

Account *c* is excepted to: 1, because commissions, costs and expenses are allowed; 2, because taxes of 1868 without voucher have been allowed; 3, because taxes of 1869 without voucher therefor has been allowed; 4, because Pumphrey is not charged with usury, and the first two interest notes are not credited, and he is not charged with the cash payment from Hoover; 5, because Cottingham's claim is allowed and also because it is not charged with usury.

Pumphrey also excepted because Rappanier was allowed any part of the fund, and because he was not allowed for taxes he claimed to have paid. These audits allowed him commissions and costs, and he had no occasion then to except, as he did afterwards, to the final audit which allowed commissions, nor to the taxes for

1868 and 1869, which he claimed to have paid. He also excepted to the accounts which charged him with a *bonus*.

We agree so fully with the manner in which the circuit court dealt with the questions thus raised on the distribution of the fund in Pumphrey's hands, and to account for which he was so properly required, that we shall quote largely from the court's opinion, as strongly presenting our view of the case and upon which we cannot improve.

It is urged on the part of Pumphrey that the petitioner Rappanier has no claim at all as against the fund in court, because of what is spoken of in the testimony as his agreement to take the Chaney farm as consideration for and satisfaction of the mortgage debt which he is now seeking to have paid. In determining this question it will not be necessary to attempt to reconcile the conflict of evidence in regard thereto. The result will be the same whether we accept as true the testimony on the one side or the other. We will, therefore, deal only with the proof adduced by the respondent Pumphrey. According to this, an agreement was entered into between the petitioner Rappanier on the one side, and Daniel A. Jenkins, the mortgagor in the mortgage under which Pumphrey made the sale reported in No. 107, on the other, the effect of which was that Jenkins was to sell the farm spoken of as the Chaney farm to Rappanier, and that Rappanier was to purchase the same, and in consideration thereof was to give up and release the mortgage debt which he now claims to have paid out of this fund; that this agreement was reduced to writing, and signed by the parties, Rappanier and Jenkins; that this written agreement was passed into the possession of Rappanier (who does not produce it upon notice requiring him to do so, and who denies that it ever existed); that before this agreement was actually consummated by the transfer of the property purchased by the one party, and the release of the mortgages by the other, Rappanier refused to carry out the agreement; that Jenkins never executed any deed of the Chaney farm, nor tendered any deed of the same; but on the contrary, after this refusal by Rappanier, exercised the usual rights and assumed the usual obligations of the owner of property, paying the taxes thereon for the two years immediately succeeding the making of the agreement, and the refusal of performance by Rappanier; and later still making the effort to sell the farm to other parties, one of whom prosecuted his inquiries concerning the state of the title to the point of being informed that it was complicated by a claim of the petitioner (Rappanier) and to a refusal by Rappanier to enter into any negotiation in regard to it when he dropped the further pursuit of the matter.

Allowing the fullest effect to this proof, it shows an agreement between Rappanier and Jenkins, to which Pumphrey was in nowise a party; that the agreement was never consummated, but on the contrary there was a distinct refusal on the one side to perform it, and an apparent acquiescence on the other in its nonperformance; and that this had been the condition and relation of the parties to the agreement for over fifteen years. To give the agreement the effect that the respondent claims for it here in the distribution of this fund, the court would be virtually decreeing specific execution of an unperfected agreement, in favor of one who was no party to it, in the face of the denial of its existence, by one of the alleged contracting parties, and in the absence of any proof that the other of said contracting parties asserts any rights under it.

In this very strong answer to this allegation on the part of Pumphrey we may add it would not only be enforcing in effect a specific performance against Rappanier when Jenkins is not asking it, but when he says in his testimony he does not even remember making the contract. It has been so long he has forgotten it, if in fact it was made. It would therefore be in effect enforcing it in favor of one not a party to it, against the wishes of both the supposed parties to it.

But it is further insisted by Pumphrey that in consequence of his agreement to take the Chaney farm in satisfaction of his mortgage, he (Pumphrey) agreed to waive his lien against the land bought by Mrs. Hoover. He so testified. To this contention of exceptant Pumphrey, the court below gives a most conclusive answer:

"If it is meant that an agreement arose out of this by which Rappanier ought to be held bound to release his mortgage claim here in question, the respondent has, by his own proof, disentitled himself to claim the benefit of the agreement, because in order to do this he must show that his part of the agreement has been performed, or that he is willing and ready to perform it; but contrary to this the proof is that in making the sale from which the fund in court, and now in controversy, was produced, he sold the whole property covered by his mortgage, which embraced the part sold to Mrs. Hoover; and so there was a failure on his part to observe his own agreement as to a waiver of the lien." We may add that not only did he enforce it, but his proof shows that he enforced it because Rappanier had backed out. He accepted Rappanier's refusal, and acted accordingly in selling the whole property covered by his mortgage. It is manifest, therefore, that Rappanier cannot be excluded from sharing in the surplus, after payment of prior liens, as one of the mortgagees in the mortgage known as the "Pumphrey, Cottingham and Rappanier" mortgage. As the other objections of Pumphrey are again raised by his exceptions to the final audit in the case we will not discuss them now.

In respect to Rappanier's exceptions to the allowance of Pumphrey's mortgage from the fund, with interest to the day of sale, and the failure to deduct anything therefrom for usury, we think there was no error. The burden of proving usury is always on the party asserting it to have been charged. He must show by proof the amount of excessive interest or *bonus* which was taken, else the court cannot ascertain with certainty the amount actually due a claimant. *Williams* v. *Banks*, 11 Md. 235.

The burden being on the exceptant in this matter the preponderance of proof should be with him. He called Jenkins to prove that usury was taken in the inception of the transaction when the money was loaned. Jenkins does testify that 4 per cent was taken off and he gave his note at 6 per cent from date, for the whole $5,000. Pumphrey was recalled and legitimately and properly in rebuttal, and the objection to his testimony was properly overruled, and he expressly denies it; and then Bannon testifies that he was present at the loan and no bonus was deducted then. The preponderance therefore is with Pumphrey that it was not taken then, and Pumphrey says that it was not taken at all.

Jenkins' recollection of many things after such a lapse of years seems often imperfect and confused in his testimony and we think the court was right in not charging Pumphrey with usury. Jenkins said in his testimony he had no recollection of ever paying anything on the Pumphrey claim. The two interest notes which were not produced, and to the allowance of which exception was made, Pumphrey says he gave to his solicitor, who confirms this statement and says they were lost or mislaid. There was therefore no error in allowing them.

The proof showed conclusively that Pumphrey had paid the Cottingham mortgage for $1,200. He ought therefore to be substituted to Cottingham's rights; and the same was properly allowed, with interest to the day of sale. There was no admissible proof of usury in this claim. Jenkins was a party to the original contract, and Cottingham was dead; therefore Jenkins' testimony must be excluded, and the court was right in disregarding it. The bonus in Rappanier's claim was clearly established by the proof and was properly charged against him, and deducted from the principal in the start.

The circuit court was also clearly right in charging Pumphrey with interest to date in favor of Rappanier. By his own confession he had not paid Rappanier, but had used the money as his own. The fact that he regarded Rappanier as not entitled because of what he understood was his agreement to take the Chaney farm instead of his claim, and in payment of it, is no answer or excuse to his delay in rendering his account to the court as was his duty. He ought to have come to the court with the fund and asked its direction respecting it. Numerous authorities could be cited for charging a trustee with interest under such circumstances. It is the settled law of this State. *Glenn* v. *Cockey*, 16 Md. 446; *Gwynn* v. *Dorsey*, 4 Gill & J. 453, Brantley's ed. 312.

To the final audit, which was stated in conformity with the circuit court's second opinion and order thereon, Rappanier again excepted. Because Pumphrey and Cottingham's claims were not credited with the bonus he claimed they received, and because they were not credited with the money on the Hoover purchase which was applied to the Laurence claim under their agreement.

As to the contention about the bonus alleged to have been received on those claims respectively that has already been fully disposed of and needs no further notice. The question as to application of the surplus of the Hoover purchase money was raised by audit "A" of those stated by the auditor to meet the contentions of the parties respectively before him. The court rejected that with the others, and ordered a new audit, and in rejecting audit "A" assigned no reasons especially applicable to it; but we think it was properly rejected.

The dismissal of Rappanier's petition in No. 60 left the questions arising on that entirely out of the case made on the petition filed against Pumphrey. Pumphrey had nothing to do with the money arising on the Hoover purchase, and was not chargeable with it. The Cottingham claim and Pumphrey's in fact received no part of it. If there was a misapplication of the money arising on the Hoover land sale by anybody, it is not cognizable in this accounting, under the pleadings and proofs there.

In rejecting the audits first made, in all of which commissions were allowed to Pumphrey for making the sale, and in one of which, audit "C," certain taxes claimed to have been paid by Pumphrey for the years 1868 and 1869 were allowed, the court expressly directed the new audit not to include either commissions, or the taxes allowed in account "C," the final audit conformed to that order, and by it no commissions are allowed and the taxes are disallowed.

Pumphrey appealed from the order so directing, and from the order ratifying the audit finally disposing of the fund without such allowances. We think the reasons assigned by the court below for the disallowance of both commissions and the taxes claimed are sound. The burden of proof, says that court, is on the mortgagee to establish the propriety of the allowances he claims.

No vouchers were produced for the taxes claimed to have been paid for 1868. Jenkins (whose duty it was to pay the taxes, according to the express terms of the mortgage) testifies that he paid the taxes for that year, but produces no voucher. Mr. Bannon says he paid them, but produces no receipt. If both paid them the collector was twice paid, and one was erroneously collected. We do not know who paid them improperly if they were demanded twice, nor which was mistaken in recollection if only paid once. There was no preponderance of proof, and those taxes were properly disallowed. The taxes for 1869, claimed to have been paid by Mr. Bannon for Mr. Pumphrey, were properly refused allowance under the case of *Wheeler* v. *Addison*, 54 Md. 41.

Under the general law those taxes were not due when the sale was made, and would not become due until the first day of January following; and unless the property was sold clear of taxes for 1869, by express notification, the purchaser took subject to what afterwards fell due. That such notice was given we have no proof; and as there is no contention or proof of a local law making the taxes due at a different period, the general law must control, and the taxes for 1869 were properly excluded.

Appellant Pumphrey complains that he was not allowed commissions, but the court was clearly right in not allowing him any. When the court appoints a trustee provision is made in the decree for the allowance of such commissions as the court may think the trustee entitled to according to "the skill, attention and fidelity wherewith he appears to have discharged his trust." It is not a matter of absolute right, and the rules of court generally prescribe a scale of allowance. This deed contains the agreement between the parties, and there is no provision in it giving the mortgagee a right to be allowed commissions, nor any language which seems to leave that question with the court. If it had been the purpose of the contracting parties that the mortgagee should be paid the usual trustee's commissions in the discretion of the court, it was very easy to have so said, provided there is no evidence of any rule of the court by which such trustees are allowed commissions; and the court below expressly says that it is the practice of that court not to make any such allowance, in the absence of provision, express or implied, in the instrument.

As to the expenses which are allowed and to which allowance Rappanier excepted, there can be no doubt of the correctness of their allowance. The law requires publication of notice and all proceedings which are practiced in ordinary trustee sales under decree, and evidently contemplates the ordinary costs resulting therefrom. The deed in this instance provides for notice and by implication contemplates the payment of its costs. The ordinary costs attending the sale and its ratification in view of the law must have been in the contemplation of the parties; and uniform practice, as we understand it, throughout the State, allows such expenses, as unavoidable.

John and Mordecai Jenkins have appealed from the court's order dated July 31, 1886, and the audit filed on August 2, 1886, and ratified on the 7th of August, "because by said orders and audits the proceeds of the sale of their property are taken to pay others' debts." This appeal is the first intimation in the record that these appellants set up any claim adverse to the mortgagees of the property. They have filed no exceptions to the auditor's reports, so as to bring the matter to the attention of the court. The court has decided no point in the case adverse to any contention or claim set up by them; so that we have nothing before us really to review as to them; but in fact this sale was made under conveyance made by their grandmother in her lifetime; and they, with their uncle, only became entitled to the equity of redemption of it by descent from her afterwards. They could in any event only have been entitled to share in the surplus after paying the mortgage of Pumphrey and Cottingham executed by their grandmother, with D. A. Jenkins, in her lifetime, and what proportion the Anne Jenkins property bore to that of D. A. Jenkins might be very hard to determine; and certainly no suggestion was at any time made that the court below might consider the feasibility of such an inquiry in this proceeding. Besides, in the face of their having executed the deed to Mrs. Hoover, in apparent execution of the agreement signed by counsel on their behalf, and of their repudiation of which no hint has ever been given the court below, we cannot see the slightest ground for their appeal.

In the course of what we have said we have sufficiently indicated our opinion as to any exception to evidence which it was necessary to consider; and we need say nothing specially on that subject.

The result we reach in this opinion is that *in each and every of the appeals in this record the decrees and orders of the circuit court should be affirmed.* Rappanier should pay the costs of his appeal against Bannon, including the costs of the record first sent to this court; Pumphrey should pay the costs of his appeal, including the costs of the second record, which has been consolidated with the first. Rappanier must pay his own costs of his second appeal, exclusive of record; and John and Mordecai Jenkins should pay the costs of their appeals, exclusive of the record.

Affirmed.

William J. ADAMS, *Appt*
v.
Frank W. BEALL, an Infant, by His Next Friend, William Colton.

1. Where **money** is **paid by** a **minor in consideration of being admitted as** a **partner** in the business of an adult, and he does become and remain a partner for a given time, he **cannot** on voluntarily withdrawing from the partnership, **recover back** the money thus paid, unless he was induced to enter into the partnership by the fraudulent representations of the adult.
2. *It seems* that where the **contract** entered into **by a minor** is of a personal nature or relates to personal property, it may be **avoided** by him **either before or after** his **majority.**

(Decided March 16, 1887.)

APPEAL from a judgment of the Baltimore City Court, in favor of plaintiff in an action to recover back money paid by an infant. *Reversed.*

Argued before Alvey, *Ch. J.*, Miller, Irving, Bryan, Stone and Robinson, *J. J.*

The facts appear from the opinion.

At the trial the court, at the request of plaintiff, instructed the jury: 1, that if the money was paid in pursuance of trade the plaintiff was entitled to recover; and 2, that if the money was paid not for necessaries, but in pursuance of trade, and as a consideration of an agreement of partnership, and that the payment was not for the benefit of plaintiff, and the plaintiff had avoided the agreement of partnership, then he was entitled to recover.

Messrs. **Albert Ritchie** and **Marshall & Hall,** for appellant:

An infant may trade; his payments made in pursuance of trade are not absolutely void; an agreement of partnership by an infant is not void, it is only voidable; he may stand by it, or, when he becomes of age, disaffirm it.

Bush v. *Linthicum,* 59 Md. 344–349, 356; *Dunton* v. *Brown,* 31 Mich. 182; *Kerr* v. *Bell,* 44 Mo. 120; *Osburn* v. *Farr,* 42 Mich. 134; *Penn* v. *Whitehead,* 17 Gratt. 503; Wald's Pollock, Contracts, § 56.

An infant cannot disaffirm an executed contract of partnership, and recover back the advances which were the consideration to the other party.

Wald's Pollock, Cont. § 60; *Ex parte Taylor,* 8 De G. M. & G. 254; *Bush* v. *Linthicum* and *Dunton* v. *Brown, supra*; *Armitage* v. *Widge,* 36 Mich. 124–130.

If the infant has paid the money, and the contract is thus executed on his part, he cannot disaffirm the contract and recover his advances, after having enjoyed the benefits of the contract. His privilege is not to enable him to perpetrate a fraud; it is "to be used as a shield, and not as a sword."

Brawner v. *Franklin*, 4 Gill, 463, 471; *Monumental Building Asso.* v. *Herman*, 33 Md. 128, 133; *Bush* v. *Linthicum*, 59 Md. 356; 2 Kent, Com. § 240; *Medbury* v. *Watrous**, 7 Hill, 110, 114 and authorities there cited; *Holmes* v. *Blogg*, 8 Taunt. 508; *Bartholomew* v. *Finnemore*, 17 Barb. 430; *Locke* v. *Smith*, 41 N. H. 346–353; *Taft* v. *Pike*, 14 Vt. 405; *Kerr* v. *Bell*, 44 Mo. 120–125; *Roof* v. *Stafford*, 7 Cow. 179–182; *Womack* v. *Womack*, 8 Texas, 397–417; *Farr* v. *Sumner*, 12 Vt. 28, 32.

If he could disaffirm and recover back, he cannot do so until after he becomes of age.

Bush v. *Linthicum*, *Monumental Building Asso.* v. *Herman*, *Roof* v. *Stafford*. *Farr* v. *Sumner* and *Medbury* v. *Watrous*, *supra*; *Levering* v. *Heighe*, 2 Md. Ch. 81–87–88.

His interest is not even subjected to his proportion of expenses, liabilities and losses.

While it is true that no personal liability could be enforced against the infant for the debts of the partnership, nor indeed under any executory contract, unless for necessaries, yet in case of a dissolution, equity would apply the entire assets of the firm to the payment of liabilities, and the infant would be entitled to only such of his proportion of any capital contributed by him as might remain.

Bush v. *Linthicum*, 59 Md. 356.

The infant partner is bound by the partnership accounts as between himself and his partners.

Wald's Pollock, Cont. § 56.

In the event of diminished capital, on dissolution, the infant is compelled to bear his proportion of the loss.

Moley v. *Brine*, 120 Mass. 324.

It is for the court to say whether any contract by an infant is to his prejudice or not, whether it is void or voidable.

Ridgeley v. *Crandall*, 4 Md. 435–441; *Monumental Building Asso.* v. *Herman* and *Levering* v. *Heighe*, *supra*.

The court determines that question by the character and subject matter of the contract, not by what may be the ultimate consequences of the contract.

Mr. **William Colton**, for appellee.

Robinson, *J.*, delivered the opinion of the court:

The appellee while a minor paid to the appellant $2,900, as a consideration for being admitted as a partner in the appellant's business. The partnership continued for more than a year, and finding it unprofitable the appellee, without formally dissolving the partnership, withdrew from the business.

The question in the case is whether the appellee is entitled to recover of the appellant the money thus paid? His right to disaffirm the partnership contract and to avoid all liabilities under it, including the partnership debts, is not denied. Being an infant when the contract was made, this is a privilege to which, for his protection, he is entitled. But when he seeks to recover money paid for a consideration which he has enjoyed, or has had the benefit of, this presents quite another question. The $2,900, was paid to the appellant in consideration of being admitted as a partner in his business. He was admitted as a partner, and continued to be a member of the firm for at least a year. The business was not, it is true, a successful one; but this, in the absence of fraudulent representations on the part of the appellant, cannot affect the question. We are dealing with a contract between an infant and an adult, executed on both sides, and upon the faith of which money was paid by the infant for a consideration which he has enjoyed.

The privilege of infancy, says *Lord* Mansfield, in *Zouch* v. *Parsons*, 3 Burr. 1804, was intended as a shield or protection to the infant, and not to be used as the instrument of fraud and injustice to others; and to hold that an infant has the right not only to withdraw from a partnership at his own pleasure, and to subject the adult partner to the payment of all the partnership debts, but has the right also to recover money paid by him as a consideration for being admitted into the partnership would be, it seems to us, to extend the privilege beyond any just principles upon which it is founded.

So long ago as *Brawner* v. *Franklin*, 4 Gill, 463, it was held that where an infant advances money upon a contract, he cannot disaffirm the contract and recover the money advanced, if he has enjoyed the consideration for which the money was paid.

Holmes v. *Blogg*, 8 Taunt. 508, is to the same effect. There the infant paid a sum of money as his share of the consideration for a lease of premises in which he and his partner carried on the business of shoemaking. They occupied the premises from March until June, when the infant dissolved the partnership, and brought an action to recover back the money he had paid the lessor for his lease. Gibbs, *C. J.*, said: "He may, it is true, avoid the lease; he may escape the burthen of the rent, and avoid the covenants, but that is all he can do. He cannot, by putting an end to the lease, recover back any consideration which he has paid for it; the law does not enable him to do that."

It is a mistake to suppose that the principle on which this case was decided was either overruled or even questioned in *Corpe* v. *Overton*, 10 Bing. 252. In the latter case, the plaintiff while an infant signed an agreement to enter into partnership with the defendant, and to pay him £1,000 for a share in the business; and to execute on the first day of January a partnership deed with the usual covenant. He also paid £100 as a deposit for the fulfillment of his part of the contract. The plaintiff afterwards disaffirmed the partnership contract, and never did in fact become a partner. The suit was brought to recover of the defendant the £100 paid by the infant as a deposit.

Tindal, *C. J.*, said the case was distinguishable from *Holmes* v. *Blogg*; in that case the plaintiff and partner occupied the premises from March until June, and the money was paid for something available, that is, for three months' enjoyment of the premises. In the present case the plaintiff paid to Overton £100 for which he has not received the slightest consideration. The money was paid either with a view to a present or a future partnership. I understand it as having been paid with a view to a future partnership. Now the partnership was not to be entered into till January, 1833, and in the meanwhile the infant has derived no advantage whatever from the contract."

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*See note to this case, Lawyers' edition. [Ed.]

Bosanquet, *J.*, "We are far from impeaching the judgment of the court in *Holmes* v. *Blogg*, as applicable to the facts of that case. * * * Here the infant has derived no benefit whatever from the contract, the consideration of which has wholly failed. * * * The £100 paid here was in the nature of a deposit; money paid on a deposit may generally be recovered back where the contract goes off, and here the contract was defeated before the infant derived any benefit from it."

Alderson and Gaselee, *JJ.*, were of the same opinion.

The plaintiff was allowed to recover the deposit money paid by him while an infant, because the partnership contract was disaffirmed by Corpe before the time agreed upon for it to begin. As was said by Alderson, *J.*, "Before the contract is performed, one of the parties revokes it, and remits the other to the same situation as if the contract had never been made."

The distinction between *Holmes* v. *Blogg*, and *Corpe* v. *Overton* is this: in the former the plaintiff was not allowed to recover the money paid by him while an infant, because it was paid on a consideration which he had in part enjoyed; while in the latter, the plaintiff was allowed to recover as upon an entire failure of consideration.

Passing then from these cases we come to *Ex parte Taylor*, 8 De G. M. & G. 254, which is a case directly in point. There an infant paid a premium on entering into a partnership, and before he came of age disaffirmed the contract, and upon the bankruptcy of the firm attempted to prove for the premium thus paid. *Lord Justice* Knight Bruce said "In my opinion a case of fraud has not been established. That being so, the matter remains one of a contract fairly made or as fairly made as a contract with an infant could be made—a contract upon which the infant acted during his minority and which during the minority has been in part performed on each side. In such a state of things I conceive that if the bankrupts had continued solvent, and an action had been brought against them by the minor, either before or after majority, for the purpose of recovering the money in question, or any part of it, there must have been either a nonsuit or a verdict against him."

Lord Justice Turner said: "It is clear that an infant cannot be absolutely bound by a contract entered into during his minority. He must have a right upon his attaining his majority to elect whether he will adopt the contract or not. It is, however, a different question whether, if an infant pays money on the footing of a contract, he can afterwards recover it back. If an infant buys an article which is not a necessary, he cannot be compelled to pay for it; but if he does pay for it during his minority, he cannot on attaining his majority recover the money back."

We have quoted at length from the preceding cases, because the question at issue is an important one, and comes before us for the first time for decision. And while fully recognizing the privilege which the law accords to minors in regard to contracts made during their minority, yet in a case like the present, where money is paid by a minor in consideration of being admitted as a partner in the business of the appellant, and he does become and remain a partner for a given time, he ought not to be allowed to recover back the money thus paid, unless he was induced to enter into the partnership by the fraudulent representations of the appellant.

Whether an infant can avoid a contract and sue thereon during his minority, or must wait until he arrives at age is a question about which the decisions are conflicting. To hold that he cannot disaffirm a voidable contract until he attains his majority would in many cases work the greatest injustice to an infant; and where the contract is of a personal nature, or relating to personal property, we see no good reason why such a contract may not be avoided either before or after his majority. *Stafford* v. *Root*, 9 Cow. 626; *Shipman* v. *Horton*, 17 Conn. 481; *Willis* v. *Twambly*, 13 Mass. 204.

The court having erred in granting the plaintiff's first and second prayers the judgment must be reversed.

Judgment reversed, and new trial awarded.

PRESBYTERIAN CHURCH of Hagerstown, *Appt.*,
v.
HOOPES ARTIFICIAL STONE, CEMENT & PAINT CO.

1. If one who has contracted to do work for another completes the work according to the contract he is entitled to recover the contract price; but **if the work** was **done imperfectly** or in any manner variant from the contract and **was accepted** by the party for whom done, the **contractor is entitled to recover what** the work was **reasonably worth.**
2. The **party for whom work** was **contracted to be done** is **not,** however, **obliged to accept** anything in place of what was contracted for; and if he does not waive his right, the other party to the contract cannot recover against him without performing the stipulations on his part.
3. **Where work** done **upon another's building in no respect fulfills** the **purpose contracted for,** or affords any comfort or gratification to the owner, **no acceptance** thereof **will be implied** by law from the fact of its being permitted to remain.

(Decided March 15, 1887.)

APPEAL from a judgment of the Circuit Court for Carroll County, in favor of plaintiff in an action to recover for work done, materials furnished, etc. *Reversed.*

Argued before Alvey, *Ch. J.*, Miller, Robinson, Stone and Bryan, *JJ.*

The facts appear from the opinion.

Exhibit No. 1 referred to in defendant's second prayer is as follows:

Office of Hoopes Stone, Cement & Paint Co.
Hollins and Paysons Streets, Baltimore, Md.
Baltimore, June 15, 1882.

Mr. C. F. Manning,

Dear Sir: Yours of the 13th to hand, with inclosed sketch. We will cover the walls with Hoopes Artificial Stone, at 12c per square foot and allow the openings. Our usual price is 12c without deducting the openings. We will warrant it to stand the weather and fire better than all natural sand stones. If you should build with the intention of coating with our stone, you must allow ¾ inch for our material —that is, if you want the sills to project one inch from the face of the wall, you must put them out 1¾ inches from bricks.

We would prefer the walls made as rough as possible. The rougher the brick and no pointing upon the outside suits our work, as we take the mortar out from the face of wall if we can.

By using cheap, hard bricks for face, you would save considerable. I inclose you full size drawing of sectional view of door frame; if there is any alterations you wish to make, mark them and return it; if not, keep it, as we have duplicate. Would be pleased to have your further orders.

Respt.,
Geo. Paist, Secy.

Plaintiff offered the following prayer:

1. If the jury believe that the defendant employed the plaintiff to cover the walls of its parsonage with its artificial stone, and if they find that the work was done as agreed, then the plaintiff is entitled to recover in this case such sum of money as the jury shall find from the evidence the defendant was benefited, if any, by such work, with interest on such sum as they shall find, if any, at their discretion. *Granted.*

Defendant offered the following prayers:

1. The defendant prays the court to instruct the jury that, under the pleadings and all the evidence in the cause, the plaintiff is not entitled to recover, and the verdict of the jury must be for the defendant. *Rejected.*

2. That if the jury shall find from the evidence that the plaintiff, by its officers, caused to be written the letter dated the 15th of June, 1882, marked Exhibit No. 1, offered in evidence in this cause, and sent the same to C. F. Manning, the agent of the defendant, if the jury so find, and that the defendant, through its said agent, received said letter and accepted the terms contained therein, and shall further find that the work mentioned in said letter and in the testimony in this cause has not been performed in accordance with the terms of the contract between the plaintiff and defendant for the doing of said work, *then the plaintiff is not entitled to recover in this cause*, and the verdict of the jury must be for the defendant. *Modified.*

3. That if the jury find from the evidence that the plaintiff and defendant, on or about the 15th day of June, 1882, agreed that the plaintiff should cover the walls of the parsonage, to be built at Hagerstown by the defendant, with a gray stone veneering, at the rate of 12 cents per square foot, and that all the openings in the walls of said parsonage should be deducted; and shall further find that the plaintiff so performed said work of putting on said veneering; that after the same was placed upon said parsonage building, the defendant's officers refused to accept the same; and shall further find that the plaintiff did not put said veneering on said building as it had contracted to do the same; *and shall further find that the secretary of the plaintiff stated to the officers of the defendant that the work had not been performed in compliance with the contract for the same, and that the said secretary did not consider that the plaintiff was entitled to be paid for the same*, then the verdict of the jury must be for the defendant. *Modified.*

4. That if the jury find from the evidence that the plaintiff contracted with the defendant to cover the parsonage, to be built at Hagerstown by defendant, with gray stone veneering; and shall further find that plaintiff furnished defendant with a sample stone of the color which said veneering would be when put upon said parsonage building to be erected; and shall further find that said sample stone has been shown in evidence to the jury; and shall further find that said veneering, when placed upon said parsonage building was not of the color of said sample stone, and was streaked and spotted; if they so find, and shall further find that the defendant has not accepted, but has refused to pay for the same, then the verdict of the jury must be for the defendant. *Rejected.*

The court granted the plaintiff's first prayer and rejected the defendant's first and fourth prayers and modified defendant's second prayer by inserting in place of the words italicized therein the following:

"And that said contract has not been executed and completed by the plaintiff, that under the pleadings in this cause, the plaintiff is not entitled to recover."

The court also modified defendant's third prayer by striking out the words in italics and inserting in place thereof the following: "And that the defendant received no benefit from said work."

Defendant's second and third prayers as modified were granted.

Messrs. **William L. Seabrook** and **Charles B. Roberts**, for appellant:

The appellee ought to have been required to bring its suit on the special contract, and not on the common counts in assumpsit.

Stirling v. *Garritee*, 18 Md. 474–5.

The appellant's fourth prayer was erroneously rejected. The settled rule in Maryland is that where there is a special contract, the plaintiff cannot recover under the common count for work and labor, unless the work under the contract was fully performed by the plaintiff and accepted by the defendant, or the contract was abandoned by mutual consent, or the fulfillment of it prevented by some act of the defendant.

Denmead v. *Coburn*, 15 Md. 29; *Jenkins* v. *Long*, 8 Md. 138.

So long as there is a special agreement, not violated by the defendant, or rescinded or abandoned by consent of the parties after a partial performance by the plaintiff, and he seeks to recover for such partial performance, the recovery must be had exclusively upon the special contract.

Jenkins v. *Long*, 8 Md. 133.

Messrs. **J. A. C. Bond** and **Randolph Barton,** for appellee:

Admitting the special contract, yet if the same was completed and closed, and nothing remained to be done but the payment of the money thereon, it was competent for appellee either to declare specially on the contract or to maintain general assumpsit.

Ridgeley v. *Crandall*, 4 Md. 441; *Jenkins* v. *Long*, 8 Md. 143; *Appleman* v. *Michael*, 43 Md. 282; 2 Greenl. Ev. § 136 and notes; 2 Smith, L. Cas. 14, 15; 1 Poe, Pl. & Pr. p. 56.

Bryan, *J.*, delivered the opinion of the court:

The Hoopes Artificial Stone, Cement & Paint Company made a contract with the Presbyterian Church at Hagerstown by which it agreed to cover the walls of the latter's parsonage with artificial stone. The evidence tended to show that some of the terms of the contract were verbal, and that others were contained in written correspondence between the parties. This suit was brought by the Hoopes Company to recover an amount alleged to be due for the work done on the parsonage. There was evidence that it was agreed that the walls were to be covered with artificial stone of a gray color, which was warranted to endure exposure to the weather and not to peel off; and also that the work was imperfectly done and not in the manner required by the contract; and especially that the stone covering was streaked, speckled, spotted and of a variegated and unsightly appearance. It was the function of the jury to pass upon the weight and value of this testimony; and it is our duty to state the propositions of law applicable to it.

If the plaintiff completed the work according to the terms of the agreement, it was entitled to recover the contract price. If, however, it was done imperfectly or in any manner variant from the stipulations of the contract, and was accepted by the defendant, the plaintiff was entitled to recover what it was reasonably worth. There can be no question on this point since the decision of this court in *Watchman* v. *Crook*, 5 Gill & J. 239.

We take the principle to be that a person entering into a contract has a right to insist on the performance of it in all particulars, according to its meaning and spirit, but that if he chooses to waive any of the terms introduced for his own benefit he has the power to do so. If he contracts for an article of a particular quality or style of workmanship, and he elects to accept in lieu of it one of another kind, he discharges the other party from the obligation of furnishing an article which complies with the specifications of the contract, and he becomes bound by a new implied contract to pay for the article which he has accepted what it is reasonably worth. And so where there is a contract for work of a particular description, and he accepts work of another kind. But he is not obliged to accept anything else in place of that which he has contracted for; and if he does not waive his right the other party to the contract cannot recover against him without performing all the stipulations on his part.

The question then in the present case, supposing that the work has not been done according to the contract, is whether the defendant has accepted it. The law on the subject of accepting work done on land' or property of another has sometimes been declared with great severity against parties doing such work in a manner not conformable to the contracts which they have made. But these harsh judgments go beyond the requirements of justice, and are much modified by the benign and equitable construction of contracts which prevails in this State.

It is true that when work is done on a man's house it is in a measure fastened upon him and he cannot very conveniently relieve himself from it, even if it is not such as he has contracted for and as he desires to have. If it is covered with a roof, for instance, it may be different in its style and workmanship and materials from that which his contract required, and he may have a right to reject it and demand its removal. But if he permits it to remain and enjoys the benefit of it, such as it is, he is certainly appropriating the labor and property of another man and of right ought to make compensation.

There is, however, a peculiar feature in this case; the evidence shows that the contract required the artificial stone covering to be of a gray color, it being the object to have the defendant's parsonage and the church of the same color and appearance. Now if the color of the coating is of the unsightly character described in the evidence, the purpose of the defendant in contracting for it is entirely defeated; and it cannot be considered as appropriating the labor and materials of the other party because something has been placed on its building which it does not wish to have there and which in no respect whatever fulfills any of its purposes or bestows any comfort or gratification on it. On the supposition which we have made no acceptance of the work could be implied in law; and all the evidence goes to show that acceptance was refused in point of fact.

It will be seen that we think that on the facts stated in the plaintiff's first prayer it was entitled to recover the contract price, and that the defendant's fourth prayer ought to have been granted. The defendant's first prayer was properly rejected. It was objectionable on account of its generality; but apart from this objection it was erroneous. An action could be maintained on the common counts by the plaintiff if it had entirely performed its part of the contract and nothing remained to be done to entitle it to the payment of the contract price; and also it might be maintained if the work, although imperfectly performed, had been accepted by the defendant. This prayer would have improperly withdrawn these questions from the jury.

The defendant sustained no injury by the modification of its second and third prayers by the court. They ought not to have been granted in the form in which they were presented. The second prayer makes no reference to the question of acceptance of the work by the defendant, which we have seen would have made it liable to a recovery, even although the work had been done in a manner variant from the contract. The third prayer does not mention in terms the alleged failure to conform to the contract color of the stone covering, which is the vital fact in repelling the inference of acceptance and might probably have misled the jury. The statement attributed to the plaintiff's secretary ought not to have been inserted in the prayer. There is no evidence in the record to show that the plaintiff was bound by his opinions or judgments. Even if the statement might be regarded as surplusage, it was well calculated to mislead the jury.

For error in the rejection of the defendant's fourth prayer, the judgment must be reversed and a new trial ordered.

BALTIMORE & OHIO R. R. CO., *Appt.*,
v.
Robert E. BOYD *et al.*

SAME *v.* SAME.

SAME *v.* SAME.

Robert E. BOYD *et al.*, *Appts.*,
v.
BALTIMORE & OHIO R. R. CO.

1. **In an action of trespass quare clausum fregit** it is **not necessary** in order **to entitle** the plaintiff **to a verdict** that he should give **affirmative proof** that he **has sustained any particular amount of damages.** Every unauthorized entry upon the land of another is a trespass; and whether the owner suffer substantial injury or not, he at least sustains a legal injury, which entitles him to a verdict for some damages, although they may be only nominal.
2. Where **lands** of plaintiff were **used for a railroad track** for some time the proper **measure of damages** is the fair rental value of such lands, for the time they were so used, where there is nothing to show that any special damage had been suffered.
3. It is error to grant **instructions** to the jury which are **not** sufficiently **definite** and are calculated to mislead.
4. **Counsel** can **not** be **permitted to argue** to the jury **against** the **instruction of** the **court,** nor to indulge in argument or comment to induce them to disregard such instructions.
5. **Declarations** made **by counsel** on a former occasion in the course of a trial, while urging the question of the damages before a jury of condemnation of the property in question, are **not admissible to prove malice on the part of defendant,** in order to enhance the damages.

(Decided March 16, 1887.)

CROSS appeals from judgments of the Baltimore City Court, in favor of plaintiffs in actions for trespass on land by a railroad company. *Reversed.*

Argued before Alvey, *Ch. J.*, Miller, Irving, Stone and Bryan, *JJ.*

Three actions of trespass *quare clausum fregit* brought by Robert E. Boyd and others, heirs of Clarissa Boyd, against the Baltimore & Ohio Railroad Company. The first action was brought June 5, 1883, the second November 14, 1883, and the third June 3, 1885.

The declaration in the first suit avers that "The defendant, on various days and times, and frequently, within three years next before the institution of this suit, broke and entered a certain close of the plaintiffs, situated within the City of Baltimore, and ran and drove large cars, drawn by locomotives upon and over the same close against the will of the plaintiffs and to their great damage."

The second declaration avers like acts of the defendant, subsequent to the bringing of the first suit, up to the institution of the second.

The third declaration avers like acts, subsequent to the second suit, up to the date of the third.

On a former appeal in the first action, in which a verdict and judgment in favor of plaintiffs was reversed and a new trial granted (see 63 Md. 325) the facts were stated by the court as follows:

In February, 1851, Mrs. Clarissa Boyd became the owner in fee of a long narrow lot of ground in the City of Baltimore, fronting about eighteen feet on the southwest side of Fort Avenue and running back about 1,200 feet to the water. Mrs. Boyd died in May, 1871, intestate, leaving her husband surviving her, who consequently became entitled to a life estate in this lot. The husband died in July, 1881, and this suit was brought by the four children and heirs at law of Mrs. Boyd.

On the 17th of July, 1869, the Mayor and City Council of Baltimore passed an ordinance providing for the condemnation and opening of certain streets between Fort Avenue and the water, and the line of condemnation crossed this Boyd lot. The ordinance recites that application for its passage was made by the Baltimore & Ohio Railroad; and one of its conditions was that it was to be inoperative, unless and until the said Company shall enter into an agreement with the city to pay all damages that may be awarded to owners of property, over and above the benefits assessed. On the same day another ordinance was passed, by which the city granted permission to the Railroad Company to construct and operate a railroad from its Locust Point line, along the beds of the streets so to be condemned and opened, so as to make a connection by water with the Philadelphia, Wilmington & Baltimore Railroad. Proceedings for condemnation were duly had under the first of the above ordinances; and in June, 1871, the Company duly paid to the city collector the excess of damages, over benefits awarded, amounting to $6,611.98.

In 1872 and 1873 the Company constructed its branch road, with two tracks in the beds of these streets, and in 1877 laid the third track. Since their construction these tracks have been used by the Company as part of its main line, and at least a dozen trains pass over them daily. The plaintiffs' lot lies in an open meadow, without buildings or inclosures; and but for the construction of the railroad across it, it is in the same condition now as at the time of the condemnation. The tracks of the road are laid at the grade of the street, but the street is graded only to the width of the tracks, about thirty-six feet, so that the space occupied by the road, as it passes through this lot, is eighteen feet and one inch by thirty-six feet.

Under the said condemnation proceedings the sum of $110 was assessed as damages for that portion of the plaintiffs' lot taken for the bed of this street and $1 each as benefits to the portions on either side of the street. The balance of $108 damages was included in the amount paid by the Railroad Company to the city, but the city never paid or tendered the same to the owners of the lot; nor was it invested in city stock, as provided by the Act of 1878, chap. 143, until December 14, 1883, after the commencement of the second suit.

Immediately after the filing of the opinion in 63 Md., reversing the judgment and ordering a new trial in the first action the Railroad Company proceeded to condemn the land of the plaintiffs, occupied by its tracks, and damages thereunder were assessed at $350, which was at once paid.

After the decision of the court in the first action the three actions were tried together and separate verdicts were obtained for $1,306.32, $312.62 and $1,081.06, respectively. Motions for new trials were overruled, and appeals were taken by the defendant. The plaintiffs also took an appeal from the judgment of $316.62 in their favor.

Further facts appear from the opinion.

Messrs. **John K. Cowen, W. Irvine Cross** and **Hugh L. Bond, Jr.,** for Baltimore & Ohio R. R. Co.:

This court decided on the former appeal that these were not cases for punitive damages.

63 Md. 336.

Without proof of substantial damage, no more than nominal damages can be recovered. This proposition is necessarily implied in the rule that "Every violation of a right imports some damage."

Wood's Mayne, Damages, §§ 5, 6; *Lewin* v. *Simpson*, 38 Md. 468; *Little Rock etc. R. R. Co.* v. *Dyer*, 35 Ark. 360; *S. C.* 10 Am. & Eng. R. R. Cas. 33; *Rusch* v. *Milwaukee etc. Co.* 54 Wis. 136.

Even though the trespasses proved might be presumed to cause substantial damage to the freehold, yet the *onus* is upon the plaintiff to prove facts from which the jury may estimate the amount of damage; and in the absence of such proof only nominal damages can be given.

Little Rock & Ft. Smith R. R. Co. v. *Dyer*, *supra.*

The refusal of the trial judge to confine the remarks of counsel within their proper bounds was prejudicial to the defendant, and is ground for reversal.

Scripps v. *Reilly*, 35 Mich. 371; 24 Am. Rep. 575; *Union Cent. Life Ins. Co.* v. *Cheever*, 36 Ohio, 201; 38 Am. Rep. 573; *Cleveland Paper Co.* v. *Banks*, 15 Neb. 20; 48 Am. Rep. 334; *Willis* v. *McNeill*, 57 Tex. 465; *Coble* v. *Coble*, 79 N. C. 589; 28 Am. Rep. 338; *Tucker* v. *Henniker*, 41 N. H. 371; *Brown* v. *Swineford*, 44 Wis. 282; 28 Am. Rep. 582.

Mr. **Charles J. Bonaparte,** for Robert E. Boyd *et al.*:

Unless it appears that the defendant has been damnified by the court's action no error, however gross, will justify a reversal.

Conser v. *Snowden*, 54 Md. 176, 186.

On the former appeal the defendant was held by this court to have acted under an honest mistake as to the law (63 Md. 336) in using the plaintiffs' land, independently of the consideration that even in a criminal prosecution, where *mens rea* is always indispensable, ignorance of the law is no excuse to its violator; *Grumbine* v. *State*, 60 Md. 355; and that "The defendant upon which corporate franchises had been conferred * * * could not well claim to be excused for hasty and illegal conduct."

Baltimore and Yorktown Turnpike Co. v. *Boone*, 45 Md. 344.

There is sufficient evidence in this record for the jury to find that no mistake of law was in fact committed, but that the Company took its action knowing it to be illegal.

Oursler v. *Balt. & O. R. R. Co.* 60 Md. 37.

There is no doubt that express malice may be imputed to a corporation.

Carter v. *Howe Machine Co.* 51 Md. 290; *Cooke* v. *Cooke*, 43 Md. 532, 533.

The plaintiffs' rights as land owners had been repeatedly invaded under a pretended claim of adverse title, which turned out to be wholly untenable. This, of itself, was an injury to their rights, rendering them less valuable.

Parker v. *Griswold*, 17 Conn. 288, 303, 304, 307.

Plaintiffs suffered considerable annoyance and anxiety of mind from the defendant's persistency in impugning their title; and, indeed, such sentiments on their part might have been fairly presumed, even had there been no direct proof.

Phila. W. & Balt. R. R. Co. v. *Rice*, 64 Md. 63; 1 Gill, 497; *Chicago etc. R. R. Co.* v. *Flagg*, 43 Ill. 364; *Owings* v. *Ulory*, 3 A. K. Marsh. 454.

Alvey, *Ch. J.*, delivered the opinion of the court:

The record now before us contains four appeals, three by the defendant from three several judgments against it, and one by the plaintiffs from one of those judgments.

There were three several actions of trespass *quare clausum fregit* brought by the plaintiffs below against the defendant, the Baltimore & Ohio Railroad Company; and by agreement, the three actions were tried together, but a separate verdict was rendered in each case, and consequently separate judgments were entered.

The first of these cases was here on a former appeal, and is reported in 63 Md. 325. The facts of that case are substantially the facts of all the present cases, so far as the main question on these appeals is concerned; the only material difference being that the last two cases were brought to cover two successive periods of time. The *locus in quo* in all three of these actions is the same as that described in 63 Md. 330; and the circumstances of the entry upon and user thereof by the defendant are there fully stated. In that case the court having determined that as the defendant's entry upon and user of that portion of the lot of vacant and unimproved ground in the City of Baltimore belonging to the plaintiffs, occupied as a bed for the tracks of its railroad, was unauthorized and therefore a wrong, the plaintiffs were entitled to recover therefor. But in view of the facts then disclosed, this court held that the plaintiffs were not entitled to recover exemplary damages, there being no element of fraud or malice, or evil intent, on the part of the defendant, in entering upon and using the ground as it did.

In the trial of the present cases the main subject of contest was as to the proper measure of damages to be awarded to the plaintiffs. At the request of the plaintiffs, the court granted three prayers as instructions to the jury, as to what damages should be allowed; and at the instance of the defendant two other prayers were granted upon the same subject; but the first prayer offered by the defendant was refused by the court.

The plaintiffs excepted to the instructions given on the request of the defendant, and the latter excepted to the instructions given at the instance of the plaintiffs, and also to the refusal to grant its first prayer.

The rulings upon the prayers are the subjects of the third bill of exceptions taken by the defendant, and of the second bill of exceptions taken by the plaintiffs.

By the first of the instructions for the plaintiffs, the jury were directed that, upon finding the facts enumerated, their verdict in the first case should be for the plaintiffs, "with such damages as would, in the judgment of the jury, amount to a fair compensation for the said unauthorized use of the said tracks." And as applicable to the second and third cases, the jury were directed that in finding for the plaintiffs, their verdict should be for such an amount as would, "in their judgment, fully compensate the plaintiffs for such continued and unauthorized use of the said tracks, between the dates named, against the wishes of the plaintiffs, and under all the circumstances disclosed by the evidence."

By the first of the defendant's prayers, which was refused, the court was asked to instruct the jury that there was no evidence legally sufficient, from which they could find that there was any substantial damage or injury done to the *locus in quo*, by the acts of the defendant, and therefore the verdict should be for nominal damages only.

The court, however, while refusing to require the jury to find their verdict for nominal damages merely, did instruct them, by granting the second prayer of the defendant, that if they found from the evidence that no substantial damage or injury was done to the plaintiffs' lot of ground, by any act or user thereof by the defendant, the verdict should be for nominal damages only. We do not understand that there is any question made as to the propriety of granting the defendant's third prayer by the court.

It clearly appears that since the death of Philip D. Boyd, in 1881, who held a life estate in the premises, the defendant in these cases has been, down to a very recent date, a *tort feasor*, in the use and continual occupancy of the *locus in quo*, as against the heirs at law of Mrs. Clarissa Boyd, deceased, those heirs being plaintiffs in the present actions.

It is true, the original entry into, and the construction and use of railroad tracks over, the *locus in quo*, were all supposed to be authorized by virtue of certain condemnation proceedings had under certain city ordinances for opening of streets, but which proceedings proved to be defective and insufficient to secure to the defendant the right of way over the lot of ground in question. The defendant, therefore, was not a willful wrong doer. This was determined by this court in the case reported in 63 Md. 325.

The lot of ground belonging to plaintiffs was, and still remains, uninclosed, and without any improvement thereon whatever, apart from the railroad tracks placed there by the defendant. The space occupied by the road, in passing through this lot, was very small, being only about eighteen by thirty-six feet. The defendant, since the decision of this case on the former appeal, has procured condemnation of the right of way for its road through the lot, and the inquisition has been confirmed; but the present actions were brought for the repeated trespasses on the lot from the time of the death of Philip D. Boyd to the time of the taking of the recent inquisition by the defendant.

That the entry upon and use of the land although under color of right, and although the ground was uninclosed and vacant, was unlawful and therefore a trespass, admits of no question or dispute; and consequently, for such invasion of their rights the plaintiffs are entitled to recover some damages of the defendant. It is not necessary, in order to entitle the plaintiffs to a verdict, that they should have given affirmative proof that they had sustained any particular amount of damages; for every unauthorized entry upon the land of another is a trespass; and whether the owner suffer substantial injury or not, he at least sustains a legal injury which entitles him to a verdict for some damages, although they may, under some circumstances, be so small as to be merely nominal. *Ashby* v. *White*, 2 L. Raym. 955; *Mellor* v. *Spateman*, 1 Saund. note 2, p. 207, a; *Taylor* v. *Henniker*, 12 Ad. & El. 448; *Dixon* v. *Clow*, 24 Wend. 188.

The present cases, however, we think, are not cases for nominal damages merely; for although there is an entire absence of any such element of wanton or malicious motives, or such reckless disregard of the rights of others, in the commission of the trespass, and the repetition thereof, as would entitle the plaintiffs to claim punitive or exemplary damages, yet the strip of ground belonging to the plaintiffs has been continuously and beneficially occupied by the defendant, as the bed of its railroad tracks, since the death of Philip D. Boyd to the time of bringing the last suit; and for such use of the land a reasonable, but a substantial, compensation ought to be paid.

It is true, there is no evidence whatever of any special damages sustained, or that the plaintiffs were hindered or obstructed in any proposed use of their lot, by reason of the presence and use of the railroad tracks; but, nevertheless, we are of opinion that the plaintiffs are entitled to a reasonable compensation for the use of their land, and we think this is measured by what would be a fair rental value for the ground, occupied as it has been, for the time covered by the actions, and nothing more. In such cases as the present, where there is nothing to show that any special damage has been suffered, the principle seems to be established by many respectable authorities, that the plaintiffs are entitled to recover such compensation as the use of the ground was worth, during the time and for the purpose it was occupied. It has been so held in several cases, and we need only refer to *Mc Williams* v. *Morgan*, 75 Ill. 473; *Chicago* v. *Huenerbein*, 85 Ill. 594; *Ward* v. *Warner*, 8 Mich. 508.

And although the facts are somewhat different, the same principle of compensation was adopted in the cases of *Blesch* v. *Chicago etc. R. Co.* 43 Wis. 183; *Carl* v. *Sheboygan etc. R. Co.* 46 Wis. 625.

Such, then, being the proper rule of damages in these cases, the instructions, given at the request of the plaintiffs, were not sufficiently definite, and were well calculated to mislead the jury. They were certainly susceptible of a construction that would permit the jury to transcend the fair rental value of the piece of ground, occupied by the defendant, as the measure of compensation to be allowed; and that such was the understanding or interpretation of these instructions by the plaintiffs' counsel is made manifest by the arguments and illustrations urged by him while addressing the jury, as reported and set out in the defendant's fourth and fifth bills of exception. We are, therefore, of opinion that there was error in granting these instructions in the terms therein employed, and that there was also error in granting the second prayer of the defendant, but no error in refusing the first, or in granting the third, of the defendant's prayers.

In the view we have stated of the measure of recovery in these cases, the questions of evidence raised by the first and second bills of exception taken by the defendant become quite immaterial; and it is unnecessary to express any opinion in regard to them.

With respect to the fourth and fifth exceptions taken by the defendant, they present a question of practice as to the right and duty of the trial judge to interpose to restrain counsel, who is alleged to be indulging in argument and illustrations before the jury, unwarranted by the instructions of the court, and which will, if unrestrained, likely mislead the jury in the finding of their verdict. This is a matter that must, in the nature of things, rest largely in the discretion of the trial court.

It is, however, proper for us to say that no duty incumbent upon the judge of a trial court is more imperative, or more important to the fair and orderly administration of justice, than that of interposing to restrain everything in the course of the trial that tends to mislead the jury and to divert their minds from the strict line of inquiry with which they are charged.

It is the function and duty of the court, when called upon in the trial of civil cases, by either of the parties, to instruct the jury as to the principles of law applicable to the case on trial; and it is the duty of the jury to observe and conform to such instruction. Counsel can never be permitted to argue to the jury against the instruction of the court, or to indulge in any line of argument or comment that would tend to induce them to disregard the instructions given for their government. This is a matter that is always within the control of the court. *Sowerwein* v. *Jones*, 7 Gill & J. 335; *Bell* v. *State*, 57 Md. 120.

When, however, the instructions given are ambiguous, or susceptible of different interpretations, and the attention of the court is called thereto, no matter at what stage of the trial, if before the jury have acted thereon, it at once becomes the duty of the court to remove the ambiguity, and to make the meaning of the court plain.

Here, as we have shown, the instructions were indefinite, and were, to some extent at least, open to the construction that was being placed thereon by the counsel of the plaintiffs when he was interrupted by the adverse counsel, and the court's attention called to what he was contending for before the jury, as set forth in the fifth exception. The counsel was not restricted in his contention by any affirmative action of the court; and we infer, from such nonaction, that the counsel, in urging the allowance of a large and discretionary amount of damages, was, in the opinion of the court, conforming his contention to the instructions given the jury. We have said that the instructions were erroneously granted; and whether or not they were rightly construed in argument before the jury is a question quite immaterial to be decided for the retrial of the cases.

There were two bills of exception taken by the plaintiffs. The first was taken to the refusal by the court to admit as evidence, to prove malice on the part of the defendant, certain declarations or statements made by counsel on a former occasion, in the course of a trial, and while arguing the question of the damages before a jury of condemnation of the property in question. We know of no principle or authority, and have been referred to none, upon which such declarations of counsel as those here offered could be admitted for the purpose indicated. We, therefore, think the court was clearly right in excluding them.

The second exception taken by the plaintiffs was to the granting by the court of the second and third prayers of the defendant. As to the second prayer, thus excepted to, we have said there was error; but as to the third, there was no error, and therefore no ground for the exception to that instruction.

It follows that the several judgments entered in these cases must be reversed, and a new trial ordered.

Thomas H. GAITHER, *Appt.*,
v.
Margaret E. CLARKE, By Her Next Friend, Joshua T. Clarke.

1. If the plaintiff in an equity case can plainly and with certainty get at his rights and have them determined without trying and **deciding a case as between codefendants,** the court will not enter into such a case. But it will enter into and decide such case, as between codefendants, whenever it is necessary for the fair determination of the plaintiff's case; and the codefendants will be bound by such determination.
2. Where in a **proceeding** by a mortgagee

to have the **mortgaged premises sold,** in order to determine what may be sold and what may be applied to the discharge of plaintiff's mortgage, it becomes necessary, the **court may determine** the question of the validity and the true nature and **effect of a deed and lease** which stand **ahead of plaintiff's mortgage;** and that question may be determined not only as between the plaintiff and one of the defendants, but as between the codefendants; and they will be bound by the determination.

3. It is **not necessary** in such case that the **plaintiff should have offered to redeem** by making tender of the amount supposed to be due to a defendant in respect to an informal mortgage held by him in the shape of a deed and lease, where the amount is unknown to plaintiff; a willingness stated in the bill, to allow all that is actually and fairly due, is all that is required.
4. **Letters from** the **agent of** the **lender to the agent of** the **borrower,** found among the papers of the latter after his decease, bearing upon their envelopes the postmarks and postage stamps showing the dates of their passage through the post office, in connection with letterpress copies in the letter book of the writer, are **admissible as part of** the **res gestæ.**
5. A **deed and lease,** *held*, under the circumstances of this case, to be **merely security for a loan** of money, **at usurious interest;** and only the amount found due at legal interest, deducting payments, allowed priority over plaintiff's mortgage.

(Decided March 15, 1887.)

APPEAL from a decree of the Circuit Court for Prince George's County, in favor of complainant in a bill to have a deed declared a mortgage and to foreclose a subsequent mortgage. *Affirmed.*

Argued before Alvey, *Ch. J.*, Miller, Robinson, Irving, Stone, Bryan and Yellott, *JJ.*

The case is stated in the opinion.

Messrs. **George R. Gaither, Jr.** and **William S. Bryan, Jr.,** for appellant:

The demurrer to the bill should be sustained, because even granting that the averments of the bill state such facts as would tend to prove that the complainant would be injured by the character of the alleged usurious transaction, there is no offer to redeem; and such relief would only be granted upon an offer to redeem. The complainant must offer to do equity.

Trumbo v. *Blizzard,* 6 Gill & J. 18, 24; *Banks* v. *McClellan,* 24 Md. 62; *Montague* v. *Sewell,* 57 Md. 407; Jones, Mortgages, §§ 335, 1095.

The burden of proof that the mortgage is usurious is upon the mortgagor. He is impeaching his own obligation formally executed under seal, and must establish the facts to constitute usury beyond a reasonable doubt.

Jones, Mortgages, § 648; *Wetter* v. *Hardesty,* 16 Md. 11.

The rule of evidence that the defense must be clearly made out is applied both at law and in equity.

Conover v. *Van Mater,* 18 N. J. Eq. 481.

Joshua T. Clarke has recited under seal that his interest in said property was under a lease, and that Thomas H. Gaither owned the ground rent, and that on the faith of these recitals Thomas H. Gaither, by agreement, extended the time of redemption of said lease, and parted with certain rights which he had thereunder. By every principle of estoppel Joshua T. Clarke is prevented from denying the facts which he has thus recited under seal, and on which Mr. Gaither acted.

Bigelow, Estop. p. 355; *Lainson* v. *Tremere,* 1 Ad. & El. 792; *Cutler* v. *Bower,* 11 Q. B. 973.

"Where others are innocently induced to acquire rights in derogation of the secret or undisclosed claims of those who cause such action, the rights so acquired are secure, whether contested at law or in equity."

Bigelow, Estop. p. 547.

Estoppel upon the parties to a deed operates also upon their privies.

Id. p. 357; *Taylor* v. *Needham,* 2 Taunt. 279.

The effect of making a prior incumbrancer a party defendant to a bill to foreclose a subsequent lien becomes, as far as the prior incumbrancer is concerned, a bill to redeem.

Jones, Mortgages, § 1439; *Hudnit* v. *Nash,* 16 N. J. Eq. 550; *Williamson* v. *Probasco,* 8 N. J. Eq. 571; *Smith* v. *Shaffer,* 46 Md. 573.

Messrs. **Joseph K. Roberts** and **William Stanley,** for appellee:

Mrs. Clarke, the mortgagee, being the assignee of the equity of redemption, stands in legal privity with the borrower and can set up the defense of usury.

Jones, Mortgages, § 644; Tyler, Usury, p. 408, 414; *Andrews* v. *Poe,* 30 Md. 485; *Rouskulp* v. *Kershner,* 49 Md. 516; Barroll, Md. Eq. p. 69; 24 Md. p. 81; *Thompson* v. *Van Vechten,* 27 N. Y. 568; *Schroeppel* v. *Corning**, 5 Denio, 236.

Junior mortgagees may set up such defense.

39 Pa. 361; 26 Conn. 241; 4 Kent, Com. 162; 30 Md. 488; 2 Md. Ch. 418.

It has been held that the plea of usury must be accompanied with a tender of the amount admitted due; but the cases where it has been so held have been cases where the party seeking to plead usury was either the mortgagor himself or the owner of the entire equity of redemption, which is not this case.

Bispham, Equity, § 222; 3 Powell, Mortgages, p. 935; *Hill* v. *Reifsnider,* 39 Md. 429; *Powell* v. *Hopkins,* 38 Md. 1; *Walker* v. *Cockey,* 38 Md. 75; *Gwynn* v. *Lee,* 9 Gill, 137; *Baugher* v. *Nelson,* 9 Gill, 299. See especially, *Thomas* v. *Mason,* 8 Gill, 8; *Doub* v. *Barnes,* 1 Md. Ch. 127.

The evidence is conclusive that the transaction between George R. Gaither and Joshua T. Clarke was a loan of money; the intention of the parties was to secure a loan; and no matter what the form, the instrument creates a mortgage.

Tyson v. *Richards,* 3 Harr. & J. 109; *Bank of Westminster* v. *Wythe,* 1 Md. Ch. 537; *Hicks* v. *Hicks,* 5 Gill & J. 75; *Dougherty* v. *McColgan,* 6 Gill & J. 275; *Artz* v. *Grove,* 21 Md. 456, 474;

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*See note and classified citations at end of this case, Lawyers' edition. [Ed.]

Rouskulp v. *Kershner*, 49 Md. 523; *Wetter* v. *Hardesty*, 16 Md. 11; *Montague* v. *Sewell*, 57 Md. 407.

As to the position Mr. Gaither occupies, see *Montague* v. *Sewell*, 57 Md. 407; *Harris* v. *Hooper*, 50 Md. 548.

The $600 deducted by Mr. Gaither was usury, as was all interest over 6 per cent, upon the authority of the following cases:

Waverly M. & P. Land etc. Asso. v. *Buck*, 1 Cent. Rep. 484, 64 Md. 338, 343; *Border State P. B. Asso.* v. *Hayes*, 61 Md. 597; *Home B. Asso.* v. *Thursby*, 58 Md. 284; *Geiger* v. *Eighth German B. Asso.* 58 Md. 569; *Montague* v. *Sewell*, 57 Md. 407; *Border State P. B. Asso.* v. *McCarthy*, 57 Md. 555; *Walter* v. *Foutz*, 52 Md. 148; *Peters B. Asso.* v. *Jaeckseh*, 51 Md. 198; *Citizens Security & Land Co* v. *Uhler*, 48 Md. 455; *Hill* v. *Reifsnider*, 46 Md. 555; *Andrews* v. *Poe*, 30 Md. 485; Tyler, Usury, 451.

The court will treat as a mortgage an absolute deed when given as security for a loan, and decree sale for payment.

Thompson v. *Banks*, 2 Md. Ch. 431.

The court has jurisdiction to take possession of the property for the benefit of those interested.

Thompson v. *Diffenderfer*, 1 Md. Ch. 489.

Where no particular time is specified in a mortgage, it is to be paid in a reasonable time, and the mortgagee may enforce payment.

Farrell v. *Bean*, 10 Md. 217; *Triebert* v. *Burgess*, 11 Md. 450.

Alvey, *Ch. J.*, delivered the opinion of the court:

In this case Mrs. Clarke, as mortgagee, filed the bill against her husband, the mortgagor, and the other defendant, Thomas H. Gaither, charging that prior to the date of the mortgage to her, which bears date the 25th of September, 1877, her husband had made a deed of the mortgaged premises, being the farm upon which he resided, to George R. Gaither, since deceased; and that, upon the date of the deed, to wit: the 15th of November, 1869, and as a part of one and the same transaction, George R. Gaither executed to Joshua T. Clarke, her husband, a lease of the premises for ninety-nine years, with covenant for renewal thereof, at an annual rent of $600, payable quarterly in advance, over and above all deductions for taxes that might be assessed upon the premises; with right reserved to Gaither of re-entry upon the premises, for failure to pay rent or taxes, according to the terms of the lease. The farm contains about 400 acres of land, and the consideration expressed in the deed to Gaither is $5,000.

It is stipulated in the lease that Clarke should have the right of redemption and a reconveyance of the farm, upon payment of the principal sum of $5,000, and all rent due, at any time between the 15th of November, 1872, and the 15th of December, 1872. This sum Clarke failed to pay within the time designated; but after the time for redemption had passed, George R. Gaither, on the 22d of January, 1873, executed an instrument under his hand and seal, whereby he extended the time for "redeeming and relieving the aforesaid land" to the 15th of December, 1876, upon payment, at that date, of the $5,000, and all arrearages of rent, and also agreed to reduce the rent to $500 per annum, to be paid in the manner as provided in the original lease.

Some time after this arrangement, George R. Gaither died; and in the distribution of his estate, under his will, this reversionary estate and ground rent, according to the face of the deed and lease, were turned over to Thomas H. Gaither, one of the defendants; and before the time had arrived for redeeming the ground rent as fixed by the agreement of the 22d of January, 1873, Thomas H. Gaither, on the 13th of November, 1876, agreed with Clarke for a further extension, for a period of two years within which Clarke might redeem the farm, "upon paying the principal sum, and all rent due," etc.; and by the same agreement the rent was further reduced to $300 per annum. It was while this arrangement subsisted between Thomas H. Gaither and Clarke, that the mortgage by the latter to his wife was made for $2,000, the larger portion of which is alleged to be still due and owing.

The plaintiff alleges that the deed and lease, with the rent reserved, were originally intended, and are still kept on foot, as a mere cover and device to evade the law of the State against usury; that the original transaction between George R. Gaither and Clarke was a loan of money at a grossly usurious rate of interest, the rate being 12 per cent per annum, on $5,000, the amount loaned, less the first year's interest deducted. It is charged that the deed and lease were not in fact intended to have operation according to their legal import, but were intended simply as means of security for the money loaned, instead of a regular mortgage; and that there was no real *bona fide* intention of effecting a sale and purchase of the farm, as between the parties.

It is charged that all, or nearly all, of the money loaned by Gaither to Clarke has been paid, with the accrued interest thereon, if all payments made on account thereof be legally and properly applied. The plaintiff insists that the deed, and the rent reserved under the lease, cannot (in view of the facts of the case) be construed as having any greater effect and operation than a mortgage for the money loaned would have; and that, as her mortgage binds the equity of redemption, the effect of the deed and lease on record is to impair her security, and that they constitute a fraud on her rights as mortgagee. She therefore insists that she is entitled to have the true nature of those instruments declared; and if there be any amount still due on account of the loan, that it shall be ascertained under the direction of the court. She prays for a sale of the mortgaged premises, and that the proceeds of sale be applied to the payment of incumbrances according to their legal priorities.

To this bill Gaither demurred, for various causes stated; but the demurrer was overruled, and he then answered. Clarke, the other defendant, also answered, admitting substantially the facts as stated in the bill. Gaither, in his answer, states that he knows nothing in regard to the justness of the plaintiff's claim, but he requires strict proof of the same. He also says that he has no personal knowledge in regard to the circumstances under which the deed and lease were made; and he therefore neither admits nor denies the nature of the transaction as charged, but he requires strict proof in regard thereto. He further states that he received under his father's will the reversion and ground rent, secured by the deed and lease referred to, and that he still holds the same; and he insists that the plaintiff shall be required to show in what manner and to what extent she is interested in having the deed and lease declared to have the effect of the mortgage; and he denies all imputations of fraud, oppression, etc.

Proof was taken and, by agreement, a decree *pro forma* was entered, from which this appeal is taken by Thomas H. Gaither, one of the defendants.

1. It is contended for the appellant that Mrs. Clarke has not alleged and shown such state of facts as will entitle her to a standing in court as against the appellant; that it is neither alleged in her bill nor shown in proof that she is or will be affected by the strict legal operation of the deed and lease, or that the leasehold estate would not be sufficient to satisfy her mortgage; and further, upon the assumption that the deed and lease should be allowed the operation only of a mortgage security, that she has failed to offer to redeem or make tender of the amount due the appellant, without which her bill ought not to be sustained.

But these contentions, although very ingeniously pressed, we think are wholly untenable under the circumstances of this case. The mortgage to Mrs. Clarke does not profess to be a leasehold estate merely; and if it were restricted and made to operate upon a mere leasehold interest of the mortgagor in the land, it would, according to the settled law of this State, become subject to the covenants and conditions of the lease, and would be liable to be entirely defeated by the exercise of the reserved power of re-entry for the nonpayment of rent or taxes. Such a state of things would certainly render her mortgage security very precarious, to say the least of it.

But the plaintiff charges and insists that the deed and lease constitute nothing more than a security for money loaned; and in that light she is entitled to treat them simply as a prior incumbrance to her own mortgage; and as it is necessary to foreclose by sale of the mortgaged premises, justice to herself and to other lien holders requires that the true nature and effect of the deed and lease should be ascertained and declared, and whatever may be due to the appellant shall be paid out of the proceeds of sale. And this, if the plaintiff be correct in her contention as to the objects and purposes of the deed and lease, would seem to be entirely consistent with principle, and promotive of substantial justice.

As a general principle of equity procedure, it is very true that if the plaintiff can plainly and with certainty get at his rights and have them determined without trying and deciding a case as between codefendants, the court will not enter into such case. But it will enter into and decide such case, as between codefendants, whenever it is necessary for the fair determination of the plaintiff's case; and the codefendants will be bound by such determination. *Cottingham* v. *Shrewsbury*, 3 Hare, 627.

This being a proceeding by a mortgagee to have the mortgaged premises sold, in order to determine what may be sold and what may be applied to the discharge of the plaintiff's mortgage, it becomes necessary to determine the question of the validity and the true nature and effect of the deed and lease, which stands ahead of the plaintiff's mortgage; and that question must be determined not only as between the plaintiff and defendant Gaither, but as between the codefendants, Gaither and Clarke, and they will be bound by the determination.

It was said by the court of appeals, in the case of *Thomas* v. *Mason*, 8 Gill, 11, that "It is the constant practice to permit a subsequent mortgagee to question the title and claim of a prior incumbrancer, and to take advantage of the legal defect or taint of the elder incumbrancer. It is the right of every party in equity to question the title or the legality of a claim that precedes his own, and, by a successful impeachment, to render it void, and defeat it."

Nor do we think that it was at all necessary that the plaintiff should have offered to redeem by making tender of the amount supposed to be due to the defendant, Gaither, in respect of what is alleged to be the informal mortgage held by him, in the shape of the deed and rent reserved by the lease. Under the circumstances of the case such tender would have been impracticable, as the amount really due, if any, was wholly unknown to the plaintiff. A willingness to allow all that is actually and fairly due is the equitable requirement in a case like the present; and this the plaintiff has expressly reserved to the appellant in her bill. Nothing more could be required, in order to do justice in the case. *Thomas* v. *Mason*, 8 Gill, 1, 12; *Doub* v. *Barnes*, 1 Md. Ch. 128, 141.

2. We come now to the consideration of the question whether the original transaction between George R. Gaither and Clarke was really a loan of money, and the deed and lease adopted as a device to evade the law against usury, or whether it was a *bona fide* sale and purchase of the farm, and a simultaneous lease thereof to the vendor. And in regard to this question, in view of the facts disclosed, there would seem to be but one conclusion to which any rational mind could come; and that is, that the transaction was simply a loan of money, at a usurious rate of interest, taken in the form of a rent.

It is not shown or pretended that the elder Mr. Gaither had ever seen the farm in question before the money was paid over to Clarke, or that he had ever contemplated the purchase of it. There is no evidence whatever of any negotiation for the purchase of the farm; but all the preliminaries to the making of the deed and lease were such as evidenced the purpose of making a loan of money and of obtaining ample security therefor. The negotiation for the loan was conducted by and through the late C. C. Magruder, Esq., of Upper Marlboro, and John Glenn & Co., real estate brokers, of the City of Baltimore. Mr. Magruder has since died; but Mr. John Glenn is still living, and has been examined as a witness in the case; and the evidence furnished by him is most material.

Mr. Glenn states in his testimony that he remembers negotiating with Mr. C. C. Magruder, attorney for Joshua T. Clarke, for a loan on certain property belonging to Clarke or his wife, or both, and of consummating that loan. The deed and lease being read to Mr. Glenn, he was asked why that form of security was resorted to, instead of a mortgage to secure the money loaned by Gaither to Clarke; and his reply was: "Because the rate of interest was over 6 per cent."

Mr. Glenn was then requested to produce any letters he might have, relating to the subject; and he produced his letterpress book, containing two letterpress copies of letters addressed to Mr. Magruder, the one bearing date the 30th of October, 1869, and the other the 22d of November, 1869, and from which letterpress book transcripts were made by the examiner. And the witness seems to have no doubt that the originals of these letters were duly mailed to Mr. Magruder. Objection, however, was taken to these copies; and afterwards the originals were produced, taken from among the papers of Mr. Magruder, to whom they were directed.

These original letters proven to have been found among the papers of Mr. Magruder, deceased, bear upon their envelopes the postmarks or stamps, and postage stamps, showing the dates of their passage through the post office; and they, in every particular, correspond with the letterpress copies. Thus proven and identified, we think these letters were properly admissible in evidence. 1 Greenl. Ev. §§ 116, 120. See also § 40. They are admissible in evidence as part of the *res gestæ*.

By the first of these letters Mr. Glenn informs Mr. Magruder that Mr. Gaither will take Clarke's property of 500 acres, as security for a note of $6,000, payable two years after date, without interest, to be discounted by Mr. Gaither at 12 per cent per annum; provided Mr. Magruder considered the property worth easily from $18,000 to $20,000, and provided he could recommend the man. This proposition seems to have been based upon the supposition that the farm contained 500 acres, and was worth at least $18,000. But as we may infer, upon being informed that it contained but 400 acres, and was worth less than $18,000, the amount of the proposed loan was reduced to $5,000, at 12 per cent per annum; as that was the loan actually consummated by Mr. Glenn.

The second letter was written after the deed and lease had been executed, and it refers to some apprehension expressed by Mr. Gaither, that his lien on the farm was not the first; and Mr. Magruder is requested to be explicit upon the subject, and to have the deed recorded, and forward it at once. The first year's interest of 12 per cent was deducted from the $5,000, and Clarke received of the loan only $4,400.

There is, certainly, nothing in all this to indicate a purpose on the part of Mr. Gaither to really purchase the farm; and it is difficult to believe that Clarke would have been willing to sell his valuable farm, of 400 acres, for $5,000, and take a lease thereof at an annual rent of 12 per cent of the purchase money. And that an actual *bona fide* sale and purchase of the farm was not what was really and truly intended by the parties is strongly indicated by the letter of the appellant, of February 20, 1880, addressed to Clarke upon the subject of his indebtedness. In that letter, the appellant says to Clarke:

"I did not mean to change our agreement; I only wanted you to see how the acct. stood between us. I will not trouble you, if you so choose, until February, 1881. I think you said you would try, during this year of extension, to pay something on account of the interest, as it matured. I would advise, if you can raise any money, that you pay what you can to keep the interest down. You know the larger claim I have the less chance you will have to get your wife's claim."

It was not rent, but interest, that Clarke was advised to keep down, and the whole tenor of the letter shows that it was to an interest bearing claim that reference was made. Upon the whole, we are entirely of opinion that the original transaction was a loan of money at forbidden rates of interest, and that the deed and lease were adopted as means to evade the law. They were intended as security for the loan, and nothing more. And such being the case, it is wholly immaterial that the transaction was made to assume the form of a sale and lease of the farm,—the general principle being that if the transaction be really a borrowing and lending of money, at unlawful rates of interest, as it doubtless was in this case, no ingenuity can give to it a form that will shield it against impeachment and judicial investigation.

This case falls directly within the principle of the case of *Montague* v. *Sewell*, 57 Md. 407, and must be disposed of accordingly. Upon account stated, whatever may be found to be due the appellant, on account of the loan of $4,400. with interest at 6 per cent per annum, will be allowed priority over the mortgage claim of the plaintiff, Mrs. Clarke.

The decree passed by the court below is correct, and is therefore affirmed.

Decree affirmed and cause remanded.

Lambert GITTINGS *et al.*, *Appts.*,
v.
Emily WORTHINGTON *et al.*

P. Hanson HISS *et al.*, *Appts.*,
v.
Emily WORTHINGTON *et al.*

ST. PAUL'S EVANGELICAL LUTHERAN CHURCH OF BALTIMORE CITY, *Appt.*,
v.
Emily WORTHINGTON *et al.*

1. Innocent **bona fide purchasers** by virtue of a judicial sale of real property, **if obliged to yield** their title and possession **to a superior title, are entitled to** an allowance for the **value of** all beneficial permanent **improvements** of the property.
2. **Where a purchaser of real property at a judicial sale which did not bar** the **title of** some of the **joint owners,** has **sold** and given deeds of **portions of** the **land** to purchasers who have improved them by the erection of valuable buildings, such sales do not increase or diminish the rights of such **joint owners,** who **may** proceed to **have partition** as if they never had been made.

3. If the **shares** of such joint owners not barred by the previous judicial sale, claimed in such **partition** proceedings, are assigned out of the improved portions of the property, an inquiry would have to be instituted to ascertain the **amount** to be **allowed for** such **improvements.**

4. The more eligible **mode of making** the **division** is to take the part claimed by such joint owners from the unimproved portion of the tract, if practicable.

5. When such **joint owners** prosecute their suit of partition as the holders of a common interest, the **portion** to which they are entitled may be **allotted** to them **collectively;** and they **can** then, by petition in the suit, **obtain a redivision among themselves** according to their respective interests, or a sale of the whole of their allotment and a division of the proceeds.

6. A **vendor** selling in good faith is **not responsible for** the goodness of his **title, beyond** the extent of his **covenants** in the deed.

7. Where the conveyances of the portions of such land given by the purchaser contained only **special warranties** which were distinct covenants that he was not to be answerable for any losses which might occur from the assertion of a title superior to his own, and **a permanent title** is subsequently **satisfied** entirely out of the portion of the property which remained in his hands, *held*, (Bryan, *J.*, dissenting), that he **must be indemnified** by the owners of the other portions of the tract by contributions in proportion to the value of their holdings; so that the **entire tract** may be **assessed ratably, to make up** the **value** of the portion allotted to the claimants by such superior title; the basis of estimation being the value of the ground considered irrespectively of the improvements.

(*Additional Opinion.*)

8. *Held*, that the **entire tract** should **contribute** to make up the value of the portion which shall be taken from the unimproved land, and that to make up this contribution the value of the land must be estimated without regard to the improvements, and that every portion of the tract must be charged with a sum proportioned to its value.

9. *Held also*, that the **responsibility of** the **devisees of** the **vendor** is dependent upon and limited by the covenants contained in his conveyances.

10. When **land leased** for a term of years is to be **assessed,** the assessment must be levied on lessee and reversioner in proportion to the value of their holdings.

(Decided March 17, 1887.)

APPEALS from a decree of the Circuit Court of Baltimore City, in favor of complainants in a bill for partition of land. *Reversed.*

Argued before Alvey, *Ch. J.*, Irving, Robinson, Yellott and Bryan, *JJ.*

By his last will, admitted to probate in 1824, Kennedy Long devised among other property a certain tract of land, in fee, situate in Baltimore County (now City), in trust for his six children, Andrew, Thomas, James, Eliza, Mary (subsequently Mrs. Knapp) and Amelia (subsequently Mrs. Worthington); the shares of Andrew, Eliza, Mary and Amelia were for life, with remainders to their respective children.

March 1, 1833, a bill was filed in the Baltimore County Court for the sale of said lands, to which the widow, six children of the testator, and the trustee were made parties. The land was sold under said proceedings, and conveyed to the purchasers who supposed they were acquiring a fee simple title. In 1848 under sundry mesne conveyances from the purchasers the property became vested in Philip Hiss, who, supposing himself to be the sole owner in fee of said tract, subsequently conveyed parts of it, with covenants of special warranty only, to various parties, several of the conveyances being leases for ninety-nine years, renewable forever.

June 1, 1880, certain descendants of Kennedy Long, who claimed that the remainders to his grandchildren did not pass to the purchasers under the sale in 1833, filed a bill in the Circuit Court of Baltimore City against other of his descendants and against Philip Hiss and his grantees, and lessees, for the sale of said tract, alleging that said tract was incapable of an advantageous division specifically among those entitled thereto and cannot be divided without loss or injury to the parties interested, etc.

Shortly after the filing of the bill Philip Hiss died, and his devisees were added as parties. The bill was dismissed by the circuit court; but upon appeal this court (62 Md. 33) determined that nine of the descendants of Mrs. Worthington were entitled to an undivided sixth, and five children of Mrs. Knapp to one sixth of another sixth of said tract; and the cause was remanded, in order that a decree might be passed accordingly.

The case having been remanded, the complainants insisted on a sale of the entire tract, on the ground (as alleged in the bill) that it was not susceptible of partition. Hiss' grantees at the same time contended that the share of the claimants should be allotted to them out of the unimproved land in the possession of Hiss' devisees, if a partition in kind could be made, or, in case a sale were necessary, out of the proceeds of the sale of the land held by such devisees.

The circuit court was of opinion that if the partition in kind could have been fairly made out of the vacant ground, the entire loss must fall on Hiss' devisees; but, as such partition was not practicable, a sale must be ordered and each holder must bear his seven thirty-sixth loss and a decree was passed accordingly.

From this decree Hiss' grantees appealed. Hiss' devisees also appealed, in order to avail themselves of the benefit of a reversal by this court upon the question of a partition in kind.

Further facts appear from the opinion.

Messrs. **Arthur W. Machen** and **Ed. Otis Hinkley,** for Lambert Gittings, *et al.*, appellants:

In equity, there is no necessity that a partition should be so made as to give each party a share in every part of the property. Each party must have his share in value, and that is all which is required.

Brookfield v. *Williams*, 1 H. W. Green, Ch. 341, 345; *Hagar* v. *Wiswall*, 10 Pick. 152; *Buck* v. *Wolcott*, 15 Gray, 502; *Paddock* v. *Shields*, 57 Miss. 340; *Abbott* v. *Berry*, 46 N. H. 369; *Earl of Clarendon* v. *Hornby*, 1 P. Wms. 446, quoted in the note to *Agar* v. *Fairfax*, 2 White & T. L. Cas. Eq. part 1, * 471; *Canning* v. *Canning*, 2 Drew. 436, quoted in same note, p. 471, 472.

Upon the bill in this case, partition is the proper relief if the property admits of it and no injury is thereby done to the claimants; and the proof does not justify a sale.

Earle v. *Turton*, 26 Md. 34; *Thruston* v. *Minke*, 32 Md. 576; *Balt. & O. R. R. Co.* v. *Trimble*, 51 Md. 109.

As between a sale and an actual partition, the court inclines to the latter alternative.

Thruston v. *Minke*, above cited, and other cases referred to in American note to *Agar* v. *Fairfax*, 2 White & T. L. Cas. part 1, p. 916. *Catlin* v. *Catlin*, 60 Md. 577.

It is the duty of the court of equity in making a partition to cause the improvements to be assigned to the respective owners of them.

Freeman, Partition, § 509; *Leigh* v. *Dickeson*, 15 L. R. Q. B. Div. 65; *Crafts* v. *Crafts*, 13 Gray, 360; *Brookfield* v. *Williams*, 1 H. W. Green, Ch. 341; *Hall* v. *Piddock*, 6 C. E. Green, 311. And see 2 White & T. L. Cas. part 1, p. 916.

Subdivisions should generally be remitted to subsequent proceedings in which those interested only would be necessary parties.

Oram v. *Young*, 3 Harr. (N. J.) 54. And see *Gordon* v. *Pearson*, 1 Mass. 323.

A party whose share can be set off without any prejudice to the other owners ought not, against his will, to have his share sold because the other owners hold in shares so small that a sale of the residue becomes necessary.

Haywood v. *Judson*, 4 Barb. 228; *Lucas* v. *Peters*, 45 Ind. 313.

It remains to consider the equities existing between the purchasers of the lots sold by Philip Hiss, and his devisees who have succeeded him in the possession of the unsold residue. Equity requires that in a partition the claimants who have made no improvements shall have their shares allotted to them out of the unimproved part of the land. The result of such a partition, by confirming the title of Philip Hiss to the improved part, is to perfect the title of his grantees acquired through his deeds.

Freeman, Partition, §§ 509, 465, 207; *Brown* v. *Bailey*, 1 Met. 257; *Varnum* v. *Abbot*, 12 Mass. 474, 476–478; *Nichols* v. *Smith*, 22 Pick. 316; *McKee* v. *Barley*, 11 Gratt. 340; *Cox* v. *McMullin*, 14 Gratt. 82.

The deed of a tenant in common conveying a parcel of the common land by metes and bounds, while void as against his cotenant, is valid and effectual as against the grantor, and all claiming under him.

Robinett v. *Preston*, 2 Rob. (Va.) 277; *De Witt* v. *Harvey*, 4 Gray, 491; *Cunningham* v. *Pattee*, 99 Mass. 251; *Holcomb* v. *Coryell*, 3 Stock. 550; *Primm* v. *Walker*, 38 Mo. 97.

The equity existing in favor of the grantees of Hiss, which will be respected by a court of chancery in a partition, must equally be recognized if a sale is decreed in lieu of partition. The grantor cannot derogate from his own grant.

Reese v. *Reese*, 41 Md. 554; *Janes* v. *Jenkins*, 34 Md. 1.

Hiss could not, nor can his representatives since his death, be permitted to throw upon his grantees a burden which, by an application of the principles of equity as to marshaling, can be made to be borne by the unsold land.

Watson v. *Bane*, 7 Md. 117; Sugden, Vendors, chap. 18, § 2, pl. 29, marg. p. 556.

It is a general rule of equity that where the owner of land which is subject to any kind of lien or incumbrance, conveys part thereof to a purchaser, the burden of the lien must, as between such purchaser and the grantor, be borne by the remaining land of the latter.

2 Story, Eq. § 1233, *a*; *Hartley* v. *O'Flaherty*, Lloyd & Goold, *t.* Plunkett, 254, 261; *Clowes* v. *Dickenson*, 5 Johns. Ch. 235.

As between the vendor and his grantees, this doctrine has never been questioned. Judge Story expressed doubts as to the propriety of applying it as among the grantees themselves, inclining to the view that they might all be treated as standing equitably on the same footing; in which doubt, however, he seems not to have been sustained by the authorities, which, with great uniformity, maintain that, as among several purchasers from the same vendor, in whose hands the entirety was subject to a charge, their respective lands must bear the burden of the original lien in the inverse order of the alienations.

Cooper v. *Bigly*, 13 Mich. 473; *James* v. *Hubbard*, 1 Paige, 233; *Stuyvesant* v. *Hall*, 2 Barb. Ch. 155; *Cowden's Estate*, 1 Pa. 267; *Carpenter* v. *Koons*, 20 Pa. 226; *Kilborn* v. *Robbins*, 8 Allen, 466; *Nellons* v. *Truax*, 6 Ohio St. 97; *Brown* v. *Simons*, 44 N. H. 475; 2 White & T. L. Cas. part 1, pp. 291, 296; *Jenkins* v. *Freyer*, 4 Paige, 52, 53; *Hamilton* v. *Royse*, 2 Sch. & Lef. 316, 328; Coote, Mort. 4th ed. 150.

Doub v. *Barnes*, 4 Gill, 21, which was founded on a case in 1 Leigh, is not inconsistent with this doctrine, except perhaps in the case of judgments.

See *Conrad* v. *Harrison*, 3 Leigh, 532, 540.

For the purposes of this case it is not necessary to determine whether Judge Story's view or the other is preferable. It is enough to rest upon the rule which he and the other authorities agree in accepting, that the vendor's remaining land must, at all events, first bear the burden, to the entire exoneration, if sufficient, of all the parcels which he has sold.

Aldrich v. *Cooper*, 2 White & T. L. Cas. part 1, 4th ed. pp. 291, 293, *et seq.*

The doctrine does not depend upon the presence of a covenant of warranty in the deed, although such a covenant may be of influence in showing the intent in a case otherwise doubtful, but exists independently of warranty.

2 White & T. L. Cas. part 1, pp. 296, 297.

The principle is irrespective of the origin or nature of the incumbrance.

Id. p. 296.

Nor is it limited to mere incumbrances. "It can have no necessary dependence upon the character of the interest or title of the claimants; it rests upon the intrinsic justice and morality of the maxim that a party shall so exercise his own rights as not to do unnecessary injury to those of others.

Agricultural Bank v. *Pallen*, 1 Freeman, Ch. 419, quoted in 2 White & T. L. Cas. part 1, p. 291.

Messrs. **S. T. Wallis** and **M. R. Walter,** for P. Hanson Hiss, *et al.*, appellants:

A vendor, selling in good faith, is not responsible for the goodness of his title, beyond the extent of his covenants in the deed.

Falconer v. *Clark*, 3 Md. Ch. 151; 7 Md. 177; *Smith* v. *Chaney*, 4 Md. Ch. 246; *Harris* v. *Morris*, 4 Md. Ch. 529.

If a purchaser has taken a conveyance, and there be no fraud, he has no remedy, although evicted for want of title, except upon the covenants of his deed.

Middlekauff v. *Barrick*, 4 Gill, 291.

The purchaser's only right to relief from defects or incumbrances, whether at law or in equity, depends, in the absence of fraud, solely upon the covenants for title which he has received.

Rawle, Cov. Title, 566.

It is one of the best settled principles of this branch of the law, that a purchaser who has received no covenants which cover the defect or incumbrance can neither obtain the purchase money, nor recover it back, if already paid. Unless there has been fraud, accident or mistake, he is absolutely without relief against his vendor, either at law or in equity.

Id. 567.

When the deed contains no covenants, the purchaser is wholly without remedy; for the consideration was the mere transfer to him of the estate of the vendor, who was to be in no way responsible for the title; and when the deed is delivered to the purchaser, he has received the entire consideration for which he bargained, entirely irrespective of any future events; and the question of good or bad title is irrelevant. When the covenants are limited to the acts of the vendor, the consideration would seem to be the present transfer of his estate in the same condition as that in which he himself received it, and the future performance by himself and his heirs, when necessary of the undertaking, that the purchaser and those claiming under him shall not suffer from any of his or their acts.

Id. 588.

When a defect has been caused by anyone in the chain of title prior to the vendor, this can form no defense to the purchaser from payment of the purchase money, for the consideration between himself and this vendor is not affected.

Id. 589.

All covenants arising from implication of law are necessarily controlled or annulled by express covenants between the parties. When a party covenants for quiet enjoyment and possession against himself, and those claiming under him, he excludes the idea of a covenant against the world.

Morris v. *Harris*, 9 Gill, 20–27.

Mr. **Sebastian Brown,** for Thomas P. Stran *et al.*, appellants:

A partition between the devisees of Philip Hiss and the Worthington and Knapp heirs, which should give to the latter their full share of the whole, out of the unimproved property, would ratify and confirm the deeds and leases made by Philip Hiss to third parties.

Robinett v. *Preston*, 2 Rob. (Va.) 277; *De Witt* v. *Harvey*, 4 Gray, 491; *Cunningham* v. *Pattee*, 99 Mass. 251; *Holcomb* v. *Coryell*, 3 Stockton, Ch. 550; *Primm* v. *Walker*, 38 Mo. 97; *McKee* v. *Barley*, 11 Gratt. 346; *Teal* v. *Woodworth*, 3 Paige, 470.

A lease or deed by one tenant in common to a stranger, of a portion of a joint estate, although voidable by the cotenants who do not join therein, is valid between the parties and against all persons, unless so avoided.

Brown v. *Bailey*, 1 Met. 257; *Cunningham* v. *Pattee*, 99 Mass. 250; *Compau* v. *Godfrey*, 18 Mich. 36; *Worthington* v. *Staunton*, 16 W. Va. 235; *Butler* v. *Roys*, 25 Mich. 53; *Hartford & S. Ore Co.* v. *Miller*, 41 Conn. 132; *Holcomb* v. *Coryell*, 3 Stockton, Ch. 549–550; Freeman, Cotenancy §§ 199, 207; *Carroll* v. *Norwood*, 1 Harr. & J. 100, 167.

The devisees of Philip Hiss, therefore, cannot be permitted to assail the deeds and leases made by their testator; and consequently it would seem that they must submit to a partition which would give to their cotenants the unsold property in satisfaction of their share.

When a cotenant has made improvements on a portion of the property, the partition will be so made as to allot him the land so improved, if this can be done without injury to the parties. This rule would be adopted if the improvements had been made by Hiss; and certainly his grantees, who paid him full value for the property, must receive at least like protection from the court.

1 Story, Eq. § 655; *Lowvalle* v. *Menard*, 1 Gilm. 45; *Town* v. *Needham*, 3 Paige, 553; *Brookfield* v. *Williams*, 1 Green, Ch. 345; *Hart* v. *Hawkins*, 3 Bibb, 510; *Pope* v. *Whitehead*, 68 N. C. 199; *Drennen* v. *Walker*, 21 Ark. 557; *Seale* v. *Soto*, 35 Cal. 104; 16 W. Va. 241; 18 Mich. 36; 52 Maine, 25; Freeman, Cotenancy, 465, 509.

If, therefore, a partition can be so made of this property that the Worthington and Knapp heirs can receive their shares out of the unsold property, that course should be adopted; and the result would ratify and confirm all the deeds and leases made by Philip Hiss.

A partition and not a sale should always be ordered where the property admits of partition without injury to the parties interested; and the court always inclines to a partition.

Earle v. *Turton*, 26 Md. 34; *Thruston* v. *Minke*, 32 Md. 576; *Balt. & O. R. R. Co.* v. *Trimble*, 51 Md. 109; *Ager* v. *Fairfax*, 2 White & T. L. Cas. part 1, p. 916; *Catlin* v. *Catlin*, 60 Md. 577.

If the property be sold and the proceeds received from the sales of that portion in possession of the devisees of Philip Hiss are sufficient (and they are doubly so) to satisfy the Worthington and Knapp heirs, reason and justice demand that they shall be satisfied out of those proceeds. The principle applied where a partition can be made should be equally applied where the property is indivisible, and cannot be sold. Otherwise, the mere fact that one lot, perhaps worth less than $1,000, being so situated that it, with other property, could not be divided without loss and injury, would determine whether the vendor or the vendee should bear the loss of thousands of dollars.

Warfield v. *Crane*, 4 Abb. App. Dec. 525; 4 Keyes (N. Y.), 448; *Reese* v. *Reese*, 41 Md. 554; *Janes* v. *Jenkins*, 34 Md. 1; *Watson* v. *Bane*, 7 Md. 117; Sugden, Vend. chap. 13, § 2, pl. 29, marg. p. 556; 2 Story, Eq. § 1233, *a*; *Hartley* v. *O'Flaherty*, Lloyd & Goold, *t.* Plunkett, 254-261; *Clowes* v. *Dickenson*, 5 Johns. Ch. 285; *Agricultural Bank* v. *Pallen*, 1 Freem. Ch. 419, quoted in 2 White & T. L. Cas. Part 1, p. 291.

It is submitted that the Worthington and Knapp heirs can receive their portions out of the unimproved ground without loss and injury.

While every cotenant must receive property in proportion to the value of his interest, nevertheless it is impossible in any case to make the division absolutely perfect.

Brookfield v. *Williams*, 1 Green, Ch. 341, 345; *Hagar* v. *Wiswall*, 10 Pick. 152; *Buck* v. *Wolcott*, 15 Gray, 502.

Should there be no difficulty in giving to each of the Knapps a lot in proportion to his interest, and there should be none under the facts of this case, the court should allot to them their share *in solido*, and they could subdivide among themselves, or have their parcels sold under a decree in equity.

Oram v. *Young*, 8 Harr. (N. J.) 54; *Gordon* v. *Pearson*, 1 Mass. 323.

Messrs. **I. Nevett Steele** and **J. I. Alexander,** for appellees.

Bryan, *J.*, delivered the opinion of the court:

This is the second appeal in this case. On the first appeal it was decided by this court that the children of Mrs. Worthington were entitled to one sixth of the real estate sold under the decree of 1833, and that the heirs at law of Moses L. Knapp were entitled to one sixth of one sixth of the same property. *Long* v. *Long*, 62 Md. 33.

The bill filed in the case sought a partition of the land devised by the will of Kennedy Long. The complainants were not in possession, and their title was denied by the defendants. The question of the jurisdiction of a court of equity to decree a partition under such circumstances was not before this court. The parties had waived it by express agreement filed in the court below; and under the statute the appellate court had no power to consider it. It was obliged to assume that the complainants were entitled to a partition, provided they showed a title to an undivided portion of the property. And the decision was that the sale in 1833, under the decree of Baltimore County Court, and the subsequent proceedings under that sale did not bar the title of Moses L. Knapp and the children of Mrs. Worthington.

Philip Hiss acquired the title of the purchasers of this sale, and since the acquisition of his interest, he has disposed of a large portion of the property; in some instances making leases for ninety-nine years, renewable forever; and in others, executing deeds in fee. He has also sold the reversions in fee, and rents of some of the property leased by him. The land sold and leased was laid off into lots and described by metes and bounds in the conveyances to the purchasers and lessees; and these lots have been improved by the erection of valuable buildings. Nearly one half in area of the land purchased at the sale in 1833 was in the possession of Philip Hiss at the time this bill was filed, and is now held by the devisees named in the will. All of this portion is still unimproved.

At the time of the sale under the decree of 1833, this tract was remote from the inhabited portions of the city, and was valued at about $5,000. It was rented for $200 a year, and after the payment of taxes and insurance the net amount was very trifling. The buildings and fencing were going to decay, and to all appearance it was very undesirable property. But the growth of the City of Baltimore in the course of half a century has made an enormous difference in its value. Streets have been opened through it and far beyond it, and it has become suitable for the residences of persons whose means are sufficient to provide the comforts and conveniences of life. The value at the present time, exclusive of the improvements, has been variously estimated by the witnesses examined in this cause at sums ranging from $160,000 to $235,000.

If Hiss had remained in possession of the whole tract, it would have been most just and reasonable that the portion now claimed by the Worthingtons and Knapps should have been allotted to them out of the unimproved portion; provided this division could have been made without injury to their interests. The sales by Hiss could not increase or diminish any rights which those persons had who were co-owners with him of the whole tract. These co-owners, not being bound by those sales, have a right to proceed with their partition as if they had never been made. They have not, however, any greater rights than they would have had if Hiss had kept the property in his own hands.

It was decided when this cause came before this court for the first time that as the present possessors of the property were innocent *bona fide* holders by virtue of a judicial sale, they would be entitled to a proportionate allowance for the value of all beneficial permanent improvements of the property, and also for taxes and insurance which have been paid by them. If the portion now claimed should be assigned out of the improved property, and then an inquiry should be instituted to ascertain the amount to be allowed for improvements and other expenditures proper to be allowed, it is evident that a very large amount of labor and cost would be incurred. The investigation would embrace a great number of details, about which it would be vain to expect certainty or accuracy. The tract originally contained a fraction more than four acres. In the course of fifty years, it has passed from the uses of rural life, and has been adapted to the requirements of a large city, about three fifths of it being occupied by costly residences.

It would be a task of exceeding and almost hopeless difficulty to estimate the beneficial expenditures which have been made on so large a body of land, in its long progress through so great a change. The simple, ready and eligible mode of making the division is to take the part now claimed from the unimproved portion of the tract, provided it is practicable. This portion amounts to nearly one half of the whole tract in area, and about 40 per cent in value. The combined interests of the Worthingtons and Knapps come to seven thirty-sixths of the whole tract. The property fronts on Madison Avenue, McCullon Street, and Druid Hill Avenue. It is well known that the customary and almost invariable mode of valuing ground in the City of Baltimore is by the front foot. Five witnesses have been examined who have made an estimate of the value of all this property by the front foot. While they differ considerably in their valuations of the property they agree pretty nearly as to the proportions of value between the improved and the unimproved. Two of them put the unimproved portion at 41 per cent of the whole, two at about 40 per cent, and one at 42 per cent.

Now the portion to be set off is about 20 per cent of the whole. There can be no difficulty in laying this off. The whole property is valued at so much a front foot, the value of the front foot varying on the different streets; so that this portion may be justly and fairly ascertained even to the fraction of an inch, and the claimants can obtain the uttermost value of their interests. It is difficult to estimate the amount of disaster which would be caused by a sale of all this property. We are to consider that a large number of families would be turned out of their homes, or compelled to buy them. The purchase money would be paid into court and there detained until there was an adjudication establishing the amounts of money to be allowed them for their improvements. The inquiry would be long, tedious and perplexing. At the very best, the result would be reached by adopting the opinions of witnesses on subjects about which they could not have any exact and accurate knowledge. The land and improvements would be sold and witnesses would be called to state their opinions as to what portion of the price should be allowed to the improvements. The value of improvements, and the proportion in which they increase the value of the land on which they are erected, depend on a great number and variety of circumstances. They must be in the nature of things somewhat conjectural. But land is daily bought and sold in the City of Baltimore, and its value by the front foot is as readily and easily ascertained as that of any commodity in the market.

It may be said that each one of these claimants is entitled to his or her portion in severalty. They have prosecuted their suit as the holders of a common interest and have been so regarded by this court. When the bill was dismissed by the circuit court, the children of Mrs. Knapp were not in a condition to appeal, for the reason that they had been made defendants. This court, however, perceiving that the litigation was for the common benefit of all these claimants, gave them the benefit of the appeal, without regarding their position on the record, which would have precluded an appeal on their part. When the portion to which they are entitled collectively has been allotted to them, they can by petition in this cause obtain a redivision among themselves, according to their respective interest, or a sale of the whole of their allotment, and a division of the proceeds, if the redivision of the land cannot be made without loss and injury. This mode of proceeding would secure all their rights, and would relieve the other possessors of this tract from vast and unnecessary expense and inconvenience. It is undoubtedly within the power of a court of equity to adapt its methods to the exigencies of justice, being careful, however, not to grasp at forbidden power, for the purpose of relieving the hardship of a particular case. In the present instance, it is the duty of the court to allot to the claimants their share of this property; and it is simply a question of proceeding, whether this result is accomplished by one division of the whole mass, or by a series of subdivisions. If a testator should direct that one eighth of his personalty should be equally divided among the children of Richard Roe, and Roe should have nine children, an auditor would first ascertain the amount of an eighth part of the personalty, and would then divide this eighth part into nine other parts; one for each of the children. It cannot be possible that such a method of division would not be equally admissible in the case of real estate.

If, in the instance just supposed, the testator had left an eighth of his real estate to the children of Richard Roe, and he had died seised and possessed of eight tracts of land of equal value, everyone would readily recognize the injustice to the other devisees, which would be wrought by a decree that the whole of the realty should be divided into seventy-two parts, and if this could not be done, that it should all be sold. And yet not less injustice would be done in this case by a sale of the whole tract.

The conveyances by Hiss contained only special warranties. A question has been presented and argued, relating to the duty of contribution as between him (or his devisees) and the persons who purchased and leased from him. A majority of the court are of opinion that the responsibility of Hiss to his vendors is measured entirely by the special warranties contained in his conveyances; that these special warranties were distinct covenants that he was not to be answerable for any losses which might occur from the assertion of a title superior to his own; that if he is required to protect these purchasers from the claims of the Worthingtons and Knapps, he is in effect made to give them all the benefit which could be derived from a general warranty; and that therefore he cannot be made to satisfy this paramount claim entirely out of the portion of the property which remained in his hands. As a necessary consequence of these propositions, he must be indemnified by the owners of the other portions of the tract by contributions in proportion to the value of their holdings; so that the entire tract may be assessed ratably to make up the value of the portion allotted to the claimants by a superior title; the basis of estimation being the value of the ground, considered irrespectively of the improvements.

I am constrained to dissent from these conclusions. The question in my view does not involve the obligations arising from general or special warranties made by a vendor of real estate.

When Hiss made conveyances to these persons, he was lawfully entitled to four fifths of the whole tract. These lots were set off to the vendees and lessees by metes and bounds. Of course as against their vendor and lessor, they have a right to hold the whole of the property purchased and leased. In other words, they acquired all the title which he was competent to convey. It is not my opinion that he was obliged to warrant and defend the title to these lots against persons claiming by a superior title; but that he conveyed such title to the property described by metes and bounds as he had, and as he was able to convey. He merely could convey an absolutely indefeasible title, except so far as it was affected by the claims of the Worthingtons and Knapps. We have seen that they will be required to take their fifth interest out of the unimproved property, and to abstain from interfering with the portion which has been sold by Hiss. The right of enforcing such a mode of division is a valuable incident to the property, and essential to its protection by its owners.

When Hiss sold these lots, he parted with every vestige of interest in them; and of necessity this right was conveyed to his vendees along with every other which concerned the ownership of the property. We may say in a few words that the equities of the case protect these improved lots from the claims of the Worthingtons and Knapps; and the owners of them have purchased from Hiss all his rights in them. I think that we can exhibit the true state of this question by a familiar illustration: suppose that Hiss had been in possession of a quantity of flour, say 100 barrels, and had sold to different purchasers sixty barrels, expressly stipulating that he would not warrant the title; and suppose that after these sales had been made, Worthington had successfully maintained a claim to an undivided fifth interest in the whole quantity. Hiss would have been obliged to deliver to him twenty of the barrels remaining in his hands; and certainly he could not have claimed contribution against the purchasers of the sixty barrels.

Everyone must see the essential identity in principle of this supposed case with the one we are now considering. As he made only special warranties in his deeds, if his vendees had been evicted by a paramount title, they would have had no recourse against him. But most assuredly he (or rather his devisees) cannot complain if his vendees maintain the possession purchased from him by means of an equitable right incident to that possession, and given by the law for its protection. If the property had remained in his possession, he would have protected it by this very equity; and his vendees merely seek to exercise a right which they have purchased and paid for. As they have only special warranties they could not claim anything from him, if they had been evicted; but in this instance he seems to be claiming something from them, because they have not been evicted.

It appears to me just, that these parties should stand where the circumstances of the case have placed them. If the vendees can protect their holdings by means of any principle or rule of equity, they ought to be permitted to do so; and the loss arising from the assertion of this claim for partition ought to rest where it may fall. Hiss has sold these lots, and has been paid for them. It is hard that he should lose some of the unimproved lots; but this misfortune does not give him any claim against those who have purchased from him. These purchasers have no claim against him; nor has he any claim against them. Each must be content with such protection as fortune or circumstances may extend to him.

It does not appear to me that Hiss or his devisees have any equitable right to call on his vendees for contribution. I do not think that this question is decided by the accidental circumstance that partition is to be made by an actual division of the property, instead of being effected by the instrumentality of a sale. It depends on the rights of the parties, and not on the forms of proceeding. If the entire tract, with all the improvements, should be sold, the rights and equities of the parties would attach to the proceeds of sale in precisely the same measure as they now affect the land. The sale would merely change the form of the property, and could not increase or diminish any interest in it. The vendees and lessees would be entitled to receive what their lots and improvements sold for; the co-owners with Hiss would receive their due proportion, and Hiss or his devisees would receive the remainder. These considerations may tend to illustrate more fully the flagrant and unnecessary aggravation of the costs which would be incurred by a sale of the whole tract.

I have dispensed with the discussion of some questions which were debated at the bar. The holders of these lots are not tenants in common with the Hiss devisees or with their co-owners. Tenants in common are said by Blackstone to be "such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously." The relative rights of Hiss and his co-owners may be determined by considering them as tenants in common, inasmuch as although the latter were kept out of possession, yet they have been decreed to be entitled to an undivided portion of the entire tract.

But there is no unity of possession between either of these persons and the holders of the several lots. The essential element of a tenancy in common is absent. Each of the holders of the lots claims and possesses in severalty the land lying within his metes and bounds, and has no color of pretense of possession to the portions of the tract lying beyond them. The rights of the Worthingtons and Knapps are not in any degree affected by these latter titles or possession. They exist and are to be asserted without any reference to the conveyances made by Hiss to the holders of these lots. They have no interest or concern in the validity or extent of their pretensions; and most certainly can in no respect be considered as having a unity of possession with them. It would greatly mislead our judgment, if we were to attempt to dispose of this question by considering what would be the affect, if there had been a recovery in ejectment against each one of these owners. There is no such condition of things. This court has decided that the Worthingtons and Knapps are entitled to have partition of the whole tract by proceedings in equity, the question of jurisdiction having been duly waived by the parties to the cause.

Now, we must take this determination just as it is, without any strained analogy to the results of other proceedings which have not taken place. It gives the co-owners with Hiss the right to have their undivided interest allotted to them out of the whole tract; and this right must be pursued and attained, according to the rules of equity practice. I have endeavored to state them in what I have said. As my views however are not shared by the majority of the court they are without avail.

It will be seen that we differ from the learned circuit court. Its decree must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Decree reversed and cause remanded.

Thereafter the following additional opinion of the court was delivered by **Bryan,** *J.:*

The court has been requested by the counsel for the Hiss devisees to state the application of the language of the opinion to the question of contribution on the part of the lessees from Hiss. This request appears to us in all respects reasonable. It is of course much to be desired that there should be no doubt about the opinion of the court on questions involved in its decisions.

The majority of the court hold that the entire tract should contribute to make up the value of the portion which shall be taken from the unimproved land and that to make up this contribution the value of the land must be estimated without regard to the improvements, and that every portion of the tract must be charged with a sum of money porportioned to its value. It is also held that the responsibility of the devisees of Hiss is dependent upon and limited by the covenants contained in his conveyances. The deeds and leases are not in the record, but we supposed from the argument on both sides that the court was desired to express an opinion on the effect of special warranties. We mentioned the cases of vendees and owners, because we wished to show the rights of contribution which existed against those who were entitled to the entire fee simple, and because in such case (as we were informed at the argument) the special warranties stood unaffected by anything else in the deeds. But we think that the principle stated in the opinion covers every imaginable case where an interest has been acquired from Hiss by any species of conveyance.

Where land is leased for a term of years, the whole interest is comprehended in the term and in the reversion. The lessee and the reversioner together own the land; their combined interests make up the ownership. When the land therefore is to be assessed, the assessment must be levied on the lessee and reversioner, in proportion to the value of their interests. Now to apply these remarks to lessees from Hiss, where his devisees hold the reversion; the term and the reversion must bear their proportionate burdens, just as where the reversions are held by third persons. If, however, there are covenants in a lease by which the reversioner is liable to make good to the termor his loss in case of eviction, the whole amount assessed on the land must be paid by the reversioner. In the absence of such covenants, the rule of contribution prevails, which we have stated. A great variety of covenants may be inserted in a lease; those most usually employed have reference to the tenant's obligation to pay rent while he continues in possession of his term. Unless we had the covenants in these leases before us we could not speak more definitely on this subject than we have done. When a tenant is evicted from any portion of the premises, ordinarily there must be a proportionate abatement of the rent. He is deprived entirely of a portion of the land for which he contracted to make his annual payment, to the landlord; he loses his possession and the landlord loses his rent. But in the case where the tenant and the reversioner together make up the loss, it would not be right to abate the rent. Instead of losing his rent, the reversioner loses the amount which he is obliged to contribute; and the tenant is relieved of a portion of the loss, instead of being allowed an abatement of the rent.

It is competent for the circuit court to cause the partition to be made by commissioners and to direct them to ascertain the sums to be assessed on the different portions of the tract. When these assessments have been ratified by the court, it can compel payment by sale of the property assessed.

I am directed by the majority of the court to make the foregoing addition to the opinion heretofore filed. I do not, however, wish it to be understood that my own personal views have undergone any change.

David M. NEWBOLD, *Appt.*,

v.

Gustav A. SCHLENS *et al.*, Trustees.

1. Under the Act of 1868, chap. 273, it is irregular for the guardian of an infant to file a **bill** in his own name as guardian **for the sale of** the **interest of** his **ward in real estate;** the bill should be filed in the name of the infant by his next friend; but such irregularity does not deprive the court of jurisdiction when the infant is a party defendant, and answers by guardian appointed by the court.
2. The **court having acquired jurisdiction of** the proper **parties**, its **decree is binding** upon all the parties interested, **notwithstanding** such **irregularity**, until it be reversed or annulled upon the review in regular proceedings for that purpose. It is not open for review by this court on an appeal from the order overruling exceptions to the sale taken by the purchaser.
3. On appeal from such order it is immaterial whether there is **evidence** in the case upon which the court below could have reasonably concluded that it would be to the **advantage of all parties** concerned that the **property** should **be sold.**
4. Even if the **decree** could be reversed for errors or irregularities in respect to the evidence or otherwise, yet, if the court had acquired jurisdiction to pass the decree, a **purchaser** in good faith under it while it was subsisting and binding the parties thereto, will **not** be **affected by** such **reversal.**

(Decided March 15, 1887.)

APPEAL from a decree of the Circuit Court for Baltimore County, overruling a purchaser's exceptions and confirming a sale of certain real estate under Act of 1868, chap. 273. *Affirmed.*

Argued before Alvey, *Ch. J.*, Miller, Robinson, Irving, Stone, Bryan and Yellott, *JJ.*

The case is stated in the opinion.

Messrs. **John P. Poe** and **John J. Dobler,** for appellant.

Mr. **F. G. Slingluff,** for appellees.

Alvey, *Ch. J.*, delivered the opinion of the court:

The bill in this case was filed by Gustav A. Schlens, in his own name, but as guardian of Christian Wilkens, a minor, against the said Christian Wilkens, and others to obtain a decree for sale or lease of certain real estate, devised by the will of the late William Wilkens, deceased, and in which Christian Wilkens, the minor, is interested as devisee.

The bill was filed to obtain a decree under the provisions of the Act of the General Assembly of 1868, chap. 273. This statute provides that "In all cases when one or more persons is or are entitled to an estate for life or years, or to an estate tail, fee simple, conditional, base or qualified fee, or any other particular, limited or conditional estate in lands, and any person or persons is or are entitled to a remainder or remainders, vested or contingent, on an executory devise or devises, or any other interest, vested or contingent in the same land, on application of any of the parties in interest, a court of equity may, if all the parties in being are parties to the proceeding, decree a sale or lease thereof, if it shall appear to be advantageous to the parties concerned, and shall direct the investment of the proceeds of sale or the limitations of the leasehold interest, as the case may be, so as to inure in like manner as by the original grant to the use of the same parties who would be entitled to the land sold or leased; and all such decrees, if all the persons or parties who would be entitled if the contingency had happened at the date of the decree, shall bind all persons whether in being or not, who claim or may claim any interest in said land under any of the parties to said decree, or under any person from whom any of the parties to such decree claim, or from or under or by the original deed or will by which such particular, limited or conditional estates, with remainders or executory devises, were created."

The bill was not filed as it should have been, by and in the name of the infant devisee, as complainant, by his next friend; but, as we have stated, it was filed by the guardian in his own name, in his character of guardian; and his infant ward and all other parties supposed to be interested in the property to be affected by the decree were made defendants. After notice to nonresident defendants by publication, a guardian *ad litem* was appointed to answer for the infant defendants, and answers for them were filed by such guardian. Proof was then taken; and on the 10th of April, 1885, a decree was passed, authorizing the sale or lease of the property, as the trustees appointed by the court might find to be most advantageous to the parties concerned.

It was under this decree that the sale to the appellant was made by the trustees, and which was reported to the court on the 30th of December, 1886. The sale thus reported was excepted to by the appellant, upon two grounds: 1, that the bill was not filed by a party in interest, as contemplated by the Act of 1868, chap. 273; that the bill should have been filed by Christian Wilkens, the infant, by his next friend, and not by the guardian of such infant, against the infant and others holding vested or contingent estates in the land; and therefore the court was without power or jurisdiction to pass the decree upon such application; 2, that it was not made to appear by evidence in the cause that it would be advantageous to the parties concerned that the property mentioned in the proceedings should be sold or leased, and therefore the court had no power to decree as it did.

The exceptions were overruled, and the sale finally ratified; and it is from this order of the court and not the decree of the 10th of April, 1885, that the present appeal is taken.

1. It is very clear that the proceeding contemplated by the Act of 1868, chap. 273, is quite different and distinct from that contemplated by sections 36, 37 and 39 of article 16 of the Code, as those sections have been modified by the amendatory and curative Act of 1868, chap. 249. Those sections of the Code contemplate and direct a proceeding in behalf of infants alone, and where the interests of the infants are the only objects sought to be subserved by sale or lease of the property. Alex. Ch. Pr. 215.

But not so by the proceeding authorized by the Act of 1868, chap. 273. By that statute it is provided that on application of any of the parties in interest, whether infant or adult, a court of equity may, if all the parties in being are made parties to the proceeding, decree a sale or lease of the premises, if it shall appear to be advantageous to the parties concerned. The guardian of an infant party concerned, however, is clearly not a party in interest within the meaning of the Act. He has no right or estate in the property, and had no power to make conversion of the realty into personalty. Therefore, unless he be authorized by express terms of the statute to take proceedings in his own name in his representative capacity, for the sale or lease of the realty belonging to his ward, he can only proceed as next friend of the infant, the latter being the real party plaintiff on the record. As we have seen, the Statute of 1868, chap. 273, does not so provide; and therefore the bill in this case should have been filed in the name of the infant, Christian Wilkens, by Gustav A. Schlens as his next friend, and not in the name of Schlens as the guardian of the infant. *Boyd* v. *Boyd*, 6 Gill & J. 25, 30; *Downes* v. *Friel*, 57 Md. 536; *Bradley* v. *Amidon*, 10 Paige, 235; Story, Eq. Pl. §§ 57, 58.

But although such be the case, it does not follow, because of this irregularity in the proceedings, that the court was without jurisdiction to pass the decree of the 10th of April, 1885. The bill was in fact filed for and on behalf of Christian Wilkens, the infant, and the bill expressly charges that it would be to the benefit and advantage not only of Christian Wilkens, the infant, but of all the other parties concerned; that the property should be sold or leased; and to this bill, Christian Wilkens, the infant, together with all the other parties concerned, then in being, was made a party defendant.

Christian Wilkens, the infant, answered the bill by guardian *ad litem*, duly appointed by the court—and we must assume that it was made to appear to the satisfaction of the court that it would be advantageous to all parties concerned that the property should be sold or leased, or otherwise the decree would not have been made. The court, therefore, had jurisdiction of the parties concerned, and of the subject matter of suit; and having acquired jurisdiction, the decree of the court is binding upon all the parties interested, notwithstanding the irregularity of the proceeding, until such decree be reversed or annulled, upon the review in regular proceeding for that purpose. *Downes* v. *Friel*, 57 Md. 531, 536.

But on this appeal, the appeal having been taken from the order overruling the exceptions to the sale, and ratifying the sale as reported, the original decree, authorizing the sale or lease of the property, is not open for review by this court. *Porter* v. *Askew*, 11 Gill & J. 347, 350; *Vickers* v. *Tracey*, 22 Md. 199.

2. The second objection taken to the ratification of the sale is that there was no sufficient evidence produced to establish the fact that it would be advantageous to all parties concerned that the property should be sold or leased, and therefore that there was error in passing the decree, which may subject it to review and reversal, on a bill of review that may, some time in the future, be filed by some of the infant defendants, when they attain age: and the case of *Earle* v. *Turton*, 26 Md. 23, is cited. But the case referred to is quite different from the present, and is not an authority for the position sought to be maintained by the appellant here.

There is evidence in the case from which the court below could have reasonably concluded that it would be to the advantage of all parties concerned that the property should be sold or leased. But whether there be such evidence or not is quite immaterial on this appeal; for the principle is now too firmly settled to be questioned, that even if the decree could be reversed for errors or irregularities, whether in respect to the evidence or otherwise, provided the court had acquired jurisdiction to pass the decree, a purchaser in good faith under the decree, while it was subsisting and binding upon the parties thereto, will not be affected by such reversal. The established principle is that a purchaser under a judgment or decree of a court of competent jurisdiction has a right to presume that the court has taken all the necessary steps to investigate the rights of the parties, and that on such investigation the decree or judgment, under which he purchased, was properly passed. He is bound, however, at his peril, to see that all proper parties to be bound were before the court, and that he does not take a title, supposed to be covered by the decree, that may be impeached *aliunde*.

In the leading case of *Bennett* v. *Hamill*, 2 Sch. & Lef. 566, where the whole doctrine is fully examined by *Lord Chancellor* Redesdale, the bill was filed to impeach and vacate a decree for the sale of an infant's real estate, and to vacate the sale thereunder, upon the ground of collusion in filing the bill, and obtaining the decree, and of certain errors and irregularities in the proceedings, which were alleged to be prejudicial to the rights of the infant. But the chancellor, while admitting the existence of the errors and irregularities in the proceedings as charged, held that the purchaser under the decree, was not to be affected by such errors and irregularities. In the course of his opinion he said:

"But as to Hart's representatives, and Hamill, the question is whether they are persons who can be affected, supposing the circumstances to be clearly true as stated, namely: that there was error in the judgment of the court in not giving a day to show cause and error also in directing a sale under the circumstances. Now on that subject I must confess, after considering this a good deal, I think it would be too much to say that a purchaser under a decree of that description, can be bound to look into all these circumstances. If he is, he must go through all the proceedings from the beginning to the end, and have the opinion of the court that the decree is right in all its parts, and that it would be impossible to alter it in any respect. The cases warrant no such opinion. On the contrary, as far as I can find, the general impression they give is that a purchaser has a right to presume that the court has taken the steps necessary to investigate the rights of the parties; and that it has on that investigation properly decreed a sale. Then he is to see that this is a decree binding the parties claiming the estate; that is, to see that all proper parties to be bound are before the court; and he has further to see that, taking the conveyance he takes a title that cannot be impeached *aliunde*. He has no right to call upon the court to protect him from a title not in issue in the cause, and no way affected by the decree; but if he gets a proper conveyance of the estate, so that no person whom the decree affects can invalidate his title, although the decree may be erroneous, and therefore to be reversed, I think the title of the purchaser ought not to be invalidated. If we go beyond this, we shall introduce doubts on sales under the authority of the court, which would be highly mischievous."

This opinion of *Lord Chancellor* Redesdale has been fully adopted by this court on more than one occasion; *Elliott* v. *Knott*, 14 Md. 121, 134; *Gregory* v. *Lenning*, 54 Md, 52; and the principle of that decision has been asserted by other courts of the highest authority. *Lloyd* v. *Johnes*, 9 Ves. 37, 65; *Whiting* v. *Bank of the U. S.* 13 Pet. 6 [38 U. S. bk. 10, L. ed. 33]; *Jackson* v. *Robins*, 16 Johns. 582.

Indeed, any rule furnishing less security to purchasers under decrees and judgments than that laid down in *Bennett* v. *Hamill*, *supra*, in view of the great number of titles held by the people of this State dependent upon judicial proceedings, would certainly lead to the gravest and most mischievous consequences.

Seeing, then, that the title to be acquired by the appellant under the decree could not be impeached or questioned because of any supposed errors or irregularities in the proceeding, for which a bill of review might lie, and if such bill were filed, possibly the decree might be reversed (a proceeding that cannot now be anticipated), there is no sufficient ground shown for setting aside the sale to the appellant. The order appealed from must therefore be affirmed.

Order affirmed and cause remanded.

Stone, *J.*, concurring:

I agree with the opinion of the court in all respects, except that I think the bill is sufficient, and should not be reversed on bill of review, and that the bill might well have been filed, either in the name of the infant by his guardian or by the guardian of the infant. I can see no substantial difference.

Margaret A. McKAIG *et al.*, *Appts.*,
v.
Henry JAMES *et al.*

1. If the real and personal estate combined are sufficient to pay the **debts of** the **deceased,** the creditors have no reason to ask that a **receiver** be appointed **to apply** the **rents** and profits **of** the **real estate** to their payment; if, however, a strong probability of this insufficiency be shown, a court of equity should interfere and appoint a receiver.
2. When the hearing is on petition and answer, **all statements in** the **answer** must be **regarded as true** if they are susceptible of proof by legitimate evidence.

(Decided March 15, 1887.)

APPEAL from a decree of the Circuit Court for Allegany County, modifying a decree for the sale of realty of deceased for the payment of debts, by appointing a receiver to take charge of such realty and collect rents and profits for the benefit of creditors. *Reversed in part.*

Argued before Alvey, *Ch. J.*, Miller, Robinson, Irving, Stone, Yellott and Bryan, *JJ.*

The case is stated in the opinion.

Mr. **James A. McHenry,** for appellants.

Messrs. **Josiah H. Gordon** and **Robert H. Gordon,** for appellees.

Bryan, *J.*, delivered the opinion of the court:

A decree was passed by the Circuit Court for Allegany County, sitting in equity, for the sale of the real estate of Thomas J. McKaig, deceased, on the ground that his personalty was insufficient for the payment of his debts. Afterwards a petition was filed by certain of his creditors praying that a receiver might be appointed to take charge of the real estate of deceased, and collect the rents and profits for the benefit of the creditors.

If the real and personal estate combined were sufficient to pay the debts of the deceased, the creditors would have no reason to apply the rents and profits to their payment. They would be fully paid without a resort to them. If, however, a strong probability of this insufficiency should be shown, a court of equity ought to interfere and appoint a receiver. The creditors ought to be relieved from the hazard of losing their debts, so far as the rents might contribute to secure them. *Warfield* v. *Owens,* 4 Gill, 364.

In this case no reasonable ground is shown for inferring that the real and personal estate combined will not be fully adequate to pay the decedent's debts. The application for the appointment of a receiver was heard on petition and answer. In the petition it is not averred that the proceeds of the sale of the real estate will not be adequate to the payment of all the debts, when taken in conjunction with the personalty. In the answer, however, it is distinctly stated that the real estate is abundantly sufficient to pay all the debts of the deceased. When the hearing is on petition and answer, all statements in the answer must be regarded as true, if they are susceptible of proof by legitimate evidence. *Crowe* v. *Wilson,* 3 Cent. Rep. 881, 65 Md. 479; *Eversole* v. *Maull,* 50 Md. 95.

The court modified the decree originally passed, and in the modified decree appointed receivers of the real estate, with power to rent it. That portion of the decree which appointed receivers must be reversed.

Decree reversed in part, with costs to the appellants in this court, and cause remanded.

NEW JERSEY.

COURT OF CHANCERY.

Henrietta T. REEVES *et al.*
v.
Henry M. T. BEEKMAN, Exr. of Fanny Traphagen, Deceased.

1. Where a **will gave** to testator's **daughter $4,000** and **one fourth of** the **residue** of his estate **absolutely,** but the **codicil** thereto **provided** that his **executor should pay** to **her** the whole of the interest, and as much of the principal thereof **as she might need** from time to time, and whatever might remain at her death should go to her issue (and if she should have no issue then to the testator's grandchildren living at her death), *held*, that the **amount** she was to receive **depended on her necessities, not on** the **will of** the **executor.**
2. The daughter having been appointed executrix of the will and the entire money having been paid to her by her coexecutor, and she having died without issue, and her executor having been called to account for these moneys by the testator's grandchildren, *held*, that the **burden of proof** is on her executor **to show** that the principal **sums** had been **paid on** the **conditions named in** the **codicil**, that is, according to her necessities; and in the absence of such proof, he must account for the principal.
3. The **absolute power of disposition** of the entire fund in her hands as executrix did **not give** her the absolute **title** to it, nor, because the testator appointed her executrix was the gift of the entire fund absolute; but she held it in trust for herself and the said grandchildren.
4. **If** she **was in need** of any part of such funds, she **might have used** them **at her own peril;** but if in doubt as to the extent of the use, she could have **called on** the **court for directions,** and the extent of her necessities could have been ascertained through a master.
5. A **trustee** can **not** be **protected from accounting,** because of the lapse of time or because he has kept no accounts or has seen fit to appropriate and claim all the trust estate as his own.

(Decided April 15, 1887.)

BILL in equity to recover certain legacies. *Decree for complainants.*

The case is stated in the opinion.

Mr. **Foster M. Voorhees,** for complainants.

Mr. **John N. Voorhees** with *Messrs.* **Collins & Corbin,** for defendant:

I. Where property is devised in trust or the income or interest of a fund is given for life subject to the devisee's disposal of the fund during life, remainder, etc., to another, the devisee takes a fee, and the remainder over is void as repugnant.

Dutch Church v. *Smock*, Sax. Ch. 148; *Downey* v. *Borden*, 7 Vroom, 460; *Courter* v. *Howell*, 6 Stew. Eq. 80; *Bland* v. *Bland*, 2 Cox, 349; *Pushman* v. *Filliter*, 3 Ves. 7; *Wilson* v. *Major*, 11 Ves. 205; *Pope* v. *Pope*, 10 Sim. 1; *Sprange* v. *Barnard*, 2 Bro. Ch. 587; *Henderson* v. *Cross*, 29 Beav. 216; *Simmons* v. *Simmons*, 8 Sim. 22; 3 Jarm. Wills, 339; *Barford* v. *Street*, 16 Ves. 135; *Annin* v. *Vandoren*, 1 McCart. 143.

In *Condict* v. *King*, 2 Beas. 375, the chancellor says: "The expression in a will 'dying without lawful issue,' under a well settled rule of law imported an indefinite failure of issue. Personal property could not be limited over, on so remote a contingency; and consequently under such a gift of a personal chattel the legatee took the absolute property."

The limitation over of a chattel personal is void where the property is vested and not the use only.

Annin v. *Vandoren*, 1 McCart. 143, and cases there cited.

Those taking under the codicil take only what remains.

In this case the absolute control of the legacy is given by the will. In the codicil, "My executors or the survivor to pay to my daughter Fanny the whole of the interest and so much of the principal as she may need and her circumstances may require from time to time, and whatever may remain at the time of her death to go to her issue equally; and should she have no issue then," etc.

See 2 Roper, Legacies, 1432.

II. There is no limitation over as to any of the fund. Limitations over will not be implied. Express language is necessary.

1 Jarm. Wills, 349; 4 Kent, Com. 531.

The language of the codicil limits the meaning of the testator. "It is my will that so far as relates to the legacy," etc. The bequest is: "I give to my daughter Fanny $4,000, to be paid to her in one year after my decease." He had given other legacies and he adds: "After paying the above legacies, I give, etc., one fourth (to persons named) of the residuum." Again; in speaking of what complainants claim he says, "What may remain of the said Fanny's legacy."

Just construction requires the same word to be used in the same sense, in the same instrument; and so the rule is expressly declared as to a will.

Goodright v. *Dunham*, 1 Doug. K. B. 268.

In numerous cases in New Jersey it has been held that the words "dying without issue," "have no issue," and "dying without lawful issue," when applied to real estate have been uniformly construed to mean, not a definite failure of issue (which is a failure of issue at the death of the person whose issue if living would take), but an indefinite failure of issue which is "a failure by the deaths of all the descendants of such person, to the remotest generation."

Den, Wardell, v. *Allaire*, Spencer, 6; *Den, Howell*, v. *Howell*, Spencer, 411, 415; 2 Beas. 101, 375; *Morehouse* v. *Cotheal*, 1 Zab. 480; 2 Zab. 430; *Kent* v. *Armstrong*, 2 Halst. Ch. 640.

In *Morehouse* v. *Cotheal*, 2 Zab. 430, the devise was as follows: "A testator gave to S. A. and her heirs forever all the residue of his real and personal estate, but if S. A. should depart this life without leaving lawful issue then to A. R. and to E. W. H. and their heirs as tenants in common." Held: this limitation over is upon an indefinite failure of issue and fails as an executory devise.

On page 439 of 2 Zabriskie reference is made to *Osborne* v. *Shrieve*, 3 Mason, 391. The term used is "die leaving no male heir."

In *Nightingale* v. *Burrell*, 15 Pick. 104, it was "die and leave no children."

In *Ide* v. *Ide*, 5 Mass. 500, it was "die without issue," or "without leaving issue;" and the same in *Hawley* v. *Northampton*, 8 Mass. 3, and in *Den, Pinkerton*, v. *Laquear*, 1 South. 301, it was "should die and leave no issue;" and in all these cases it was held to refer to an indefinite failure of issue.

In *Den, Pinkerton*, v. *Laquear*, the court, *C. J.* Kirkpatrick, says: "It will be sufficient to say that no principle in our law is more clearly settled than this: that a devise to one for life or for life only, or for life and no longer, and then to the heirs of his body, carries an estate in tail to the devisee."

The Courts of New Jersey have settled what the effect is as to personalty, when as to real estate the language creates an estate tail in the devisee. 2 Beas. 101, 375.

In *Van Horne* v. *Campbell*, 1 Cent. Rep. 532, 101 N. Y. 608, it is held "Where in a will a devise is made in words which carry an absolute fee and in a subsequent clause a devise of the same estate is made over upon condition that the first devisee died seised, without issue, the devise over is void. The first taker has an absolute fee whether the estate be real or personal property.

In chapter 41, Vol. 3, Jarman, Wills, p. 296, the general rule is thus stated: "It has long been settled (as to wills made before 1838) that words referring to the death of a person without issue whether the terms be 'if he die without issue;' 'if he have no issue;' 'if he die without having issue;' 'if he die before he has any issue;' or 'for want' or 'in default of issue,' unexplained by the context and whether applied to real or personal estate are construed to import a general indefinite failure of issue."

In the case of *Campbell* v. *Harding*, 2 Russ. & M. 390, 13 Eng. Ch. 390, we have a very exhaustive and lucid exposition of this doctrine. The case was first decided by the Vice Chancellor, then by the Lord Chancellor and on appeal from the House of Lords under the name of *Caudry* v. *Campbell*, affirmed. All the authorities seem to be here collated, and the case seems to be on all fours with ours.

III. But if a trust was created upon failure of issue definite, then the gift over was only what remained at the death of the first devisee. Such remainder, being the result of a discretionary power of expenditure, vested in the trustee. This is a void bequest, both for uncertainty and because the prior disposition of the property imparted absolute ownership.

Bull v. *Kingston*, 1 Meriv. 314; *Bourn* v. *Gibbs*, 1 Russ. & M. 615, note 1; 2 Story, Eq. Jur. § 1070; 2 Roper, Legacies, 1431.

Bird, *V. C.*, delivered the following opinion:

David Traphagen made his last will August 2, 1836. One clause reads thus: "I give to my daughter Fanny $4,000, to be paid to her in one year after my decease." As to the residue he said: "One fourth part I give to my daughter Fanny." He made his son David executor.

February 1, 1840, he made a codicil to his will, in which he said "It is my will that so far as relates to the legacy in my said will given to my daughter Fanny, that my executors and the survivor of them pay to her the whole of the interest which may accrue on the money given to her, and so much of the principal as she may need and her circumstances may require from time to time, and whatever may remain at the time of her death to go to her issue equally; and should she have no issue then I give the same equally to my grandchildren at the time of her death (that is my grandchildren that may be living at the time of her death)."

By this codicil he appointed his brother Henry executor with his son David. He authorized his executors to make said payments to Fanny whether she should be married or not, and declared that her receipt should be a sufficient voucher. May 20, 1841, he revoked the appointment of his brother Henry as executor, and appointed his daughter Fanny executrix. He died in 1842.

The will and codicils were proved. David and Fanny undertook the burden of the settlement of the estate. They had in hand the $4,000 legacy, the interest of which was so given to Fanny and so much of the principal as she might need or her circumstances require, and also $2,952.41, one fourth of the residue. Fanny died in the year 1885 leaving a will in which the defendant is named as executor thereof.

The grandchildren of the testator named in the codicil claim these legacies at the hands of the executor of Fanny.

The executor of Fanny's will resists this claim. In plain words, the *first* contention is that both of these legacies were paid over to Fanny in her lifetime, according to the directions of her father's will; that she accepted them as her own private and separate estate, as she had a right to; and that consequently, the defendant, as the executor of her will, cannot be called to an account. Is it true, then, that Fanny received all these moneys according to the plain intent of the testator, as expressed in the codicil? She doubtless became possessed of both sums in full. After the death of her brother, who was coexecutor, she had a right to the possession of the fund. But, as the case stands, did she hold these sums as executor or trustee, or did she hold them in her own right absolutely? Her coexecutor in 1847 assigned to her bonds and mortgages of the estate of the value of $5,300 in the receipt for which she acknowledged taking them "from my brother David Traphagen, executor of my father, and to be allowed him on the legacy and money, in part payment, given me in and by the will of my said father."

David died in 1850, but after he and his sister had made what they regarded as a final settlement of their accounts in the orphans' court. He left a last will and named Joseph Thompson executor. As such executor Judge Thompson had a settlement with Fanny Traphagen September 30, 1852, in which these words and figures are made, "Fanny's legacy bal. due, $2,011.83. "April 1, 1853, inst. thereon, $120.71. "Allowed her for commissions $1,200.00." For these sums she gave a receipt to the executor of David.

Other receipts given by Fanny to her brother, as executor, are produced, showing payments by him to her of moneys; one April 1, 1848, for $275, one April 8, 1850 for $583, and one September 26, 1850 for $230. It does not appear on what account these last three sums were paid her.

It is plain that when David paid Fanny the $5,300, he regarded it as a payment on account of her legacies. It is also plain that when Judge Thompson, as executor of David, paid Fanny the $2,011.83 and $120.71 and the $1,200, he regarded the first two items as payments on account of her legacies.

The question still comes up, Shall the court regard those payments made to her in her right as executor and trustee or in her own individual right? If David intended to pass these moneys over to his sister, as part of her own separate estate, in attempting it, did he comply with the will and codicil under which he was acting? The very first glance at the will and codicil prompts the remark that the testator did not intend the legacy to be paid to Fanny in bulk; he did not intend that she should have the principal as an unqualified gift. It seems quite useless to make observations on this point, but the counsel for defendant pressed their views with great ability, insisting that the two acts, the one by David, in paying the $5,300, and the one by Judge Thompson, in making the other payments, were the exercise of legitimate powers, under the will, and effectually transferred the money to Fanny's private estate. Is this the true view of the case?

By his *will* the testator gave to Fanny $4,000, payable in one year after his death. Therefore, his first intention was that she should have the entire sum absolutely. But by the codicil he as distinctly says that his executors or the survivor of them shall pay to her the whole of the interest which may accrue on the money given her, and so much of the principal as she may require from time to time. He says the whole of the interest, but in express terms limits the payment of the principal to her needs or to the requirements of circumstances. This plain language cannot be disregarded. In considering the rights of these grandchildren, the court must take it into account. The testator had them in mind and their claims cannot be overlooked.

But, to continue, the testator changed his mind from making an absolute gift, to one depending on the legatee's necessities. Payments were not to depend upon the will of the executor; of this there is not the slightest intimation; for whatever might be their will or wish, the prevailing condition was Fanny's necessities. But it nowhere appears that she was ever in the slightest "need" of funds, or of aid of any description. It nowhere appears that there ever arose any "circumstances" the most remote, "requiring" the payment of any part of the principal. Must not these things appear, when the intention of the testator is so unmistakable, before the grandchildren can be cut off? I think so.

But, again; on whom is the burden? I think on the defendant. He stands in the place of Fanny. Fanny had these moneys. With the facts as they are now presented, had a bill been filed in Fanny's lifetime against her, requiring her to account for these moneys, as trustee, she doubtless would have been required so to do. I cannot imagine any condition which would justify her in resting where the defendant has rested, saying, in effect:

"These moneys were all paid to me; one parcel of $5,300 by my coexecutor, and two other parcels by the executor of my deceased coexecutor; and I accepted them as my own under the will of my father."

I think that the court would have required her to show affirmatively that the principal sums had been paid on the conditions named in the codicil, and that if such conditions had not been satisfied by the proof, Fanny would have been required to render an account of the principal, and to invest it in such manner as to distinguish it, and to preserve its identity.

In the second place it is urged that although these legacies are given upon condition or with a qualification, the condition is void, because the legatee has the absolute power of disposition of the fund. In one of the briefs it is said that if there was any restraint imposed by the first codicil, it was removed by the second, which clothed the same person with both the trust estate and the beneficial interest; adding that the effect is the same as if the testator had said: "I give my daughter Fanny $4,000, she shall hold the same in trust to use the interest and as much of the principal as in her own judgment she needs or her circumstances require. If on her death anything remains, it shall be paid to my grandchildren." I would express it thus in effect; a gift to Fanny, as trustee, to be held by her in trust for herself and the grandchildren of the testator; she to have the interest and so much of the principal as she may need or her circumstances require for her own use, absolutely.

It is maintained that this is an absolute gift of the entire fund. *Kendall* v. *Kendall*, 9 Stew. Eq. 91, 96, is cited as sustaining this contention. I think that a very different case from this. The chancellor said: "Though, by the terms of the bequest, the property (which is consumable) is given to her for her natural life, there is also granted to her power to sell it, or any part of it, for her own benefit if she shall see fit so to do. There is no gift over. The authority to sell is evidence of the extent of the interest intended to be given, and is not a mere power. She takes an absolute interest in the property, and not merely a life interest with power of disposition during life." There was no gift over; and the legatee was permitted to sell all or any part of it for her own use, as she might deem best. She was not limited by her necessities. She came to the possession of the goods given as legatee and not as trustee. She had a right to dispose of them as legatee, and not as trustee.

I think the case of *The Dutch Church at Freehold* v. *Smock*, Saxton, 148, is as widely different from the one in hand. The testator in that case said: "I also give to my wife the sum of $600, to be at her disposal during her life." I cannot see that this case is controlling. The remarks above made apply to this case with equal force.

Annin's Exr. v. *Vandoren,* 1 McCart. 185, is regarded as fully analogous to this; but in that case the legacy was given to the legatees, without any qualification respecting their necessities. This clause followed the gift: "Should my daughter Leah or Mary or either of them die, leaving no legal issue, the share or shares herein bequeathed to her or them (if not paid over by my executors, and if paid over then such part thereof as remains unexpended), I give and bequeath unto my surviving children and their heirs equally between them." Here the testator undoubtedly placed the gift within the absolute control of the legatee, if the legatee once acquired possession, and to that extent the general rule applied; but the question discussed and decided was whether the general rule also applied to the moneys which remained unexpended. The court held that it did. The learned chancellor expressed a desire to reach a different conclusion on this branch of the question, but was unable to do so. He observes:

"The uncontrolled power of expenditure necessarily implies absolute ownership, as fully as the power of disposing of it. And this difficulty can only be overcome by limiting the right of expenditure to so much as may be necessary for the support of the legatee." And so, the very method of overcoming a well settled rule of law, suggested by the court in the case of *Annin's Exr.*, we find adopted in the will of Traphagen.

In my judgment this case is not only not decisive but really raises no doubt as to the one in hand.

Nor is the present case within that of *Courter* v. *Howell*, 6 Stew. Eq. 80. In that case, although in the first instance the gift of the $3,000 was for life, the testator expressly provided that if the legatee should elect, it might be invested in a house and lot and the conveyance made to her, which of course made it absolutely hers, she having so elected.

I conclude that Fanny took possession of these moneys as executrix or trustee, and that she held them as trustee. So far as appears she exercised and had no right to exercise any other power over them; for the conditions under which she might exercise other rights over them are not proved. It seems to me that it would be a great departure from equitable rules, to allow an executor in such case to appropriate an estate or any part of it to himself, because he chanced to be both legatee and executor. That these moneys were held in trust is shown by the views of *Mr. Justice* Depue in *Pratt* v. *Douglas*, 11 Stew. Eq. 584. See also *Thorp* v. *Owen*, 2 Hare, 608, 610, which shows that the court has the power to enforce just such trust as this.

If Fanny was in need of any part of these funds, she might have used them at her own peril; but if in doubt as to the extent of the use, instead of acting as judge in the matter, she could have called on the court for directions; and, through a master, the extent of her necessities could have been ascertained. *Woods* v. *Woods*, 1 Mylne & C. 401, 403, 409; *Kilvington* v. *Gray*, 10 Sim. 293, 296, 297. This case shows the power of the court and how to exercise it. *Raikes* v. *Ward*, 1 Hare, 445.

The argument that a long period of time has elapsed, and that nothing appears among Fanny's papers to show that she held these moneys as trustee and must therefore have held them in her own right, I think is unsound and dangerous. To protect a trustee from accounting, because of the lapse of time and because he has kept no accounts, or has seen fit to appropriate and claim all of the trust estate as his own, would be exceeding any liberality heretofore exercised by the courts towards that class; if such doctrine were to prevail it would prove disastrous to all interests of *cestuis que trust.*

I think that the codicil operates upon both legacies, the $4,000 as well as the residuum. The testator in said codicil speaks of the legacy and of the money given to Fanny. Now both are legacies; and both are money. If it should be thought that the testator meant only one of them, it would be impossible to say which. I have no doubt that he meant both.

Fanny was never married, and consequently had no issue at the time of her death. In this event, the codicil gives the legacies to certain of the testator's grandchildren, being the complainants. I conclude that they are clearly entitled to the $4,000, and the $2,952.41, with interest on both sums from the time of Fanny's death.

The complainants are entitled to costs.

Mary A. WILSON *et al.*
v.
Joseph WILSON *et al.*

In a **suit to quiet title**, when an **issue** as to the title was **framed** and tried by a jury, and the justice before whom the issue was tried certified that, in his opinion, the verdict was warranted by the evidence, and it does not appear that any error of law was committed at the trial, and no reason for setting aside the verdict being found, the **decree** will be **in accordance with** the **verdict.**

(Decided April 30, 1887.)

BILL to quiet title. On motion to set aside verdict for complainants and counter motion for decree upon the verdict. *Decree for complainants.*

The case is stated in the opinion.

Mr. **E. S. Savage,** for complainants.

Mr. **W. Brinkerhoff,** for defendants.

Runyon, *Chancellor*, delivered the following opinion:

This is a suit to quiet title brought under the Act "to compel the determination of claims to real estate in certain cases and to quiet the title to the same." Rev. p. 1189.

It is brought by Mary A. Wilson and her husband against Joseph Wilson and his wife, to quiet the title of Mary A. Wilson to certain real estate at Iselin (formerly Uniontown) in the County of Middlesex, in this State.

The bill alleges that the property in question was conveyed to Mary A. Wilson in fee, by

Jacob Wilson, her father-in-law, in 1883, by deed delivered in July of that year, in consideration of her marriage to his son, whom, at the grantor's request and in consideration of his agreement to make such conveyance, she married in March of that year; that after the deed was delivered to her she redelivered it to her father-in-law for safe keeping, and it remained in his custody unrecorded, at the time of his death, which occurred in May, 1885; that she has had possession of the property ever since her marriage; that her title is disputed by the defendant Joseph Wilson, brother of her grantor, who claims under a deed from her grantor to him made in 1881, which the complainants allege was made without consideration, and merely in trust for the grantor, who was then engaged in a litigation, and who made the conveyance to prevent the property from being subject to any judgment which might be recovered against him therein; and they also allege that at the time of making that conveyance the grantee executed and delivered to the grantor a deed reconveying the property, which latter deed was never recorded.

The defendants by their answer set up title to the property under the before mentioned deed of 1881, from Jacob Wilson, Sr., to Joseph Wilson, and allege that that deed was made and delivered in good faith for the consideration of $16,000 paid by the grantee to the grantor for the property, and that it was given and taken for the use and benefit of the grantee and his heirs and assigns, and not in any way in trust for the grantor or to protect the property from any judgment; and they deny that any reconveyance by the grantee to the grantor was ever made. On motion of the counsel of the complainants an order was made directing that an issue at law be framed in the supreme court (to be tried by a special or struck jury, unless one should not be ready at the term fixed for the trial in which case it was to be tried by a common jury) to inquire, ascertain and determine in the ordinary way whether the complainants or the defendants are seised in fee of the premises.

An issue was framed accordingly, to determine whether the complainant Mary A. Wilson is the owner in fee simple of the property. The issue was, as appears by the *postea*, duly tried at the Middlesex Circuit, by a struck jury, and resulted in a verdict in favor of the complainant Mary A. Wilson. The justice of the supreme court before whom the issue was tried certifies that it was duly tried, and that in his opinion the verdict was warranted by the evidence. It is not alleged and it does not appear that any error of law was committed at or in the conduct of the trial; and the judge is satisfied with the result.

I have read with great care all the testimony, and find no reason for setting aside the verdict upon any ground.

There will be a decree for the complainants in accordance with the finding of the jury.

George COCKS *et al.*,

v.

Anna VARNEY *et al.*

1. On demurrer to a bill filed by devisees, to compel an account and payment by executors of what is due complainants for their share of the estate, *held*, that, as the **testator** was **domiciled in** the State of **New York** and his will was proved there, and it does not appear that it was ever proved in this State, the **executors** can **not** be **required to** come to an **account here** for their dealings with the estate.

2. Relief against all the **defendants as executors and** relief against one of the defendants **as mortgagee** of trust property with notice of the trust, are distinct matters having no connection with each other; in the latter the executors as such have no interest. A **bill** uniting all such matters is **multifarious.**

(Decided April 13, 1887.)

Bill for relief. On general demurrers. *Allowed.*

The case is stated in the opinion.

Mr. **T. N. McCarter,** for demurrants.

Mr. **R. Allen, Jr.,** for complainants:

Cited *Crane* v. *Hearn*, 11 C. E. Green, 378; *Brice* v. *Stokes*, 11 Ves. 324; 5 Stew. Eq. 611; 9 Stew. Eq. 522; 13 Stew. Eq. 14; *Brownlee* v. *Lockwood*, 5 C. E. Green, 239; 74 N. Y. 539.

Runyon, *Chancellor*, delivered the following opinion:

The bill states that John Cocks, deceased, late of New York, the grandfather of the complainants, by his will provided that one fifth of the residue of his estate should be invested by his executors and the interest thereof applied by them to the support of his son David (the father of the complainants) and his wife and children, and that at David's death the share should go to David's children; that the will was proved in the State of New York and letters testamentary thereon issued there to the executors, who were the testator's sons David and Harrison, and his daughter Phebe, and Daniel E. Haviland, her husband, his daughter Mary and George J. Barlow, her husband, and his daughter Anna Cocks, who after his death became the wife of Charles Varney; that Barlow, with the consent of the other executors, got all the estate into his hands and with part of the above mentioned share bought a house and lot in Monmouth County, and took the title in his own name; and after mortgaging the property to one Wardell Ivins (now deceased) for $400 and to Mrs Varney for $4,000, conveyed it, subject to the mortgages, to the complainants whose father was then dead.

The bill alleges that that is all that the complainants have received for or on account of their share of the estate, and that the share was of far greater value than that property. It also states that Mrs. Varney knew when she took her mortgage (it was taken in the lifetime of David Cocks) that the property had been bought with money which was part of the before mentioned share; and it also alleges that she, as executrix, was liable to the complainants for a far greater sum on account of that share than the amount which she claims is due to her upon the mortgage. Ivins' administrator has begun a suit to foreclose his mortgage, to which suit she is a party. The bill prays an account of the estate of John Cocks from the surviving executors, and that they may be decreed to pay over to the complainants what is due to them for their share. It also seeks to restrain Mrs. Varney from collecting or parting with her mortgage, and prays that it may be canceled.

Mr. and Mrs. Haviland and Mr. Varney demur to the bill, upon the ground of want of jurisdiction as to the relief prayed against the executors, and for multifariousness; and Mrs. Varney demurs, upon the ground of want of jurisdiction as to the discovery and relief in respect to the estate, and answers the rest of the bill.

The testator was domiciled in the State of New York, and his will was proved there. It does not appear that it was ever proved in this State. The executors, therefore, cannot be required to come to an account here for their dealings with the estate. The demurrers are well taken on that point.

And so too as to the other ground of objection. Relief against all of the defendants as executors and relief against Mrs. Varney as mortgagee of trust property, with notice of the trust, are manifestly distinct matters, having no connection with each other. In the latter the executors as such have no interest.

The demurrers will be allowed.

John P. STOCKTON, Atty-Gen., *ex rel., etc., et al.,*
v.
Mayor etc., of City of NEWARK.

1. In a **suit** brought by the Attorney-General **to establish a trust in** certain **land in Newark,** known as "The Old Burying Ground," **and to restrain** the mayor etc., of that City from **removing** from such land the **remains of persons buried** there, etc., *held*, that the **City** has no **title to** the **land** in question, except such as it may have under the Act of 1804 and its charter; that, if the Indian title is valid, the City has no title under it.
2. **If** the **title** to the land **was held by** the **Township under** the **Act of 1804** merely **in trust for** use as a **burial ground,** the **City holds** it in like manner and **upon** the **same trust.** It cannot sell the land, nor release or extinguish the use for which the land was dedicated, nor employ it in any way variant from the purposes for which it was designed.
3. The City, if it holds the title in trust, holds it for the **use** of the property **as a burying ground** and for no other use whatever: and if the Act of 1886 gives the City the power to destroy the trust, such Act is unconstitutional.
4. If a **grant** is made **to a municipal corporation, charged with a trust** in favor of an individual, private corporation or charity, the interest which the *cestui que trust* or beneficiary has under the grant may sustain it against **legislative revocation.**
5. The **Act of 1886** cannot be supported under what is known as the police power of the Legislature; the Act is not an exercise of that power.
6. A **trust for a burying place** devotes the ground to the perpetual repose of the remains of the dead.
7. The fact that the place in question has become a **nuisance,** from the neglect by the City to take proper care of it, is no reason why the City should be permitted to go still further and destroy the use altogether.

(Decided April 19, 1887.)

BILL for an injunction. On order to show cause upon bill and answer. *Preliminary injunction allowed.*

The case is stated in the opinion.

Mr. **Cortlandt Parker,** for complainants:

I. The trust in the deed of 1696 is not of a burying place for all people, but only for "the old settlers, their heirs and assigns." It was dated 1696; the settlement was in 1666, when sixty-four men came, whose names were recorded. There was no uncertainty in the trust.

The contemplated use "for a public market" is forbidden.

The relators are descendants of the old settlers, and have the interests of *cestuis que trust;* and but for the ordinance of the City, forbidding all interments in the City, they have a legal right in the soil. They certainly have the right to protect their forefathers' graves and monuments. The grantors of the deed contemplated use, protection, and preservation.

II. If the use is not for the heirs and assigns of the old settlers only, then it is for the use of all inhabitants of Newark, and is still an enforceable trust impressed upon the land. It is a charitable use.

Dexter v. *Gardner*, 7 Allen, 243; *Re Beekman St. Ch.* 4 Bradf. 503.

At any rate it is a good use and enforceable at the suit of the Attorney-General.

If the original deed was void for uncertainty, the City has nothing to do with the property; but why is the deed for the use of the old settlers and their heirs and assigns any more uncertain than for the use of the inhabitants of Newark, their heirs and assigns?

III. What was the effect of the Law of 1804?

1. Not to change the *cestuis que trust.* That it could not do.

2. Not to expound the words of the deed so as to do this. That is not legislation. The Legislature cannot explain words in a deed.

3. Not to devest the trust from the land; on the contrary it intensified its force.

4. Its only effect was to change the trustees; this it had the right and power to do.

IV. What was the effect of the Act of 1848?

It was in aid of the City to protect part of the ground which it had taken for its own use and profit. The City proposed to the Legislature to protect, preserve and maintain these grounds in consideration of profits arising from part of the land which it had taken and in consideration of which promise the Legislature gave them a clear title to such portion, and a contract was thus formed which the City is now estopped to deny.

V. What effect had the Law of 1886 upon this trust? None, because,

1. It refers to cases where there is a holding of lands by the City, *i.e.*, where they are the property of the City.

2. It refers to lands held by cities "for burial purposes," but the City never held this land for that purpose. It holds it now to protect and preserve decently that which is there.

3. The City does own a burial ground and it is affected by a trust to devote it to that use. Municipal Laws, p. 359.

4. The Act is void on its face. The trust referred to in such Act cannot be devested by the Legislature.

5. The Act is void as impairing the obligation of a contract, and as impairing vested right.

6. The Act is a private, local, and special Act.

VI. No case can be found where a trustee is authorized by an Act to abrogate his trust and himself enjoy the proceeds.

Mr. **R. Wayne Parker,** also for complainants:

The right of sepulture is a vested right; the trust for that purpose is a charitable use. The monuments and the right to their present location belong to the heirs of the dead, and the kindred of the departed have a legal interest in the safety of their graves, which a court of equity will protect.

We have in this case a charitable use for the burial of the dead, recognized not only by the deed of 1696, but by the Acts of 1804 and 1848, the latter of which provides funds for the keeping of the burial grounds in repair.

The Act of 1886, although general in its scope, was aimed at the conversion of this burial ground into a public market and is unconstitutional: 1, as a special Act, there being no other burial ground in the State embraced in its terms; 2, it is confined by its terms to cases where there is a special trust, and attempts to abrogate such trust and the contract on which it is founded.

Dartmouth Coll. Case.

The general Statute of 1886 does not repeal by implication the special Statute of 1848.

Anderson v. *Hill*, 13 Vroom, 351; *Sheridan* v. *Stevenson*, 15 Vroom, 378.

There is a special trust in this case. The land is in trust for use as for a burial place for the old settlers and their heirs. The relators and all descendants of the old settlers are such heirs, and have a fixed interest by the deed, as recognized by the statutes in these identical lands and the individual and separate graves. Of this no statute can deprive them. The monuments are by common law an heirloom, descending from ancestor to heir, and as to which they have an actual legal right.

See 21 Am. Law Reg. 512; 16 Am. Law Reg. 155; *Pierce* v. *Swan Pt. Cemetery*, 10 R. I. 227: *Wynkoop* v. *Wynkoop*, 42 Pa. 293; *Opening of Beekman St.* 4 Bradf. (N. Y.) 503; Burn, Eccl. Law, 334, 530, 532.

Mr. **Joseph Coult,** for defendant.

Runyon, *Chancellor*, delivered the following opinion:

This suit is brought by the Attorney-General, by information, at the relation of Henry Congar and others, and by the relators as complainants, against the Mayor and Common Council of the City of Newark to establish a trust in certain land in Newark known as "The Old Burying Ground," and to restrain the defendant from removing from that land the remains of persons buried there and to compel the defendant to keep and maintain the ground in decent and proper order so as to protect the remains and memorials therein from desecration.

The bill states that the relators and complainants are citizens of Newark and heirs and descendants of the old settlers of the Town of Newark; and they bring suit not only for themselves but also for the benefit of all such other citizens, heirs and descendants as may be made parties, and for the protection of the charitable use to which the burying ground was, as they allege, devoted.

The bill states that on the 10th of December, 1696, shortly after the settlement of the Town, the proprietors of the Province of East New Jersey, in pursuance of the concessions to actual settlers thereof theretofore made by them, granted to John Curtis, John Treat, Theophilus Pierson and Robert Young, of the Town of Newark, certain parcels of land in Newark for public use, among which was a tract including the land in question, which tract is described in the deed as "All that small tract therein allotted for the burying place, taking in the pond and meeting house, being seven chains in length and four in width, bounded west by John Treat, south by John Johnston, north and east by highways;" that as to that land the grant was made and was in the deed declared to be made to the grantees and their heirs, to the only proper use, benefit and behoof of the old settlers of the Town of Newark, their heirs and assigns forever, in common; and that it was also therein declared that the land was granted to be and remain for the use in the deed expressed and to be appropriated to no other use or uses whatever.

The complainants allege that the greater part of that tract was then and thereafter used for and devoted to the use of a burial place for the people of the Town, those who settled the place, the old settlers, and their heirs and assigns, and that it has been reserved and kept for such purpose and has been known as "The Old Burying Ground," and that there have been buried in it from time to time deceased persons, people of the Town, old settlers and their heirs and descendants and that the memorials of such deceased persons have been erected there and that some of them still remain; that about the 15th of February, 1804, the Legislature of the State, for the purpose of vesting the legal estate in the property upon the same trust and to the same use upon and to which it had been granted, passed an Act by which it was recited that the inhabitants, the first settlers of Newark, on their first settlement, after purchasing all the lands lying within the bounds of the Town of the native Indians, proceeded to parcel them out among themselves and such settlers as thought proper at various times to settle in the Town according to the rules and regulations established by the first settlers respecting their admission, at the same time reserving certain portions of land in various parts of the Town for public purposes; and that doubts having arisen as to the validity of the Indian title it was afterwards thought advisable by the inhabitants of the Town to take a grant from the proprietors of East New Jersey, for the confirmation of their rights to that public land; and that as the inhabitants of the Town were not incorporated and were incapable of taking a legal estate it was thought advisable to take the grant in the names of certain trustees for the use of the inhabitants, which grant was accordingly taken on the 10th of October, 1696, in the names of John Curtis, John Treat, Theophilus Pierson and Robert Young, to have and to hold, to them, their heirs and assigns forever, to the only proper use, benefit and behoof of the old settlers of the Town, their heirs and assigns forever, in common (the lands) granted to be and remain to and for the several uses therein particularly expressed and to be appropriated to no other use or uses whatsoever; that the original trustees were all dead and the heir of the survivor not known to be resident in Newark; and that through the ignorance of those infant times the use created in the grant, although really meant for the benefit of the inhabitants of the Town of Newark and their successors, yet was so inartificially expressed as to render it difficult for the then inhabitants of the Town, as incorporated by law to assert their rights to the premises; by means whereof the lands contained in the grant and originally reserved by the first settlers for public purposes were exposed to encroachments and other injuries without a competent remedy therefor, either in law or equity; and it was thereby enacted that the trust estate vested in the trustees, their heirs and assigns forever, by the deed from the proprietors for the only proper use, benefit and behoof of the old settlers of the Town of Newark, their heirs and assigns forever, should thenceforth cease and be void, and that the estate so vested in those trustees, their heirs and assigns forever, should be vested in the inhabitants of the Township of Newark in the County of Essex as incorporated by law, and their successors forever; and that they were thereby vested with the legal title thereto, as fully and absolutely as though they had been originally named in the grant in the place of the original trustees; saving the rights of *bona fide* purchasers without notice of the trust; provided that nothing in the Act should in any way extend to or affect the parsonage lands described in the grant or such parts of the burying ground as had been leased or sold by the First Presbyterian Church in Newark before the first of January then last, or the ground upon which the market then stood. And it was thereby further enacted that the estate vested by the Act in the inhabitants of the Township should be appropriated and forever remain to and for the several uses in the before mentioned original patent (the deed from the proprietors) expressed and for no other use or uses whatever.

The bill further states that in 1836 the City was incorporated and thereupon by force of the laws of this State became subject to all the responsibilities of the Township and succeeded to the duties of the inhabitants of the Township as trustees; that it thus obtained the legal title to the land in question and that it was its duty to protect and preserve the property to the uses to which it was originally devoted, but that it has not only neglected its duty in that behalf but now proposes to remove the remains from the ground and devote the land to use as a public market for the sale of meat and vegetables, and to let it out for hire for those purposes accordingly; and that its action in the manner is under an Act of the Legislature passed in 1886, and obtained by the City itself, by which it was enacted that where lands held by the cities or municipalities of this State for burial purposes are or may be affected by any trust that they shall be devoted to that use and in the judgment of the common council or other governing body the public good will be served by devoting such lands to other public uses, it shall and may be lawful in every such case to use such lands for any public purpose or use to which, in the judgment of the common council or other governing body, they are best adapted; and that in case interments have at any time been made in such lands or any part thereof, the common council or other governing body shall cause the remains so interred to be removed to some suitable and proper burial place, and make proper and reasonable provision therefor and for the protection thereof; and to that end may make such reasonable appropriation of public moneys as may be necessary.

The bill attacks that Act, upon the ground that it is really a private, special and local law within the meaning of the Constitution, and alleges that there are no other cities or municipalities in this State, except the City of Newark, which hold land in trust for burial purposes; that no public notice was given, of the intention to apply for the Act, nor of the object of it; and that the passage of the Act was forbidden by the Constitution of this State, because of the want of such notice and because the Act vacates public grounds.

The answer states that the first settlers came in May, 1666; that soon after they came they laid out the land of which they had taken possession without leave or license, claiming it by occupation, and divided it among themselves into what they called home lots; that in order to secure a more perfect title, they bought the land from the Indians and took from them three conveyances therefor, one in 1666 and the others in 1667; that in laying out the town site they reserved streets, squares and public places for the common benefit of the people of the Town; that among the portions so allotted was the tract set apart for a church and burial place and that that was common property; that soon after the settlement the only building for religious worship in the Town was built upon the property; and that in accordance with the original design of the settlers the bodies of all the settlers who died were there interred; and that the property was common to all the inhabitants, the meeting house for worship, and the burying ground for interment; that up to 1713 the form of government of the Town was a pure democracy, in which all who lived in the settlement and were entitled to a vote were obliged to participate; that in that year the tract then known as the Town of Newark was by royal patent created a township by the name of the "Trustees of the Freeholders and Inhabitants of the Township of Newark," and the government was thenceforward to 1798 carried on under that charter; that in the last mentioned year the Township was incorporated and that the City was incorporated in 1836; that from the earliest settlement the lands in dispute or portions thereof were used as a burying ground and interments were made in it from time to time of the bodies of persons who were inhabitants of the Town, but that it was always common property under the control of the public; that the settlers denied the right of the Indians, although they took the before mentioned deeds from them, and they denied the right of the proprietors, and they held possession for over thirty years before they took from the proprietors the deed mentioned in the bill, which they took as a merely confirmatory conveyance; that it was not intended that that deed should impose any unalterable trust upon the property in question or impress upon it a perpetual use; but the answer alleges that the words relied upon in the bill to establish the use are merely words of description denoting the use to which the inhabitants of the Town had put the land, and were used in order to designate them with absolute certainty; that after the making of the deed of the proprietors the land continued to be used by the public in the same way and to the same extent as before that time, and that in consequence of the doubts which had always existed as to the right and title of the public thereto and to quiet the title, the Act of 1804 was passed; that, subject to such limitations as were by that Act put upon its power, the City had a lawful right and full authority to take such measures as were expedient for the care and custody of the grounds and the preservation of the remains and monuments therein; that the tract lies in the heart of the City and is surrounded by the most populous and valuable portion of the City; that no interments have been made there for many years, and that on account of the peculiar situation and location of the property it has now become unsuitable for burials; that originally the whole of it was used in common by the people of the Town, for purposes of worship and interment, but as the land grew more and more valuable, encroachments were made upon the Broad and Market Street fronts which are now, with a small exception, covered with business buildings in which large amounts of money are invested; that in making such encroachments the persons who claim to be the owners of the buildings have actually erected them upon parts of the land in which interments were made, and that it has been impossible for the City to protect the property from desecration; that it has been and is now open to the common use of the public and is used as a rendezvous for immoral persons, and as a depository for rubbish, and for a long time has been a public nuisance; and that by virtue of its general control over the grounds and under the terms of the Act of 1886, the City has determined that the general good of the community and all considerations of respect for the memory of the early settlers of Newark whose bodies are buried there require that the use to which the premises have been so long devoted should be determined, and that proper measures should be taken to care for the remains of those deceased persons and to perpetuate their memories; that the City proposes to reinter the remains to be removed, in an appropriate place, and erect a suitable monument over them; that it proposes to occupy the land for a market, but only temporarily, and that it intends to get another place for such market hereafter, and to relieve the land in question from use as a market place.

It is evident from the foregoing full statement of the main contents of the pleadings that the City has no title to the land in question, except such as it may have under the Act of 1804, and the charter which provides that the Mayor and Common Council and their successors shall, by virtue of the charter, become and be absolutely and completely vested with, possess and enjoy all the lands, tenements, hereditaments, property, rights, causes of action and estate whatsoever, both in law and equity, in possession, reversion or remainder, which at the time of the passing of the charter were vested in the Township as a corporation, according to such estate and interest as the Township, as a corporation at the time of the passing of the charter, had or of right ought to have therein. P. L. 1836, p. 185, and P. L. 1857, p. 117.

If the title to the land was held by the Township under the Act of 1804, merely in trust for the purposes of the charity (use as a burial ground), the City holds it in like manner and upon the same trust. But it is urged by the answer that the City holds it irrespective of the Act of 1804 as public property generally, without the impress of a trust or of devotion to any particular use upon it. This claim cannot be sustained. How did the City get title, if not under the Act of 1804? And what title has it except such title? Before that Act the title was in the grantees under the deed from the proprietors or the survivors or survivor of them or the heir at law of the last survivor.

If it be conceded that the Indian title is valid, the City has no title to the land under it. If the land was dedicated to public use as a burying ground by the old settlers, the power of the City over it under such dedication is (apart from the Act of 1886) only for the protection and regulation of the public use. It cannot sell the land nor release or extinguish the use for which the land was dedicated, nor employ it in any way variant from the purposes for which it was designed. *Trustees* v. *Mayor of Hoboken*, 4 Vroom, 13.

Under the Act of 1804 the title was vested in the Township as a corporation, to be appropriated and forever remain to and for the several uses expressed in the deed from the proprietors, and for no other use or uses whatever. The City, if it took the title under that Act and its charter, took it subject to that provision and with that trust impressed upon it.

In *Montpelier* v. *East Montpelier*, 27 Vt. 704, it was held that land held in trust by the original Town of Montpelier did not pass to the new Towns of Montpelier and East Montpelier, created out of the territory of the original town (the court held that by force of the provisions of the Act the original town ceased to exist), although the Act provided that all property then owned and possessed by the original town should be thereafter owned and enjoyed by the new towns in certain proportions. The City then, if it holds the title in trust, holds it for the use of the property as a burying ground and for no other use whatever unless the Act of 1886 has given it power to abolish the use. That Act is an Act to destroy the trust. If it be conceded that there is no valid objection to it, on the grounds mentioned in the bill (a subject which it is not necessary to pass upon at this time), and the Act be regarded as a general law, it may be characterized as an enactment empowering the municipal authorities at will to destroy the trusts in all such cases.

As such it is in my judgment unconstitutional. It is not within the power of the Legislature to abolish such trusts as that on which the City if it has title to the old burying ground holds that property. It is established law that if a grant is made to a municipal corporation charged with a trust in favor of an individual private corporation or charity, the interest which the *cestui que trust* or beneficiary has under the grant may sustain it against legislative revocation; a vested equitable interest being property in the same sense and entitled to the same protection as a legal interest. Cooley, Const. Lim. 278.

In *Montpelier* v. *East Montpelier*, 29 Vt. 12, it was said that grants of property to municipal corporations in trust for other purposes than corporate and municipal use, are no more the subject of legislative control than are the private and vested rights of individuals. It is urged on behalf of the City that this Act may be supported under what is known as the police power of the Legislature, by virtue of which it may, to protect the health of the public, exercise directly, or by delegating it to the municipality, the power of directing the removal of bodies from a graveyard. It is enough to say on this head that the Act is not an exercise of that power.

According to the answer, it may be remarked, no interments have been made in the ground in question for nearly sixty years. The Act provides that when lands held by the cities and municipalities of the State for burial purposes are or may be affected by any trust, they shall be devoted to that use; and if in the judgment of the common council or other governing body the public good will be served by devoting such lands to other public uses it shall and may be lawful in every such case to use such lands for any public use to which in the judgment of the common council or other governing body they are best adapted. This is not a grant based upon the power to prevent or abate nuisances, but construed as the defendant construes it, it is a gift of power to the common council or other governing body to put (entirely at their discretion) land granted to the municipality in trust for burial purposes, whether located in or out of the city or municipality, to any or other public use to which they may think it best adapted; and that too without reference to any consideration of the public health to justify it.

Nor can it justly be claimed that in view of the fact that no interments have been made for so long a period, since 1829, the use has ceased. The object of burial is not to put the dead away temporarily, merely, but to place them in a final resting place. When land is given in trust for a burial place, it obviously can by no means be said that the trust is at an end when the last body which can be buried in it has been deposited. The expectation in the burial of the dead is that they are to remain permanently; and the unauthorized disturbance of their remains is regarded with abhorrence, as a desecration, and is criminal. A trust for a burying place devotes the ground to the perpetual repose of the remains of the dead. It dedicates it to uses of the most sacred character. The burying ground is God's Acre.

In *Campbell* v. *Liverpool*, L. R. 9 Eq. 579, by Act of Wm. III, land belonging to the Parish of Liverpool was set apart and dedicated to the use of a burial ground; and by the sentence of consecration the corporation renounced all right to the land. In 1854 the ground was closed against burials by an order in council. In 1866 the corporation (being authorized to take a part of the ground, under an improvement Act) refused to pay for the land to be taken, on the ground that the land reverted to the corporation on the closing of the ground against burials and that on such closing the use came to an end; it was held that the land had been dedicated forever to the use of a burial ground; that there was no reverter to the corporation, and that the court would, if necessary, presume a conveyance of the legal estate. See also *Moreland* v. *Richardson*, 24 Beav. 33.

Manifestly the fact that the place in question has become a nuisance from the neglect by the City, of its duty to take proper care of it, is no reason why the City should now be permitted to go still further and destroy the use altogether. By an Act of March 3, 1848 (P. L. 1848, p. 152) the fact that the City had authorized or permitted encroachments upon the ground was recognized, as also the fact that it derived revenue for such encroachments; and it was provided that it should be the duty of the Mayor and Common Council to protect and preserve the ground as then inclosed and the inclosures thereof. It may be added that the nuisances mentioned in the answer are all of them such as the City may prevent.

A preliminary injunction will be allowed according to the prayer of the bill.

HUNT
v.
HUNT.

1. **Proceedings in** a cause in **partition,** showing that certain lands were sold to defendant and that the court approved the sale, are **relevant** evidence **to show** that **defendant accepted a deed for** the **land named in such proceedings.**
2. A **transcript of** the **proceedings in a** cause in partition **in a court of another State,** duly authenticated, according to the Act of Congress, to make it evidence in this State, except that the **seal of** the **court** annexed to the certificate of the clerk is **not impressed on wax,** is **admissible** in evidence, notwithstanding the absence of wax or anything in the nature of wax from the seal.

(Filed April 23, 1887.)

On objections to the ruling of a master in admitting in evidence a certified transcript of proceedings of a court of another State. *Ruling of the Master sustained.*

The question presented is stated in the conclusions of the Vice Chancellor.

Mr. **James Buchanan,** for complainant.

Mr. **W. D. Holt,** for defendant.

Bird, *V. C.*, filed the following conclusions:

On the examination of witnesses before the master, the complainant offered in evidence by way of rebuttal what purports to be a transcript of the proceedings in a cause in partition in one of the counties in Missouri. The defendant objected to its admission, on the grounds that it is irrelevant and that it is not properly authenticated.

First, as to the relevancy of the facts appearing on the face of the record: one of the principal points in dispute is whether or not the defendant ever accepted a deed for the land named in the proceedings certified. The fact appears that certain land was sold to him, and that the court approved the sale. How far such a fact, judicially ascertained, will be efficacious need not now be determined; but that it is relevant cannot be doubted.

Second, as to the authentication. This objection rests on the absence of *wax*, or anything in the nature of wax, from the certificate. The want of *wax* makes the whole record a nullity! The want of *wax* deprives it of all solemnity, of all certainty, of all truthfulness!! It is said that the Act of Congress makes wax the *sine qua non* of such a paper; and it is said that the Supreme Court of the State of New York has pronounced such interpretation as the only true one of the Act. *Coit* v. *Millikin*, 1 Denio, 376.

I am a great admirer of precedents. It is a great relief to be sheltered and protected by an adjudication of a most distinguished court. But when such decision is not of one's own State and it seems to be against reason, and to violate the principles of justice and equity, and not to be required by any sound public policy, I think a judge may be pardoned, if it is not followed.

Now, Congress intended to facilitate judicial proceedings, not to obstruct or embarrass the administration of them. Congress intended to promote and to secure justice and equity, and therefore declared that a copy of the record or judicial proceedings at length, accompanied by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form, shall have full faith and credit.

Congress was much more liberal than those who have been called upon to interpret its Acts. Congress said that the seal of the court should be annexed; but Congress was not so worshipful of the seal as to assign to it the sole arbiter of the rights of men, for it distinctly declared that such judicial proceedings shall be entitled to equal credit when they come from a forum which has no seal.

In this case the clerk certifies that he has affixed the seal of the said court. This makes it most clear that the court in which the proceedings were had have adopted what it regards as a seal, without the use of wax. To that court it is a seal, to all intents and purposes. But suppose I take it upon myself to say it is not a seal, and reject the record, what follows? The rejection of the record, and for aught that can now be foreseen, the failure of justice. Can this be overcome? Can any one State say to another, You shall use wax in affixing your seals, if you expect your judicial proceedings to have credit abroad?

Such an attitude would not prove beneficial to anyone, much less to the suitor whose rights may be imperiled. Suppose that A has brought his action against B in Missouri for the recovery of $10,000 upon B's note, which action B has fairly and successfully resisted, and that afterwards A brings another action on the same note in New Jersey, and B offers the proceedings of the formal trial and adjudication, in all respects complete, except that the seal of the court is not impressed on *wax*, and B has been disabled from making his former defense, by the death of witnesses or otherwise, would it be right, in any sense, to reject such proceedings because of the absence of a little wax?

I do not see how such rejection could be justified. If, under the Act of Congress, everything in the shape of a seal may be dispensed with and the proceedings, when certified, entitled to credit, then surely, in all reason, when the clerk certifies that he has affixed the seal of the court, every solemnity appears, even though the wax is absent.

I conclude that the Master was right in overruling the objections and admitting the proceedings of the cause as certified from the court in Missouri.

The complainant is entitled to costs.

Eliza HOWELL *et al.*

v.

Floyd W. TOMKINS, Exr., *et al.*

Where a **testator devised lands** to his executor in trust **for** the **use** and support **of** his **daughter** E., **during** her **lifetime,** and her daughter S., and to her heirs after her, and if S. die before the age of maturity and without issue then to the children of his son, with power in the executor to sell the property, *held*, that S. having arrived at maturity, and having children, is **entitled to** the **whole estate** after the death of E. and that E. and S. **may elect to take** the **land** and so prevent the executor from selling it; and if S. cannot elect by reason of being a **married woman** and under disability, a court of equity can give the necessary aid to protect her interests.

(Filed —— —1886.)

BILL for an injunction to restrain a sale by an executor. *Decree for complainants.*

The case is stated in the opinion.

Mr. **John W. Taylor,** for complainants.

Mr. **Robert McCarter,** for defendants.

Bird, *V. C.*, filed the following opinion:

James Tomkins died, leaving a will. He gave to his grandson, James S. Howell, his farm, lying in the County of Morris, his horses, cattle and farming utensils, on condition that he should secure and provide a comfortable maintenance and support for Eliza, the daughter of the testator and mother of James, and to Sarah, a granddaughter of testator and a sister of James. He also gave to James all the furniture in his house on said farm:

"To him and his heirs forever * * * Which I give and bequeath to him, my said grandson, in trust, for the use of his mother during her lifetime, and to his sister, Sarah Jane Howell, during her minority."

He also gave him a bond and mortgage for $1,300, directing the interest to be appropriated for the use and support of his said daughter and granddaughter. He then says:

"And when my grandson, James S. Howell, shall arrive at the full age of twenty-one years he shall have full power and authority to sell and dispose of any or all of the above named real and personal estate devised and bequeathed to him, or any part or parcel thereof, by and with the consent of his mother, Eliza Howell. And in case my said grandson, James S. Howell, shall not survive his mother, Eliza Howell, then I do order that the aforesaid severally named bequests to the said James S. Howell shall revert back to my son, Floyd W. Tomkins, to be held in trust by him, in all respects, in the same manner and in the same use as was intended the same should have been done by James S. Howell, to wit: for the use and support of my said daughter, Eliza, and Sarah Jane, her daughter, and to her heirs after her. But if the said Sarah Jane die before she arrives at the age of maturity, and without issue, then it is my will, and I do order, that the said legacies in trust be equally divided between the surviving children of my son, Floyd W. Tomkins, share and share alike."

He named Floyd W. Tomkins sole executor. The will bore date March 31, 1855. On February 14, 1859, he made a codicil, in which he revoked the provision requiring the consent of his mother to the sale of the real and personal estate, and said:

"And do hereby order and direct the same to be sold, by and with the consent of my executors, if they think proper."

And concluded the codicil thus:

"Lastly. And whereas, my grandchild, James S. Howell, has arrived at full age since my making my last will and testament, I hereby constitute and appoint the said James S. Howell coexecutor, jointly and together with my son, Floyd W. Tomkins, as named in my last will and testament."

James S. Howell died in April, 1866. The said Sarah Jane has arrived at the age of maturity, has been married eleven years, and has two children. The said Eliza, since the death of her husband, has occupied the said farm and enjoyed the rents and profits, and desires to continue so to do during her natural life. Both Eliza and Sarah Jane, the mother and daughter, claim to be the beneficial owners of the rents and profits of said farm, and consequently of the right to the possession thereof during the lifetime of the said Eliza; and the said Sarah Jane claims that having arrived at the age of maturity under the law, the fee of the said farm is vested in her absolutely. And if this be not so in strict law, they have the right of election and, in the exercise of that right, to continue to take the rents and profits, or to take the land absolutely, discharged of the trust named in the will.

Such right they claim to have exercised, and insist that this court shall declare and give effect to that right by decreeing that they are not only entitled to the rents and profits, during the lifetime of Eliza, but to the actual possession and control of the said farm without the interference of the said executor, and that at the death of the said Eliza, the said Sarah Jane, her heirs and assigns, will be entitled to the fee.

The determination of this question has been precipitated by the desire of the executor to sell the farm, to restrain which a preliminary injunction was granted.

Should this injunction be made perpetual? The bill might have been so framed as to have obtained the aid of the court in preventing a sale, upon the ground that it would be more beneficial to the *cestuis que trust* to possess and enjoy the farm, and the rents and profits, than to receive the interest of the consideration money in case of the sale. But the bill is not so framed. Its construction is such as to go to the root of the matter, and to warrant the court in putting such an interpretation upon the will as will determine the rights of the parties thereunder. With this in view, the question arising was discussed before me.

The defendant insists that the title is vested in Floyd W. Tomkins, and that he is entitled to the whole estate, subject only to the trusts imposed during the lifetime of said Eliza and Sarah Jane. This I think is a forced construction, and not in accordance with the meaning of the testator. It seems to me that in one event, that is, the death of Sarah Jane before maturity and without issue, the said estate would have passed, not to Floyd W. Tomkins, but to his children; but in the event of Sarah Jane arriving at the age of maturity or having issue before her death, she was entitled to the whole estate after the death of her mother. And this clause, it seems to me, justifies such construction, viz:

"And in case my said grandson, James S. Howell, shall not survive his mother, Eliza Howell, then I do order that the aforesaid severally named bequests to the said James S. Howell shall revert back to my son, Floyd W. Tomkins, to be held in trust by him, to be appropriated, in all respects, in the same manner and for the same use as was intended the same should have been done by James S. Howell, to wit: for the use and support of my said daughter, Eliza, and Sarah Jane, her daughter, and to her heirs after her. But if the said Sarah Jane die before she arrives at the age of maturity and without issue, then it is my will and I do order that the said legacies in trust be equally divided between the surviving children of my son, Floyd W. Tomkins, share and share alike."

I can only read this as saying that in case James S. Howell did not survive his mother, then the testator gave and devised the said farm to his son, Floyd W., to be by him held in trust for Eliza and Sarah Jane, during the lifetime of Eliza, and, after the death of Eliza, for Sarah Jane absolutely, in case she arrived at the age of maturity. Certain it is that in case Sarah Jane should have died before arriving at that age, the whole estate was given absolutely to the surviving children of the testator's son Floyd W. It was absolutely given; there was nothing left of it to be disposed of; nothing for the executor or trustee as such, and nothing for the son, Floyd W. These are the last expressions of the testator upon the subject; and they are clear and distinct and, though not in all respects technical, seem to convey an unmistakable intent.

But it is said that the fee did not and cannot pass under this will, except by the act and co-operation of the executor to whom the fee is devised, with the power and authority to appropriate the rents and profits to the use of Eliza and Sarah Jane. It is insisted that the application of the doctrine arising under the Statute of Uses cannot be called in to aid the complainants. Speaking with reference to general principles this is true. If there is any active duty imposed upon the devisee of the legal estate in carrying out the purposes of the devise in favor of the *cestui que use*, which requires him to be vested with the legal estate, it becomes a trust to her, and the *cestui que use* is, in modern language, a *cestui que trust*, the legal seisin and the estate vesting in the trustee. 2 Washb. Real Prop. 434; 2 Jarm. Wills, 148.

Whether the present case is within this rule or not, I need not now determine. Its being a devise and not a conveyance by deed does not prevent the operation of the statute. 2 Washb. Real Prop. 433; 1 Greenl. Cruise, 386; *Hance* v. *West*, 3 Vroom, 233.

But to proceed to more certain ground: it also insisted that the title is so placed by the peculiar phraseology of the will as to bar the complainants from every right under the doctrine of election. In other words: it is said that the complainants have no such interest in this land under the will as entitles them to say they will take the land itself, out of which the proposed legacies are to be raised by sale, rather than the legacies themselves. Since I have concluded that the whole estate or interest in the land passes to Sarah Jane after her mother's death, it is not necessary for me to decide the interesting question whether the complainants could elect to take the land during their lives and so resist effectually a sale, or not, during that period. Can the complainants take the land and so prevent the executor from selling it at any time is, I think, the question in this case.

In my judgment this question should be answered in the affirmative. The right to elect, when a proper case arises, is not questioned. *Fletcher* v. *Ashburner*, 1 White & T. Lead. Cas. Eq. Part 2, p. 1118; *Fluke* v. *Fluke*, 1 C. E. Green, 480; *Current* v. *Current*, 3 Stock. 186; *Scudder* v. *Stout*, 2 Stock. 377; *Craig* v. *Leslie*, 3 Wheat. 563 [16 U. S. bk. 4, L. ed. 460].

But it is virtually claimed that the right of election, in all cases, springs from the doctrine of equitable conversion, and that there can be no election here because there has been no equitable conversion. This contention is made upon what seems to be a well settled rule: that there is no equitable conversion in such cases, unless the order or direction to sell, and thereby convert, be inoperative or out and out, which has not been done by the testator in this instance, he only having ordered the sale to be made by and with the consent of the executors "if they think proper."

I recognize this doctrine in all its length and breadth. The heir at law can claim its protection. A devisee would perhaps enjoy the benefit of it over and above a legatee. But I can find no case in which the court has allowed the person to whom the land has been devised in trust, for the use and benefit of others, with a power of sale for their benefit, to defeat the right of election, because the doctrine of equitable conversion could not be applied. It would be a strange doctrine to hold, in such case, that the legatee could not take the land. If such be the law, then, in every case like the present, the trustee can defeat the plainest intentions of the testator. This case affords an apt illustration of the severity, if not the absurdity of the rule sought to be applied. For example: had Sarah Jane died before reaching the age of maturity or without issue, this trustee could have prevented a distribution of the estate among his own children, by saying that they were only entitled to the proceeds of the sale, and that there could be no sale unless he saw fit to make it, and that he did not see fit to make it.

But the executor sees fit to sell. He sees fit to convert. Now, therefore, if he be allowed to sell and to convert, who is entitled to the proceeds? Eliza and Sarah Jane are entitled during the life of Eliza, and Sarah Jane to the fund upon the death of Eliza. It seems clear to me that in such case the rule which allows a legatee to take the land instead of the money arising from the sale applies. It is said that, since the legatee, if she desires the land, can take the money and buy the land, the courts will not oblige her to pursue that useless and expensive form, but will give her the land at once. This, I think, is a most reasonable and commendable rule. I conclude that it should be applied to this case.

Again; it is urged by way of objection that the legatee is a married woman and cannot elect. I cannot understand why she cannot accept what the testator gives; but if she be under any such disability, in my judgment, a court of equity can, when called upon, give the necessary aid and protect her interests.

I think the complainants are entitled to the relief sought for by their bill, and will so advise.

Joseph W. BALLENTINE, Trustee,
v.
John B. WOOD *et al.*

1. It was agreed, upon a **trustee's** third accounting, that he should receive 5 per cent **commission** on the gross receipts of the estate, and that this agreement should be retroactive so as to cover his second accounting. *Held*, that as the agreement did not apply to the trustee's first accounting, it was improper to allow him 3 per cent additional commission upon income upon which he had been allowed 2 per cent commission in his first account.

2. *Held*, in construing a will, that by the

expression "the **moneys arising from** the sales of my **real estate,"** although broad enough to include proceeds of land specifically devised, the testator **referred** only **to** lands constituting the **residue** of his real estate.

3. *Held also*, that in a clause providing that after the death of all of testator's children (during whose lives the property was devised in trust) the residue of his real estate should "go and descend * * * to the respective right heirs of my said children in fee simple, to hold as tenants in common and not as joint tenants,"—the words **"right heirs" meant "children,"** and that the **words "and descend"** were superfluous or equivalent to "go down," and were **not** used to **express descent in** the **legal sense**, but devolution by force of the devise; and that the gift in remainder and the life estate vested at the same moment.
4. *Held also*, that the **grandchildren** of testator who were alive at his death **took** a **vested title** to the remainder at his death by independent gift, their estate being, however, subject to the liability to open and let in grandchildren born subsequently.

(Decided April 30, 1887.)

BILL for relief. On exceptions to master's report and applications for instructions as to distribution of money in the hands of Trustee.

The case is stated in the opinion.

Mr. **J. Aug. Fay Jr.,** for complainant.

Mr. **H. C. Pitney,** for Helen B. Wood.

Mr. **W. L. Dayton,** for John B. Wood and others:

The language of the will is that the income shall be paid "to my children or their lawful issue," and, as to moneys in hand, "to the respective right heirs of my said children, the child or children of each deceased child taking the part or share which the parent would be entitled to."

Under such a devise the son's widow cannot, as such, nor can she as legal representative, take any interest in the estate.

A widow is neither an heir, nor next of kin.

Schouler, Wills, § 542.

On a devise of personalty in trust for life, with remainder over to children and their lawful heirs, it has been held to go neither to next of kin nor to the legal representative, but to the heir at law.

Smith v. *Butcher*, L. R. 10 Ch. Div. 113; 2 Jarm. Wills, 614.

The moneys and securities belonging to the specific trust in hand at its close were, "from and after" the death of the last surviving life tenant, "to be paid over, delivered and transferred to the respective right heirs of my said children; the child or children of each deceased child taking the part or share which the parent would be entitled to."

This last provision must necessarily be read "surviving" children, etc. taking the part or share of the parent. Moneys and securities cannot be "paid over, delivered and transferred" to the dead.

Remainders so devised are contingent and not vested.

See *Slack* v. *Bird*, 8 C. E. Green, 238; *Van Tilburgh* v. *Hollinshead*, 1 McCart. 32.

In construing the same will in another case this court has already held that the grandchildren of testator's children took their share of the rents and profits under the provisions of the will, which directed that children should take the parent's share.

Ballentine v. *DeCamp*, 12 Stew. Eq. 87.

Mr. **A. Flanders,** for John De Camp and others:

The intention of the testator controls.

1 Jarm. Wills, p. 33; *Wright* v. *Brotherton*, 2 Rawle, 133, 134; *Bowlly* v. *Lamont*, 3 Harr. & J. (Md.) 4; *Provost* v. *Provost*, 12 C. E. Green, 296.

The legal title to testator's land was vested in the trustees.

Zabriskie v. *Morris & Essex R. R. Co.* 6 Stew. Eq. 22.

The law favors immediate vesting.

2 Jarm. Wills, p. 406.

Title vested immediately.

Thomas v. *Anderson*, 6 C. E. Green, 22.

Remainder will vest.

2 Jarm. Wills, p. 409; *Demarest* v. *Hopper*, 2 Zab. 599; *Abrahams* v. *English*, 2 Harrison (N. J.) 281; *Heater* v. *Van Auken*, 1 McCart. 160.

A gift of the income from personal estate without limit as to time is equivalent to a gift of the principal, and the rule applies whether the income be given directly or through the intervention of trustees.

Hawkins, Wills, 123; *Gulick* v. *Gulick*, 12 C. E. Green, 498.

A devise of the rents and profits or income of land is equivalent to a devise of the land itself.

Hawk. Wills, 120; *Manners* v. *Manners*, Spencer, 142.

That the residue is ordered to be sold to pay debts will not change the status.

Detwiller v. *Hartman*, 10 Stew. Eq. 348.

The minor children inherit by virtue of the statute.

Ballentine v. *DeCamp*, 12 Stew. Eq. 87; *Demarest* v. *Hopper*, 2 Zab. 612.

The answering defendant is estopped by the acts of her husband.

Story, Eq. Jur. § 1539.

The remainderman may acquiesce.

Perry, Trusts, § 467, p. 568.

Who are bound by estoppels? Privies or those who derive title from or through the parties ordinarily stand in the same position as the parties and will be bound by every estoppel that could have been binding on them.

Wait, Act. & Def. p. 680; *Carver* v. *Jackson*, 4 Pet. 1 (29 U. S. bk. 7, L. ed. 761).

Runyon, *Chancellor*, delivered the following opinion:

Two objections are presented under the exceptions to the master's report: one is that the master has reported an allowance of commissions to the complainant, and the other is as to the amount of such allowance.

It was proper and necessary to establish the amount of commissions in taking the account of the Trustee, in order that distribution might be ordered.

The master has allowed the Trustee 3 per cent additional commissions upon $35,194.95 of income, upon which the Trustee in his first account was allowed 2 per cent commissions. I see no reason for making this extra allowance. In his intermediate account, filed in 1877, to which the master refers as the first intermediate account, the orphans' court fixed the Trustee's commissions upon the income received up to that time. The agreement made by the exceptants in 1880, that the Trustee should receive 5 per cent commissions on the gross receipts of the estate, provided that he should not receive more than $500 in any year or in a greater proportion for any part of a year, expressly provided also that it should be retroactive, so that the sum to be allowed to the Trustee upon his second accounting should be determined on the basis thereof, but that it should have no other retroactive effect. The master has applied it to the first accounting. Therefore, so far as the exceptants are concerned, the award of commissions upon the $35,194.95 is unlawful. The agreement upon the same subject made by other persons interested in the estate covered the whole period from the beginning of the Trustee's administration. The exception must be allowed.

A question was presented upon the argument (but not under the exceptions) as to the right of Mrs. Helen B. Wood to participate in the distribution of the moneys in the hands of the Trustee.

James Wood, deceased, by his will devised to his executors, as trustees, certain specified lands in trust to permit his wife to occupy for life, or so long as she should remain his widow, certain parts of that property, to lease the rest (and after her death or remarriage to lease it all), and after deducting the necessary expenses of repairs, improvements and insurance, to pay over the net proceeds arising from the rents to his wife so long as she should remain his widow, and his five children, William N., Sarah Ann, Jane Elizabeth, Theodore T. and Laura Louisa, share and share alike, and, after the death or marriage of his wife, to pay over such net proceeds arising from the rents to his before mentioned five children in equal shares; and in case of the death of any one or more of his children without leaving lawful issue, then to pay over the share or shares of such deceased child or children to his, the testator's, surviving child or children, in equal parts or shares; and in case of the death of any of his children, leaving lawful issue, then to pay over his or her share to and among said issue in equal parts or shares.

The testator gave power to the executors at their discretion to sell parts of the property, and provided that in case of sale the proceeds of sale should be invested, and that the interest should be paid over to and among his children or their lawful issue, as directed in regard to the rents and profits of the property.

He then provided that from and after the death of all his children the trust thereby created should cease and determine, and that the several tracts or parcels of land and premises therein before mentioned and described (except so much thereof as might be sold by the executors) should go and descend, freed and discharged from all trusts whatever, to the respective right heirs of his children in fee simple, to hold as tenants in common and not as joint tenants; it being always understood that the child or children of any of his deceased children should take the part or share of the trust estate that the parent would have taken had the testator died intestate, and that in like manner all the moneys which the trustees or the survivors or survivor of them or the heirs of the survivor of them may then have on hand, together with all securities for money, be paid over, delivered or transferred to the respective right heirs of his, the testator's, before mentioned children; the child or children of each deceased child taking the part or share to which the parent would be entitled.

The will contains a residuary clause disposing of the residue of the testator's real estate; but that provision was revoked by a codicil by which the testator gave and devised the residue of his real estate to his executors and to the survivors and survivor of them, and to the heirs of the survivor, in trust to sell such residue at discretion or to mortgage it to pay his debts; and he provided that the moneys arising from sale or which might be borrowed on mortgage, together with the moneys due him on bonds, notes, books of account, stocks or otherwise, or so much thereof as might be necessary for the purpose, should be appropriated to the payment of his debts and the expenses incident to the settlement of his estate; and he directed that the residue thereof should be invested, and the dividends or interest thereof be paid over and divided to and among his five children; and that whenever, in the opinion of his executors or a majority of them, any of his children should require more than his or her share of the interest or dividends for his or her comfortable support and maintenance, his executors or a majority of them might pay over and deliver to such child or children a part or the whole of his or her one fifth part or other proportion of the principal moneys or other property constituting such residue; and that at the death of any of his children his or her part or share in such residue of the testator's estate be paid over to his or her child or children; and that if any of his children should die leaving no lawful issue, his or her part or share in the residue be paid to the testator's surviving child or children, and to the child or children of such of the testator's children as should have died leaving children; it being always understood that the child or children are to take the part or share which their parent would have taken if living.

The testator's wife died in his lifetime. His children all survived him. The children are all dead. Two of the daughters died childless. Theodore T. Wood, one of the children of Theodore T. Wood, one of the testator's sons, survived his father but died in the lifetime of the last survivor of the testator's children without issue, leaving a widow, Helen B. Wood, to whom by his will he gave all his property. She claims to be entitled to an equal share with the children of her father-in-law who survived him. If the interest of her husband in the estate of his grandfather, the testator, was a vested interest, she is, as her husband's universal legatee and devisee, entitled to it. It is urged by her counsel that the above quoted provision of the codicil as to the moneys arising from the sale of the testator's real estate includes in its terms and was intended by the testator to embrace the proceeds of the sale of the real estate specifically devised as well as the proceeds of that which may be termed the residuary real estate. But it is quite clear that such a construction is inadmissible.

By the clause of the will by which the testator disposed of the residuary real estate he provided that his executors should sell that property, and that out of the proceeds of sale and the moneys due him upon bonds, notes, books of account, stocks or otherwise, his debts and the expenses of settling his estate should be paid; and he then disposed of the residue of those proceeds. By the before mentioned codicil he revoked that devise, and gave the property to his executors, in trust, to sell it or to raise money upon it by mortgage to pay his debts; and he then directed that the moneys arising from the sales of his real estate and which his executors might borrow on mortgage, together with the moneys due him on bonds, notes, books of account, stocks or otherwise, or so much thereof as should be necessary for the purpose, be appropriated by his executors to the payment of his debts and the expenses incident to the settlement of his estate; and he directed that the residue be invested and that the dividends or the interest thereof be paid over and divided to and among his five children; and that at the death of any of his children his or her part or share in such residue of his, the testator's, estate, be paid over to his or her (the decedent's) child or children, etc.

Although in the provision just quoted the testator gives direction as to the disposition of the proceeds of his real estate, and the language used by him, "the moneys arising from the sales of my real estate" is broad enough to include the proceeds of the sales of the land specifically devised, yet it is apparent from the context that he had in mind and referred only to the lands constituting the residue of his real estate. The claim of Mrs. Wood depends upon the construction to be given to the provision of the clause of the will by which the lands specifically devised and the proceeds thereof are disposed of after the death of the testator's children. That clause is as follows:

"And it is further my will that from and after the death of all my children, the trust hereby created shall cease and determine, and the several tracts or parcels of land and premises hereinbefore mentioned and described (except so much thereof as may be sold as aforesaid) shall go and descend, freed and discharged from all trusts whatever, to the respective right heirs of my said children, in fee simple, to hold as tenants in common and not as joint tenants; it being always understood that the child or children of any of my deceased children shall take the part or share of the said trust estate that the parent would have taken had I died intestate; and in like manner all the moneys which the said trustees or the survivors or survivor of them may then have on hand, together with all securities for money, be paid over, delivered or transferred to the respective right heirs of my said children; the child or children of each deceased child taking the part or share which the parent would be entitled to."

By the words "right heirs" in the clause the testator meant children, as is evident from the accompanying qualifying provision that the child or children of any of his deceased children shall take the part or share that the parent would have taken. At the death of the last survivor of the testator's children the trust is to cease, and the property, if unsold, or, if any shall have been sold, then so much as shall remain unsold and the proceeds of that part of it which shall have been sold, shall go to the testator's grandchildren.

The words "and descend" are merely superfluous. The word "descend" was used not to express descent in the legal sense, but devolution by force of the devise; and the use of it was probably due to the fact that while the gift for life was to parents, the gift in remainder was to children. It is as if the testator had said "go down" to the children. The gift in remainder and the life estate vested at the same moment. The grandchildren who were alive at the death of the testator took the title to the remainder at his death by independent gift; for while the gift in the first instance is to the trustees for the life of the longest liver of the testator's children, the subsequent provision is that at the death of the last survivor of the equitable life tenants the trust is to be at an end and the property is to go to the grandchildren. But the estate taken by the grandchildren at the testator's death was subject to the liability to open and let in grandchildren born subsequently. The amount of the interest in each stock of grandchildren would therefore not be fixed absolutely (except by the death of the parent life tenant) until the death of the last survivor of the life tenants. But subject to that liability to open it was vested at the death of the testator. Theodore T. Wood, Jr., therefore, at his death had a vested interest which was subject to a liability to be diminished in amount by the birth of other children of his father, but only subject to that liability. It is to be observed that the gift is to the children individually, and not as a class; for it is expressly made to them as tenants in common and not as joint tenants.

The cases which support the construction which I have put upon the provision under consideration are numerous. Among them may be mentioned: *Wintermute* v. *Snyder*, 2 Green, Ch. 490; *Howell* v. *Green*, 2 Vroom, 570; *Van Dyke* v. *Vanderpool*, 1 McCart. 193; *Feit* v. *Vanatte*, 6 C. E. Green, 84; *Beatty* v. *Montgomery*, 6 C. E. Green, 324; *Herbert* v. *Post*, 11 C. E. Green, 278, and *S. C.* 12 C. E. Green, 540.

The cases cited by the counsel of those who oppose Mrs. Wood's claim are not in point. They are: *Smith* v. *Butcher*, L. R. 10 Ch. Div. 113; *Van Tilburgh* v. *Hollinshead*, 1 McCart. 32, and *Slack* v. *Bird*, 8 C. E. Green, 238.

In *Smith* v. *Butcher* there was a gift of personalty in trust for the children of the testator's brother for life, with provision that on the death of either of them, his or her share of the principal should go to his or her "lawful heirs." The words "lawful heirs" were held to be used in their ordinary sense. There was nothing in the context to prevent or militate against such construction.

In *Van Tilburgh* v. *Hollinshead* the devise was to the testator's son, with provision that at his decease the property should go to his, the son's "surviving children according to law." It was held that the estate of the children was contingent upon their surviving their father; the rule being that where an interest is given to one for life and after his death to his surviving children, those only can take who are alive at the time the distribution takes place. *Slack* v. *Bird* was a similar case with a like decision.

TERHUNE
v.
BELL.

1. Where a **creditor's bill was filed** and the **complainant in this suit** was **appointed a receiver,** he **may file** his **bill for** the **collection of moneys** which **are held in trust for** the **debtor** in the original suit, making the person who holds the money defendant and charging her with the trust, **without first obtaining** another **judgment at law** and issuing execution thereon,—the complainant in the original suit, the creditor, having already obtained judgment and issued his execution.
2. It is no objection to such suit that the complainant has a **remedy at law;** he has a remedy **also in equity.**

(Filed April 23, 1887.)

MOTION to strike out bill. *Denied.*

The case is stated in the opinion.

Mr. **William Pintard,** for the motion.

Mr. **James Steen,** *contra.*

Bird, *V. C.*, filed the following conclusions:

A creditor's bill was filed in this court under the statute, and proceedings were thereunder taken for discovery. The complainant in this suit, now pending, was appointed a receiver. He files his bill for the collection of certain moneys which he claims are held in trust for the debtor in the original suit, making Grace Bell the person who, as he alleges, holds said money, defendant, and charging her with the trust.

Under the rules, motion is made to strike out the bill, *first*, because the complainant has a remedy at law; and, *second*, because the complainant shows no lien by execution, or otherwise on the money sought to be recovered.

As to the first point, however certain it may be (as contended for by the defendant) that the complainant has a remedy at law, it is equally certain, and I think beyond dispute, that he has a remedy also in equity. Certain it is that he is in this court in pursuit of the rights and credits of the debtor which it is impossible for him to reach at law, under our practice. The applicability of this rule will appear more fully in this case as we consider:

Second; whether the complainant, as receiver, should obtain another judgment at law and issue an execution thereon (the complainant in the original suit, the creditor, having already obtained judgment and issued his execution) before he can proceed in equity. The statement of the question suggests the answer. No such duplication of proceedings can possibly be required. The certainty of the complainant's demand has been once fixed by a judgment. It has been ascertained with such reasonable certainty that the defendant has moneys in trust that the court appointed a receiver to collect such moneys and to apply them to the payment of the judgment.

The bill by the receiver, now filed for that purpose, shows that the defendant in the original suit, the debtor, was at one time the owner of valuable real estate which he conveyed in such a manner and upon such consideration as to have secured unto himself, in the hands of the defendant, Grace Bell, a large sum of money, alleging that said Bell now holds such money for the benefit of the said defendant.

As to the points raised by the notice, the bill is well filed and is sufficient in its statements to sustain a decree in equity.

The motion is denied, with costs.

PREROGATIVE COURT.

Jacob H. DAWSON, Jr., *Appt.*,
v.
Theodore MACKNET *et al.*, Surviving Exrs., etc., *Respts.*

1. An **advancement** creates no debt to the person making it; and in all its features and in its very nature is **distinguishable from a debt** or indebtedness.
2. In the absence of evidence of intention on the part of the testator that the money was to be an advancement, bonds and **mortgages executed by a son to the testator,** to secure money received, **and notes indorsed and paid by** the **testator** for the accommodation of the son, are **evidence of debt** and **not** of **advancement.**

(Decided March 5, 1887.)

APPEAL from a decretal order of the Essex Orphans' Court. *Affirmed.*

The nature of the case, and the facts and questions raised, appear from the opinion.

Mr. **G. W. Hubbell,** for appellant.

Messrs. **J. W. Taylor** and **J. R. Emery,** for appellees:

The several claims of the testator, evidenced by bonds and mortgages of the appellant and the promissory notes are debts.

A debt is "a sum of money due by certain and express agreement, as by a bond for a determinate sum or bill or note."

3 Bl. Com. 154; Burrill, Law Dic. title, *Debt.*

The bonds and mortgages both recognize and characterize the sums of money secured thereby, as debts. The same is true with respect to the promissory notes. They were entered in appellant's bill book as debts or liabilities.

The debts bear interest, the bonds and mortgages on their face, by express terms, and the notes from their maturity.

An "advancement" is "money or property supplied by one person to another, who will be his heir or distributee, in anticipation of, and to be deducted from the share of the recipient in the donor's estate as *distinguished from a loan* made to be repaid in any event, or a gift which would benefit, in addition to the inheritance or distributive share.

Abbott, Law Dic. title, *Advancement*. See also Bouvier, Law Dic.; Burrill, Law Dic.

An advancement creates no debt to the person making it, and in all its features, and in its very nature is distinguishable from a debt or indebtedness.

Chase v. *Ewing*, 51 Barb. 597, 601; Wait, Act. & Def, 206, § 2.

An advancement is an irrevocable gift by a parent in his lifetime, to a child, on account of such child's share of the parent's estate. Where a father, on advancing a sum of money to a son, takes a bond for its repayment, with or without interest, it is a debt and not an advancement,

High's App, 21 Pa, 283, 287.

A note given by a son to a father is not of itself evidence of an advancement by the father. It is evidence of indebtedness by the son.

Batton v. *Allen*, 1 Halst. Ch. 99, 102.

Where money is lent or paid by a father, to or for a son, at the request of the latter, and an account is stated by the father and interest charged, such loan or payment is a debt and not an advancement.

Harris' App. 2 Grant, Cas. 304; 1 Wait, Act. & Def. p. 206, § 2.

In the leading case of *Kirk* v. *Eddowes*, 3 Hare, 516, Wigram, *V. C.*, says: "The questions I have to consider are two; first, as to what the second transaction (the alleged advancement) really was; and, secondly, as to the effect, if any, of the second transaction upon the first (the legacy). Where similar questions have arisen upon gifts given by two distinct instruments, the law as to the admissibility of parol evidence has, I believe, long since been settled. In such cases the rule of law applies, that written instruments cannot be added to or explained by parol evidence; and, therefore, unless the second instrument, in express terms or by presumption of law, adeems the gift made by the instrument of earlier date, no question can arise. Both instruments will take effect."

See also 1 Pom. Eq. Jur. §§ 569-572.

Runyon, *Ordinary*, delivered the following opinion :

Jacob H. Dawson, Sr., deceased, who died July 9, 1882, by his will, dated January 28, 1875, gave to the appellant, one of his sons, one eighth of the residue of his estate. On the first day of April, 1878, the appellant received from his father $10,000, and gave to him his bond and mortgage of that date for the amount, payable in one year with interest. The mortgage states that it was given to secure the payment of the appellant's bond to the testator, of even date with the mortgage, conditioned for the payment of $10,000, in one year, with interest.

After the death of the testator, the bond was not found among his papers; and the appellant, at the request of the executors, executed another one of the same description, tenor and terms, to supply its place. On the 21st of February, 1880, the appellant received from the testator the further sum of $8,000, for which he gave him his bond and mortgage of that date, payable in one year, with interest. On the 4th of October, 1881, he received from the testator the further sum of $2,200, for which he gave him his promissory note of that date, payable to the testator's order, on demand, for value received, at the maker's office, No. 363 Halsey Street, in Newark.

On the 13th of April, 1882, the testator indorsed for the accommodation of the appellant the note of the latter of that date for $5,000, at four months, payable to the order of the testator; and on the 12th of May following he indorsed another note of the appellant for the accommodation of the latter, of that date, for $5,000, at four months, payable to the order of the testator. Those two notes for $5,000 each were discounted by the National State Bank of Newark at the request of the appellant, who received and applied to his own use the proceeds thereof. The notes did not mature until after the death of the testator, and they were paid by his executors out of his estate.

The appellant paid interest upon the $10,000 bond and mortgage up to July 1, 1882, and on the other bond and mortgage up to February 21, 1882. He claims that these various instruments (the bonds and mortgages and notes, including those indorsed for his accommodation) were all advancements made to him by the testator, on account of his residuary share of the latter's estate, and were not intended to be evidence of indebtedness on his part, to the testator or to his estate.

The orphans' court decreed that the advance in question created debts from the appellant to the testator, and that the payment of the two $5,000 notes created a debt from the appellant to the testator's estate, and that any dividends of the estate that should become due to the appellant should be applied first to the payment of principal and interest upon the notes, and next to the principal and interest of the bonds and mortgages, and then to any other unsecured debt besides the notes, due from the appellant to the estate.

That the two $5,000 notes were not intended as advancements is clear. They were renewals of other notes, the originals of which were made by the testator for the accommodation of the appellant. The notes thus made or indorsed for the accommodation of the appellant, whether made by him or by the testator, were always entered in the appellant's books as notes payable by him. The notes in question, those which were unpaid at the testator's death, were not made by the testator, but were merely indorsed by him; and his liability thereon was a merely contingent liability. The notes, as already stated, did not mature until after his death, and they were then paid by his executors. There is no evidence showing or tending to show that the testator gave the indorsements on acount of the appellant's interest in his estate.

And so too in regard to the note for $2,200. So far as appears it was given to secure a loan of so much money from the testator to the appellant, and the money was advanced without any reference to the residuary legacy.

The bonds and mortgages were made and taken, as was the note just mentioned, precisely as they would have been made and taken had the advances of money, the payment of which they purport to secure, been made by the testator with the full intention of requiring and enforcing, if necessary, the payment thereof, as a loan strictly, and with no intention to make an advancement. An advancement creates no debt to the person making it; and in all its features and in its very nature it is distinguishable from a debt or indebtedness. Per Johnson, *J.*, in *Chase* v. *Ewing*, 51 Barb. 597.

In the absence of evidence of intention on the part of the testator that the money was to be an advancement the bonds and mortgages and notes are evidence of debt and not of advancement. *Speer* v. *Speer*, 1 McCart. 240; *Batton* v. *Allen*, 1 Halst. Ch. 99; *Bruce* v. *Griscom*, 9 Hun (N. Y.), 280; *High's App.* 21 Pa. 283.

The case of *Wanmaker* v. *Van Buskirk*, Saxt. 685, in which it was held that there was an advancement, although a bond for the repayment of the money was given, was (as was said in *Batton* v. *Allen*) decided upon the peculiar circumstances of the case.

But to consider the testimony which is claimed to be evidence of advancement: there is no evidence at all that the $2,200 was given as an advancement; and the evidence that the testator intended to advance to the appellant, on account of his residuary legacy, the money for which he took the bonds and mortgages is not convincing. It is as follows:

McDonald, who was the appellant's bookkeeper up to November, 1884, says he has heard the testator "say in so many words, a number of times, that it was merely done—he did not keep any records himself, and wanted them to appear among his papers, and that at his, the testator's death, they (the mortgages) would be the appellant's; that at his, the testator's death, the interest would stop, that the appellant would have no more interest to pay." He says that he remembers that on one occasion the testator said that in forty-eight hours after he would be under the ground, the appellant would have $50,000 coming to him, and would have no interest to pay; and that on an occasion when the appellant, objecting to pay the interest, said that it was "eating him out of house and home," the testator said, "As soon as I am gone, your interest will stop."

Mr. Hixson, who was a creditor of the appellant, testifies that the testator said that the mortgages would never bother the appellant, that they would not have to be paid, but that the appellant must pay him interest so long as he, the testator, should live, but that he did not expect him to pay him the mortgages. Hixson says he is not sure that the testator used the word "pay;" but he says he gave him, Hixson, to understand that the mortgages were not likely to trouble the appellant. He further says that on another occasion when the appellant asked the testator to give up the mortgages to him and take from him an agreement to pay the interest, the testator declined, saying that it did not make any difference about the mortgages, that all the appellant had to do was "to pay him the interest so long as he (the testator) should live, and when he was gone it would stop and the mortgage is paid." David A. Hall says that the testator said to him that the mortgages did not amount to anything to the appellant, that they were merely memoranda that he, the testator, retained against the appellant, and that at his, the testator's, death, "it would wipe the thing out," or something to that effect.

In all this there is no evidence of advancement, but on the contrary the testimony shows that the testator regarded the mortgages as valid claims against the appellant not only for the interest, but for the principal also. When the appellant proposed to him, in the presence of Hixson, to give up the mortgages and take an agreement instead thereof for the payment of interest only, he refused. What he meant by what he said was that the appellant, at his, the testator's, death would be enabled to pay the mortgages off out of his share of the estate, which share it seems the testator estimated at $50,000; but he manifestly intended to hold a claim, for the money for which the mortgages were given, upon the appellant and the mortgaged premises so long as he lived. Had there been occasion, or had he been inclined to do so, he might have collected the money, and of course might have made such disposition of it as he saw fit. It is quite clear that he did not intend to part with his property in it so long as he lived, and indeed he never did part with it, but held it up to the time of his death. The fact that he referred to the gift which he had made to the appellant in his will (the gift of a share of his residuary estate) as a means of paying off the mortgage, did not make the transactions under consideration an advancement. Had the testator brought an action upon the bonds or suit for foreclosure upon the mortgages, the appellant could not have defended himself therein by the claim now made. The statements of the testator now relied upon would not have been admissible.

The order appealed from will be affirmed, with costs.

Samuel B. PICKEL *et al.*, Exrs., *Appts.*,
v.
Mary Ann ALPAUGH *et al.*, *Respts.*

The **orphans' court** has full **power** and authority **to** hear and **determine** all controversies respecting the **fairness of inventories;** and one method of questioning the fairness of an inventory is by filing exceptions to it.

(Decided—— —1887.)

APPEAL from order of the Hunterdon Orphans' Court. *Affirmed.*

The case is stated in the opinion.

Messrs. **E. P. Conkling** and **J. F. Dumont,** for appellants.

Messrs. **J. N. Voorhees** and **W. A. Cotter,** for respondents.

Runyon, *Ordinary*, delivered the following opinion:

This appeal is from an order of the Orphans' Court of Hunterdon County, denying a motion to dismiss exceptions to the inventory, filed by legatees. The ground of the motion was that the exceptions were improvidently and illegally filed.

There is nothing in the record to support the objection. The orphans' court has full power and authority to hear and determine all controversies respecting the fairness of inventories; Orphans' Court Act, § 2; and one method of questioning the fairness of an inventory is by filing exceptions to it. *Dilts* v. *Stevenson*, 2 C. E. Green, 407.

The order will be affirmed, with costs.

Harlem G. CHAMBERLIN, Admr., etc.,
Appt.,
v.
Susie E. McDOWELL, *Respt.*

When an **executor out of** his **own money** has **paid preferred debts of** the **testator,** he is **entitled to be reimbursed** by subrogation **out** of the funds **of** the **estate in** the **hands of a subsequent administrator** of the estate appointed on his removal, to the extent to which these funds are available for that purpose, in preference to an unpreferred claim against the executor, the estate being insolvent.

(Decided—— —1887.)

APPEAL from a decree of the Orphans' Court of Hunterdon County, directing the payment of a claim against a decedent's estate. *Affirmed.*

The case is stated in the opinion.

Mr. **W. A. Cotter,** for appellant.

Mr. **C. A. Skillman,** for respondent.

Runyon, *Ordinary,* delivered the following opinion:

The orphans' court in this case directed the appellant, who is administrator *de bonis non cum testamento annexo* of John Sproat, deceased, to pay out of the balance in his hands (the estate is insolvent) certain money which was decreed to be due to the respondent, one of the executors (the executors were removed by order of the court) upon the passing of her account, and then to pay the rest upon a claim of Joseph Sproat, administrator of Elizabeth Sproat, deceased, against the executors upon a promissory note given by them to his intestate.

The court decreed that the respondent's debt was a preferred debt, and therefore entitled to priority in payment over the Elizabeth Sproat claim. The ground of preference appears to have been that the money was expended by the respondent out of her own funds in payment of preferred debts of the estate.

The money for which the note was given by the executors to Elizabeth Sproat was borrowed by them from her to pay debts of the estate of their testator. The appellant insists that the latter claim is entitled to preference in payment over that of the respondent.

The respondent, having paid preferred debts with her own money, was obviously entitled to be reimbursed by subrogation out of the funds of the estate in the hands of the appellant, to the extent to which those funds were available for the purpose. She had been removed, and the estate had been taken out of her hands. She, therefore, could not reimburse herself. The funds in the hands of the administrator were sufficient to repay her in full.

The claim of Elizabeth Sproat was and is a claim against the executors themselves personally. The court, probably in view of the purpose for which that money was borrowed, recognized it as a claim against the estate, entitled to preference over the other (unpreferred) debts. Whether the money was in fact used for that purpose does not appear. But the propriety of that preference is not in question.

It is said that the money went to increase the assets of the testator, but there is no evidence upon the subject. It does not appear in the respondent's account.

The decree will be affirmed, with costs.

John W. GRIGGS *et al.*, Trustees, etc.,
Appts.,
v.
Hefford SHAW *et al.*, *Respts.*

1. Where the **trust** is one **devolved upon** the **executors by** the **will, an error in** the executors' **account** may be **corrected by** the **orphans' court** in their subsequent accounts as trustees.
2. Where the **commissions** allowed the executors were too large, in an account which is not final, the fixing of the commissions being in the discretion of the court, it is competent for the court, without notice and *ex proprio motu*, to take such error in the allowance of commissions into account when fixing the commissions in a subsequent account.

(Decided —— — 1887.)

APPEAL from a decree of the Passaic Orphans' Court fixing the commissions of trustees on an accounting. *Affirmed.*

The case is stated in the opinion.

Messrs. **Barkalow, Pennington & Beam,** for appellants.

Mr. **Eugene Emley,** for respondents.

Runyon, *Ordinary,* delivered the following opinion:

The accountants, trustees under the will of John Shaw, deceased, appeal from so much of the decree of the Passaic Orphans' Court upon the allowance of a partial account filed by them in 1886, as fixes their commissions at the sum of $10. The period covered by the account is one year from March 31, 1885.

By the account it appears that the accountants received during that time, $7,117.70 of rents, interest and dividends, and $36,958.48 from the sale of real estate; altogether $44,076.18.

No reason appears upon the face of the proceedings for the allowance of so small an amount of commissions. It is suggested, however, that the reason may have been that the accountants, who were executors of Shaw as well as trustees under his will, were allowed in what purported to be their final account as executors, passed in 1882, too large commissions, and that the orphans' court may have undertaken to correct such error if it existed by the small allowance made in the account under consideration.

The orphans' court had a right to correct such errors, if any there were, unless prevented by the fact that the account of 1882 was the account of the appellants as executors, while the account of 1886 was their account as trustees. The will is not before me, but I perceive that the partial account of the appellants of 1884, covering their transactions for a year from March 31, 1883, is stated to be their account as "executors and trustees" of the testator, although what purported to be their final account as executors was settled in 1882.

The subsequent accounts, however, are filed as their accounts as trustees merely, and not as executors. But it appears from the statements and arguments of the counsel that the trust was one devolved upon the executors by the will. There is, therefore, such a connection between the accounts that any error in the executors' account of 1882 might be corrected by the orphans' court in their subsequent accounts as trustees. It is urged upon the part of the appellants that if the reason suggested for the making of so small an allowance of commissions was the true reason therefor, they had no previous notice, either by exceptions or otherwise, that the court would be called upon to refuse to allow the usual commissions upon the account of 1886, in view of the fact that there was any error in their favor in the allowance of commissions in their account of 1882 as executors.

But the account of 1882 is not a final one, and the fixing of the commissions was in the discretion of the court, and it was quite competent for the court without notice and *ex proprio motu* to take any previous error in the allowance of commissions into account in fixing the commissions on the account in question.

The suggestions as to the practice in *Jackson* v. *Reynolds*, 12 Stew. Eq. 313, are in reference to the fixing of commissions upon a final account, where an excessive allowance had been made upon passing the intermediate account or accounts.

As the record stands, the decree must be affirmed.

James MILLER, *Appt.*,
v.
Francis C. VAN DYK, *Respt.*

Held, **on the facts, that** a decree admitting to probate a will made by a woman about seventy-seven years of age, whereby she disposed of her property differently than she had done in a former will, should be affirmed—it appearing that the **testatrix was of testamentary capacity, and free from undue influence.**

(Decided April, 1887.)

APPEAL from a decree of the Passaic Orphans' Court, in the matter of the propounding of the last will of Jane Miller, deceased, admitting the will to probate. *Affirmed.*

The case is stated in the opinion.

Messrs. **D. L. Bolton** and **J. W. Griggs,** for appellant.

Mr. **Frank E. Pellett,** for respondent:

The attestation clause to a will is *prima facie* evidence of the facts stated in it, and the instrument will not be rejected because the witnesses fail to remember the mode of the execution.

Mundy v. *Mundy*, 2 McCart. 290; *Allaire* v. *Allaire*, 8 Vroom, 312; *Re Alpaugh*, 8 C. E. Green, 507.

A will may be established without evidence of witnesses to it and without any attestation clause in case it is signed in the presence of a sufficient number of witnesses.

Bailey v. *Stiles*, 1 Green, Ch. 220–232.

When the evidence is doubtful the presumption is in favor of the attestation clause, and the burden of proof is on the contestants.

Tappan v. *Davidson*, 12 C. E. Green, 459.

The test of testamentary capacity.

The test which the law applies is a practical one. Was the testatrix, at the time of making the will, capable of discerning and feeling the ties of kindred and obligations of family and blood? Had she a mind to recollect the property she means to dispose of, the persons who are to be the objects of her bounty and the manner in which it is to be distributed among them?

Den v. *Vancleve*, 2 South. 589; *Stackhouse* v. *Horton*, 2 McCart. 202, 206; *Den d. Trumbull*, v. *Gibbon*, 2 Zab. 133, 134.

The time of the execution of the will is the material period to which the court must look to ascertain the state of the mind of the testator.

Whitenack v. *Stryker*, 1 Green, Ch. 8; 1 Jarm Wills, p. 75; *Chambers* v. *The Queen's Proctor*, 2 Curt. Eccl. 415.

If there is any doubt as to the sanity of the testatrix on the day of making the will, the benefit of the doubt ought to be in favor of the sanity of the testatrix.

Clark v. *Fisher*, 1 Paige, 171; 1 Jarm. Wills, p. 75, note.

The mistrust of and hostility to James Miller, if founded on reasonable grounds of believing that testatrix had been injured and wronged by him is no ground for setting aside the will.

Stackhouse v. *Horton*, 2 McCart. 228.

It is a well established principle of law that all influence on the part of the devisee in his or her favor is not undue influence. The influence of affection, of kind offices, of fair argument or urging upon one person the propriety of providing for the helpless or even of persuasion does not invalidate a will, otherwise the very motive of the testator's benevolence would make void the gift.

Den d. Trumbull, v. *Gibbon*, 2 Zab. 117, 136; *Re Gleespin*, 11 C. E. Green, 523.

The influence which the law denounces as undue influence over a testator, must be such as to destroy his free agency and amount to moral or physical coercion; it must be proved moreover that the act done was the result of such coercion; there must be a control exercised over the mind of the testator or an importunity practiced which he could not resist, or to which he yielded for the sake of peace.

Den d. Trumbull, v. *Gibbon*, 2 Zab. 136. See also *Lynch* v. *Clements*, 9 C. E. Green, 431; *Barker* v. *Barker*, 9 Stew. Eq. 259; *Chandler* v. *Ferris*, 1 Harrington (Del.), 454–456; 1 Redf.

Wills, p. 521, 523; *Kitchell* v. *Beach*, 8 Stew. Eq. 455.

Mr. **T. M. Moore**, also for respondent.

Runyon, *Ordinary*, delivered the following opinion:

Jane Miller, widow, late of Paterson, died in that place, October 11, 1885, at the age of about eighty years. Her husband died December 30, 1876. Her property consisted of her household furniture and wearing apparel, about $1,500 due her from a savings bank, and a lot of land upon which were two houses on Passaic Street in Paterson. That property was worth $4,000 or $5,000. She supposed that she owned a vacant lot on Sheridan Avenue on Totowa Hill in Paterson, but her title to it has proved invalid.

At her death she had five children, Mary Ann Tuttle of Morristown, Catharine Crocker and James Miller of Paterson, George Miller of Chicago and Matilda Dumas of Northampton, Massachusetts. In 1879 she made a will by which she gave to James her black walnut bedroom set of furniture and her best bedding for the bed. All the remainder of her household furniture, and her clothing and all the rest of her personal estate she gave to her three daughters in equal shares. To George she gave only her love and best wishes, adding that she supposed that he was well situated as regards this world's goods without anything further from her estate. To James she gave the Passaic Street property and she devised the lot on Sheridan Avenue to Eugene Dumas, a minor son of her daughter Matilda, and appointed her son James his guardian to take care of that property for him, with power to sell it and invest the proceeds for his use.

She appointed James her executor. In the summer of 1882 she was living on the Passaic Street property. Matilda and James were living there with her. She was then managing her own business, collected (through James) her rents from her tenants, deposited her money in the savings bank, kept her bank book, etc. During that summer, while they were so living together, a rupture of their friendly relations occurred. She became offended at James and Matilda, and left the house and went to the house of her daughter Mrs. Crocker, where she stayed for about a week. She then, in company with Mrs. Crocker, returned to the house in Passaic Street; but James talked so violently to her that she declared that she was afraid of him and she went again to Mrs. Crocker's. In the latter part of July or early in August of that year she made a visit to her daughter, Mrs. Tuttle, at Morristown, and stayed there until some time in September, when James took her to Mrs. Crocker's in Paterson, where she remained until her death.

In the winter of 1882, and before the will in question was made, she came to the Passaic Street house where Mrs. Dumas was. Affectionate relations had been resumed between them. James found them there together (he says they had his trunk open and were pulling his clothing out of it) and violently and with curses ordered his mother to go away, back to Mrs. Crocker's, and stay there. She fled from the house. He appears to have cursed both of the women upon that occasion. On the 9th of December, 1882, the testatrix, with Mrs. Dumas, went to the office of the late Socrates Tuttle, a counselor at law of high standing in Paterson, and he then, at her request, drew for her another will; and he and his son, who also was a lawyer, witnessed her execution of it.

By it she gave $500 to her before mentioned grandson Eugene, and then gave $300 to each of her five children by name. She then empowered her executor to sell the Passaic Street property, either at public or private sale, for the best price he could obtain for it, and ordered that the proceeds of the sale, together with the residue of her money if any, be divided into six equal shares, one of which she gave to Eugene, and one to each of her children. She then gave to James her best bedroom set, and gave her wearing apparel (except her broché shawl, which she gave to her daughter Mrs. Tuttle), to her three daughters. She then gave the lot upon Sheridan Avenue to Eugene, and provided that in case of deficiency all the legacies should abate proportionately, except the legacy to him, which should not abate all all. She appointed Francis C. Van Dyk, of Paterson, executor.

Soon after her death, James filed in the Passaic Surrogate's Office a *caveat* against admitting to probate any paper purporting to be her will, until examination and decree thereon. After a full trial and investigation the orphans' court made a decree admitting the will of 1882 to probate. From that decree the *caveator* appealed to this court.

The will in question was executed with all due legal formalities. Mr. Tuttle was dead when the trial in the orphans' court took place, and his son, the other witness to the instrument, could remember nothing whatever of the transaction. He proved the signatures of his father and himself, however, to the certificate of attestation, which certifies to all the legal requisites of execution. The certificate is *prima facie* evidence of the facts stated in it.

Mrs. Dumas, who was present at the execution of the will, testifies to what she remembers of the proceedings. Her testimony corroborates the statements of the certificate; and there is no evidence impeaching them.

The preponderance of evidence is in favor of testamentary capacity of the testatrix, at the time of executing the will. She was indeed about seventy-seven years old then, and was afflicted with nervous palsy, and at times she was subject to delusions; but it appears affirmatively that when the will was made she not only knew what the business was in which she was engaged, what her property was and who had claims upon her bounty or consideration, but she had a long cherished object in making the will, which she declared and which she said bore heavily upon her mind, and that was to make a better provision for her grandson Eugene, before mentioned and for whom she made some provision in the will of 1879, by giving him the lot upon Sheridan Avenue. He was a deformed child incapable (to a very great degree at least) of earning a living.

It appears from the testimony of her pastor, Rev. Dr. Magie, that she frequently spoke of the necessity of changing her will in order to make better provision for Eugene. He says that on the day she made the will, of 1882, she called upon him and told him that she had been in great anexiety in regard to that child and that she could not rest quietly until she had made a special provision for him, and that she had been to Mr. Tuttle's office and had executed a will by which she had made such provision.

Dr. Marsh, her physician, testifies that she called upon him (it was on the same day) and that he had quite a long conversation with her; that she spoke of having made a will and with one particular object; that of making provision for her grandson Eugene because he had since his childhod had an infirmity and disease which had left him permanently crippled. It appears from the testimony of Mrs. Dumas that the testatrix gave the same reason to Mr. Tuttle for desiring to make a new will. She gave another also: that James, to whom she had given the Passaic Street property by the will of 1879, had grieved her by his subsequent treatment of her. Mrs. Dumas testifies that Mr. Tuttle satisfied himself of the testatrix's testamentary competency by conversing with her for the purpose before drawing the will.

On the same day on which the will was executed, and after it had been executed, the testatrix, at the suggestion of Mr. Tuttle, went to Dr. Magie and Dr. Marsh with a view of obtaining from them a certificate that in their opinion she had testamentary capacity. This she did because she apprehended that opposition would be made to the will, on the ground of her alleged incapacity. Dr. Magie says she appeared unusually bright and intelligent, and that he never heard her speak more intelligently than she did at that time. He was her pastor for about fourteen years. Dr. Marsh says that he saw no evidence that she was laboring under any delusion, that she appeared to know what she was doing, that he talked with her about the provision she had made for Eugene, that he conversed with her upon some other matters at that time (in order to test her mind) and that he talked with her about the different members of her family; and he says her mind seemed perfectly clear but not very capacious; that her memory was not very capacious, although things seemed to be perfectly clear before her. He also says that she could not tell him the number of her children, whether there were four or five of them, nor where they were located, and that he saw no defect in her mind except a little want of clearness in that respect.

Mrs. Dumas testifies that the testatrix when questioned upon the subject by Mr Tuttle, with a view of drawing the will, gave the names and places of residence of her children. Indeed Mr. Tuttle and his son, by the act of signing the will as witnesses, certified that in their judgment the testatrix was possessed of testamentary capacity.

It would seem that the *caveator* himself did not then doubt her competency to dispose of her property. He says that before Christmas in 1882, his sister, Mrs. Crocker, with whom as already appears, the testatrix lived, said to him that she thought the latter had been to some lawyer's office and probably was making out some papers; and he says he asked the testatrix whether "she had lately been in any lawyer's office having anything to do with papers," and that she said she had not, and that he said: "If you have, there are the keys of your house and your bank book. You pay me what I have spent upon the house, and then take your property and do as you like with it." Again; he says he asked her if she had been to Mr. Tuttle's office "making out any papers" and she said she "had not altered a paper."

From the letters of Mrs. Crocker to Mrs. Dumas, contained in the testimony of the former, written one in June and the other in October, 1884, it appears that even at that distance of time Mrs. Crocker did not consider the testatrix as of unsound mind. Mrs. Crocker says that the testatrix was pretty well on the day when Mrs. Dumas came to the house and took the testatrix out, which Mrs. Crooker supposed was the day on which the will was made; but according to Mrs. Dumas' testimony, it was a day or two before that time; so that, according to Mrs. Crocker, the testatrix was in good condition of body and mind about the time of making the will.

The testatrix concealed the fact that she had made a new will from James and Mrs. Crocker, because she thought (and it would seem correctly) they would be displeased with her if they knew it. It may be added that she apprehended (and it appears not without reason) that James contemplated placing her in a lunatic asylum, and she was dissatisfied with his conduct towards her in taking her away from her house in Passaic Street, where she might have lived with Mrs. Dumas, and compelling her to live at Mrs. Crocker's; and she was displeased with him, because of his harsh treatment of her, before referred to, and because he persisted in taking her business into his own hands against her will, collecting her rents and keeping her bank book, etc.

Nor does the evidence establish the fact of undue influence on the part of Mrs. Dumas. It appears, as before stated from the testimony of Dr. Magie, that the testatrix had it in contemplation for a long time before she made the will in question to change her testamentary disposition of her estate so as to make better provision for Eugene. Her feelings towards James had changed because of his treatment of her; and it was natural for her, under the circumstances, to revoke the disposition so largely in his favor (which she had made in the will of 1879) by which she gave to him alone the Passaic Street property.

By the last will she treats her children substantially alike, making only such slight discrimination as was reasonable and to be expected in favor of James as to the bedroom set and her daughters as to her wearing apparel. The reasons which led her to change the disposition as to James would of course lead her to appoint another person executor. She herself appointed the respondent whom she had long known as a member of the church to which she belonged. It may be added in this connection that before she went to Mr. Tuttle's office to have the will drawn she requested her neighbor Judge Sanderson to act as executor, but he declined. It may be added that the fact that the change in the disposition of her estate was largely due to her wish to provide for Eugene is evidenced by the provision contained in the will that in case of deficiency the legacies to others shall abate proportionately, but his shall not abate at all.

The orphans' court had the witnesses before it, and had the advantage of seeing them and of observing their manner in giving their testimony. They adjudged that the will was well executed, that the testatrix had testamentary capacity and that the will was not the product of fraud.

I see no ground for coming to a different conclusion. *The decree will be affirmed.* The *costs* of this litigation in both courts and a reasonable counsel fee to both sides, in both the orphans' court and this court, *should be paid out of the estate.*

COURT OF ERRORS AND APPEALS.

Charles E. ROGERS *et al.*, *Appts.*,
v.
Henry TRAPHAGEN, Admr., *Respt.*

Henry TRAPHAGEN, Admr., *Appt.*,
v.
Charles E. ROGERS, *Respt.*

1. The **functions of** the office of **administrator end after** his **final accounting** and the payment of the balance in his hands to the persons entitled thereto.
2. Guardians of infants are entitled to receive an infant's share. **Payment** by **a** trustee **to an infant,** without the sanction of the court, is irregular and the trustee may be compelled to pay again to the infant when he comes of age.
3. But in the absence of bad faith on the part of the **administrator** making the payment, he should be **allowed** the **benefit of all disbursements which would** clearly **have been sanctioned by a court of equity** had the administrator occupied the position of guardian.

(Decided —1886.)

CROSS APPEALS from a decree of an advisory master, on exceptions to a master's report of a balance due from an administrator on a bill for an account. *Affirmed.*

The facts appear from the opinion.

After hearing the exceptions to the master's report Joseph D. BEDLE, Esq., Advisory Master, filed the following conclusions:

I think the jurisdiction of the court of chancery to deal equitably with this case is clear, although no question is raised upon it. The claim of the complainants is subject to equitable adjustment and control.

The administrator has kept his accounts in such a way, and mingled the funds of the estate with his own in such manner, as to make the examination of the case very difficult; and for that reason he is entitled to no liberal consideration in a court of equity. Still, it is not the right of the complainants in any way that they should profit by his errors.

I detect no actual fraud in the management of the estate. The management has been loose, and, from a mistaken judgment, palpably so; yet in the settlement of the equities and the subjection of himself to proper liability the object of the court should be to do equity to these complainants, to give them what they are fully entitled to under the circumstances.

Although the management has been loose, yet in some respects I think it may be said that it is not unlikely that they will get more out of the estate than if the management had been better.

If there had been a guardian appointed for these minors, who were very young when their father died, and the expenses of the guardianship, and the disbursements of the moneys through the hands of a guardian, it is not unlikely that these complainants would have received less than they will receive now. The view I take of it is that they should not profit by the mistakes and looseness of management of the administrator, but that they should, by an equitable adjustment, be entitled fairly to what their interests require in this estate.

Now I will take up these exceptions: in regard to the first, second, seventh and eighth (these being the exceptions applicable to the two children and concerning the claim on the part of the administrator for board after the death of the father and up to the final accounting, and also for clothing), my judgment is that the final account settled May 6, 1872, does not conclude the allowance of these claims. It would not have been proper to include in the final account any of these matters. Whatever advancements have been made to those who are entitled to a distributive share of the estate are not proper matters to go into the final account at all.

The account must be settled without reference to any advance; and the fact of an advancement preceding the final account does not conclude an allowance therefor.

There is an error in a good many that the final account takes in all transactions previous to it. These moneys, that are advances on the distributive interest, are to be taken out of the balance when settled in the final account; and, therefore, I do not regard that these exceptants are concluded by the final account, and do not see any reason why these allowances should not be made up to the final account as claimed for the board of the children and the clothing. They were of tender years; and the amount claimed seems to be not unreasonable, both for the board and clothing.

I therefore shall allow these exceptions, viz.: the first, second, seventh and eighth, and these amounts should be taken right out of the balance fund in the final account. They need not disturb the system of calculating interest by the master, except only so far as they will reduce the amount that he starts with.

Now that brings us to the third and ninth exceptions: I shall disallow these exceptions. The facts do not warrant them.

Now I take up the fourth exception: speaking generally, the master has stopped any allowances on the account of Charles since 1880, or rather there are no allowances after that time, being about the time of his marriage. In the account of the administrator in regard to Charles, there is a gap between November 22, 1879, and April 29, 1881, and this exception is to the nonallowance of a claim for groceries between that date, April 29, 1881, and July 1, 1884. The question is as to whether that exception should be allowed during the time the mother was living with Charles and his wife, Charles having been married in or about the month of October, 1880. The evidence is clear that Charles got these groceries. He admits it, and it is evident that they were obtained through the instrumentality of the mother.

I have examined this testimony several times on this point, and the conclusion that I have reached is that those groceries, so much a month, were actually received by Charles, and there is no controversy in the case about the facts with reference to it. I therefore think that he should be charged with them; I do not see any reason why he should not be. He was then married. He had his wife, and they were living together; the mother was living with them, and he got the benefit of these groceries. I think the equities are all most decidedly in favor of allowing this claim.

I now take up the tenth exception and also the eleventh: the tenth exception is a claim for rent from March 1, 1879, to March 1, 1882, at $10 per month. The eleventh exception is a claim for rent from March 1, 1882, to July 1, 1884, at $10 per month. Emma became of age October 5, 1881. The allowances on the account of Emma cease, under the master's report, September 6, 1877, which I understand to be the date of her marriage. I have concluded not to make any allowance for rent previous to October 5, 1881, the time she became of age; and my reason is that although there are some equities in favor of it, from the fact that she did, with her husband, actually occupy this house, yet I do not think that, in the light of her minority and the fact of her having a husband, I should make this allowance. I think that the administrator should be at whatever loss he has sustained by reason of that; but the proof is, in substance—and there does not seem to be any controversy in the testimony about it—that she was there occupying these premises under an understanding that they were to be paid for out of her share of the estate.

The administrator swears to that, and she herself admits it distinctly, in forms of expression like this: that she had received nothing except rent. She repeats that several times, over and over again; and it is quite clear, from the general run of her testimony, that she regarded herself as in there under an arrangement that she should meet the rent out of her estate. Now, when she became of age, I do not see any difficulty in her making such an arrangement; and I think the facts warrant my deciding that that was the fact, and I do not feel willing to deprive the administrator of his claim for that rent, under those circumstances, when she, an adult, taking it from the time of her becoming of age, was occupying this property under an understanding that the rent should be satisfied out of her distributive share of that estate.

I have read the testimony several times upon that point, both the testimony of Emma and Mr. Traphagen, and that is the conclusion which irresistibly forces itself upon me. I therefore think that, notwithstanding her husband, but treating her as of age October 5, 1881, and she occupying the premises and getting the benefit of it, under an arrangement that it should come out of her distributive share, the administrator should have an allowance for it here.

These two exceptions then will be allowed, so far as they cover the rent from October 5, 1881, the time that she became of age, up to the end of the claim for rent. These tenth and eleventh exceptions both have reference to Emma, and they are allowed as stated.

The twelfth exception is disallowed.

The fifteenth exception, which is the claim for commissions is disallowed.

Now, the other exceptions cover the question of interest. In regard to interest, as I understand the mode adopted by the master, up to the period of time when he ceased to make allowances, he calculated interest at the end of each year, deducting the allowances or payments, commencing six months after the final accounting. I think that that principle is right, but, so far as any question of compounding after that is concerned, I disallow it.

Practically, a readjustment of the account will result in this: These allowances that are now made cover a later period of time, and up to near the commencement of the suit. My decision is that the same system of calculation adopted by the master during the period of time that he made allowances be continued during the whole period covered by the allowances now made by me, and that the balance be not compounded, but draw only simple interest. And my reason for that is this : that the allowances or payments were such that it would be unjust to adopt any compound system.

The amount of the interest was not such as to require the administrator to keep it invested, under the penalty of having it compounded against him; and besides, the payments will absorb the interest,

The administrator is to pay the costs out of his own pocket.

Mr. **S. B. Ransom,** for Henry Traphagen, administrator.

Messrs. **Parmley, Olendorf & Fisk,** for Charles E. Rogers.

Reed, *J.*, delivered the opinion of the court:

These are cross appeals from a final decree, fixing the extent of the liability of Henry Traphagen as administrator of Charles E. Rogers,

Charles E. Rogers died December 7, 1870, leaving a widow and two children, Charles E. and Emma A.

Letters of administration were granted to Henry Traphagen on December 24, 1870.

On May 6, 1872, Mr. Traphagen filed his final account as administrator, with the surrogate of the County of Hudson, which was duly passed showing a balance in his hands of $6,897.54.

He paid to the widow the one third part of said balance, and held the children's portions of $2,132.51 each in his own hands, no guardian of the estate of the children having been appointed. The administrator, at different times and in various ways, made payments of money to, and for the benefit of, the children, up to the time when they attained their majority. On February 29, 1884, the children filed their bill in the court of chancery for an account, and on October 15, 1884, an account was ordered.

The master, to whom the matter was referred, reported that there was due to the complainant Charles E. Rogers, the sum of $2,210, 44, and to Emma A., the sum of $2,824.78.

Exceptions were by Mr. Traphagen, filed to this report, which exceptions were referred to Advisory Master Bedle, who advised a decree allowing a number of the exceptions and disallowing others. From these conclusions of the master, appeals are taken by both parties to the suit.

In the consideration of the counter contentions as to the amount of the allowances which should be permitted to the accountant, it is observable that the administrator made the disbursements to the infants and for their benefit, in a manner entirely irregular.

The functions of his office as administrator were entirely ended when he had filed his account and received the orphans' court's approval thereof, with the one duty still subsisting, namely, that of paying over the balance in his hands to the persons by law entitled thereto. The persons entitled by law would have been the regularly appointed guardians of the infants. Payment by a trustee to an infant, without the sanction of the court, is irregular, and the trustee may be compelled to pay again to the infant when he comes of age. *Dagley* v. *Tolferry*, 1 P. Wms. 285; *Phillips* v. *Paget*, 2 Atk. 80; *Davies* v. *Austen*, 3 Bro. Ch. 178; *Lee* v. *Brown*, 4 Ves. 362; *Furman* v. *Coe*, 1 Cai. Cas. 96.

The court, sometimes, where the amount is small, for the purpose of saving the expense of taking out letters of guardianship will direct a payment to a relative of the infant. *Farrance* v. *Viley*, 21 L. J. Ch. 313; *Ker* v. *Ruxton*, 16 Jur. 491.

It is not, however, an inflexible rule that payment directly to an infant, without an order of the court which supervises the trust, results in a forfeiture of all benefit arising from the payment made.

Nor do I perceive any reason why, in the absence of bad faith on the part of the person making the payment, he should not be allowed the benefit of all disbursements, which would clearly have been sanctioned by a court of equity had the administrator occupied the position of guardian.

His conduct should undoubtedly be scanned with the closest scrutiny; but if his acts appear to have been *bona fide*, and to have been attended by a benefit to the infant *cestui que trust*, then he is equitably entitled to the same degree of relief as if his conduct had been marked by the strictest conformity to the rules of legal or equitable procedure.

The advisory master in the present case recognized this equitable rule in dealing with the several questions presented for his consideration. Regarding the cause from the same point of view, the question is presented whether the court of chancery, in so dealing with the accounts, failed in certain particulars to reach correct results.

The counsel for Mr. Traphagen first insists that he should be allowed a bill for groceries which were delivered to Emma A., and paid for by Traphagen. Emma was at this time married, and living with her husband and her mother, although she was yet an infant. Her husband was presumably able to support her, and it was his duty to do so. The disallowance of this payment was correct.

Next, the counsel objects to the manner in which the advisory master dealt with a claim for the allowance of $324 for three years' rent.

It appears that Emma A. removed with her husband, in March, 1879, into a house belonging to Mr. Traphagen, and lived there until July 1, 1884. Mr. Traphagen prayed an allowance for $9 per month rent, during a period from March 1, 1879, to March 1, 1882, and for $10 per month for the rest of the period of occupancy.

Emma arrived at her majority on October 5, 1881.

The advisory master sustained the claim for an allowance for rent from the time Emma was of age, but disallowed it for the time previous to that event.

The disallowance is based upon the fact of her infancy and her marriage, and the consequent liability of her husband to support her. The allowance is grounded upon a contract made by her after she attained her majority, by which the rent was to be deducted from her distributive share.

I think there is in her testimony that which justified the conclusion of the master in finding the existence of such an agreement; and the law places no obstacles in the way of such a contract on the part of a married woman. If the renting was to her, it was her own contract, and valid by the terms of our statute.

In regard to that part of the rent, the allowance of which was refused, it is urged that the master erred. It is insisted that Emma, by remaining in possession of the premises after October 1, 1881, ratified an agreement to pay rent, made while she was an infant. The position of Emma is likened to that of a person who has purchased land while an infant and remains in possession when of age; and of one, who, having taken a lease for years, remains in possession after attaining his majority. But whatever may be the effect of the retention of possession by an adult, of the subject of his infantile contract of sale or letting, it is apparent that the facts in the present case bear no resemblance to either of the samples.

There was no contract of letting, for a term of years proven, which expired after the arrival of October 5. There is nothing to show the terms under which she agreed to hold the house.

Mr. Traphagen says that he charged so much a month, and she says that she received nothing from Mr. Traphagen but rent.

Upon this slender foundation is built up an agreement to pay rent accruing after she arrived at her majority, but certainly no contract for any specific time can be deduced from it.

The agreement to pay after arriving at maturity seems to be merely an admission of a liability to pay for a previous use and occupation. Certainly the possession of Emma cannot be said to have been the ratification of any precedent contract.

It is also a ground of objection that there is a compounding of interest, against the express views of the advisory master, who ordered simple interest. On the other hand it is objected that the part of the decree which directs that there shall be no compounding is erroneous.

The advisory master ordered yearly rests, so long as there were payments made by Mr. Traphagen, and interest to be computed upon the balances; but he directed that only simple interest should be computed after the disbursements ceased.

I am not clear but this was an equitable adjustment of this branch of the case under all the circumstances, and that it should stand.

The counsel for the complainants below, upon their appeal, insist that there was error in permitting the administrator to claim an allowance for disbursements made to the infants previous to the settlement as administrator. It is said that the presumption is conclusive that such payments were included in that account.

But there is no such presumption, because such payments would have no legitimate place in such accounting. They can be regarded as payments in advance of a part of the distributive shares in the estate, and can be deducted whenever such shares are claimed. As the claims are made by way of this bill for an accounting, it is the right of the defendant to claim the benefit of any legal disbursements to the distributees, made at any time upon the credit of the future shares to be distributed.

There is a claim allowed, however, about which I have had some doubt.

It is a sum of $294.03, claimed to have been paid to the mother of Charles, for his benefit, by groceries delivered to her, and charged to Mr. Traphagen.

At this time Charles was married, and was earning wages, and his mother was living with him. The groceries, Charles says, he got the benefit of. This amount was all that he received during this period from the administrator. It seems to have been a great assistance to him. It was not in excess of the interest charged against the administrator during that period, so no inroads were made upon the principal of the infant's estate. I think if a guardian had made this expenditure, it would receive the sanction of the supervising court. So I incline to an allowance of this item.

I think the conclusions reached by the advisory master in other respects should stand, and that the decree below should be affirmed, without costs.

Decree unanimously affirmed.

LEHIGH ZINC & IRON CO. (Limited) *Appt.*,
v.
Charles W. TROTTER, *Respt.**

†Trotter was under a **contract to deliver** to a company in Pennsylvania certain quantities of **ore** each month and received monthly payments. A suit having arisen, the court of chancery, during its pendency, by consent of the parties, placed a manager in charge of the business to deliver ore and receive payments. A writ of **attachment was issued in Pennsylvania** by a creditor of Trotter and the money due for ore was attached in the hands of the Company, who thereupon refrained from making a monthly payment—on account of which the manager stopped shipments for three months. *Held*, that a **decree** ordering that the Company should, after the expiration of this time, receive, in addition to its regular monthly quotas, parts of the ore which had been detained by the manager, is **erroneous.**

(Decided ——— — 1887.)

APPEAL from a decree of the Court of Chancery. *Reversed.*

The case is stated in the opinion.

Messrs. **Charles D. Thompson,** and **George Northrop** of Philadelphia, for appellant.

Messrs. **Cortlandt** and **R. Wayne Parker,** for respondent.

Reed, *J.*, delivered the opinion of the court:

The decree appealed from was made upon a petition filed in this cause. The facts involved in the suit which are important in respect to the question raised by the petition are substantially the following:

Trotter, the respondent, in 1881, entered into an agreement with one Heckscher that he would deliver to Heckscher 12,000 tons of Franklinite ore in regular monthly shipments of 1,000 tons each month, said shipments not to fall short of 990 tons nor be in excess of 1,010 tons.

The agreement further provided that after the expiration of the time mentioned for the delivery of the above 12,000 tons, Heckscher, upon notice to Trotter, should have the right to the delivery to him of such quantities of ore as he indicated in his notice, under certain specified conditions.

On the 6th day of August, 1881, Heckscher assigned all his interest existing under this agreement to the appellants, the Lehigh Zinc & Iron Company. On the 22d of May, 1882, the said Company gave notice to Trotter that they would take 12,000 tons of the said ore annually, in monthly shipments of not less than 990 tons, nor more than 1,010 tons, until the year 1907, under the same terms, covenants and conditions as contained in the agreement of June 2, 1881.

The agreement provided that the prices of the said ore should be graded according to the percentage of the oxide of zinc which it was found to contain by the test made by an assayer or assayers to be appointed by the parties. A disagreement arose in 1882 in respect to the accuracy of the assays, and Trotter, alleging that money was due him which the Company refused to pay, stopped the shipment of ore. He then filed a bill for the specific performance of the agreement, and the Company filed a cross bill for the same purpose and for the appointment of a receiver of the mine.

The court in August, 1882, appointed a manager for the purpose of seeing that the ore was delivered and paid for, according to the terms of the contract. This was in accordance with the prayers of both parties.

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*See other phases of this controversy reported in 2 Cent. Rep. 729, 737; 3 Cent. Rep. 468, 677; 4 Cent. Rep. 77; 5 Cent. Rep. 330, 644, 838, and *post* 481.

†Head note by Reed, J.

The Zinc Company failed to pay for the ores shipped under the contract for the month of December, 1884, and on January 15, 1885, the manager ordered shipments to stop and they thereupon stopped.

The reason assigned by the Zinc Company in its answer to the petition for the cessation of payments is based upon the following alleged existing facts: that Trotter, when he entered into the agreement to deliver ore, was a lessee of the land from which the ore was to be taken. His lessor was James L. Curtis, who had the legal title to the premises. Curtis conveyed his reversion to the Franklinite Steel & Zinc Company, and that company sold the same to Heckscher. Under one of the two leases made to Trotter rents and royalties were reserved; and Heckscher, as the assignee of the reversion, claimed these from Trotter.

Attachments were issued, both in this State and in the State of Pennsylvania, for their collection. Under the last mentioned writ the moneys due from the Lehigh Zinc & Iron Company in Pennsylvania to Trotter were attached. After the service of this writ of attachment the Lehigh Zinc & Iron Company held back the December payment. This was followed, as we have observed, by a stoppage of the shipments of ore. Trotter then filed the present petition. In it was set forth the issuance of the writs of attachment and that the claim of Heckscher for royalties was unfounded, that the moneys due were required to operate the mine.

The petitioner prayed that Heckscher might be enjoined from prosecuting his writs of attachment, that he be decreed in contempt for the issuing of the same, and that the Zinc & Iron Company might be decreed to have forfeited its right (which had been decreed to it in the suit) to detain in the court of chancery moneys due to the petitioner. The petitioner prayed to be advised whether by reason of the foregoing acts of Heckscher and the Company he was not justified in abrogating the contract made for the delivery of and payment for the ore.

Upon the hearing upon the petition and answers it was decreed that Heckscher was in contempt for issuing the attachment in Pennsylvania. It was further decreed that Trotter should ship to the Lehigh Zinc & Iron Company each month the number of tons called for in the contract, and also should deliver in addition thereto at least 250 tons of ore each month, until the whole number of tons of ore due to the defendants for the months of January, February and March should have been shipped, but no more in any month, unless defendants required it. It is from this part of the decree, namely: the order for the extra shipments of ore, that this appeal is taken by the Lehigh Zinc & Iron Company.

The action of the manager in stopping the shipments of quotas of ore for the months of January, February and March was induced by the failure of the defendants to pay for the previous December shipment. He acted upon the supposition that the failure of the Company to pay for one or more justified him in refusing to deliver any subsequent quota until the previous dues were liquidated.

In this view he was supported by the court, which by an intermediate order approved his conduct in this respect. It was upon the assumption that the stoppage of the shipments was justified by the default of the defendants, and for the purpose of restoring to the petitioner what he had lost by the cessation of shipments for three months, that the part of the decree appealed from was made.

It seems plain, however, that under the contract the failure of the defendants to pay for the December shipment did not justify a refusal to deliver the quotas due in each of the succeeding three months.

When this cause was before this court on a previous occasion it was held that a default in payment for one installment of ore did not excuse the nondelivery of a subsequent portion unless the conduct of the defaulting party was such as to evince an intention to abandon the contract. *Trotter* v. *Heckscher*, 2 Cent. Rep. 729, 13 Stew. Eq. 612.

No facts are apparent which indicate such an intention on the part of the defendants; but on the contrary all the circumstances display the absence of such an intent. But even if it be admitted that an unjustifiable refusal to pay for the December shipment afforded a legal ground for the refusal to make deliveries during the three subsequent months, yet the facts appearing in the petition and the answer to the petition relieves the defendant from responsibility for the failure to make the payment.

The money due upon the December delivery was impounded in the hands of the defendant by legal process from the Courts of Pennsylvania. Although the attachment, under which this was done, was sued out by Heckscher, and although he was held to be in contempt by the court of chancery for this conduct, yet no complicity between him and the defendants in carrying out this scheme is proven.

After the garnishment of the money due for the December quota the defendants were powerless to do aught except hold the money to answer the purposes of that proceeding, until the attachment was dissolved or otherwise terminated.

It seems clear, therefore, that the defendants were not responsible for the failure to pay for the December quota of ore and also that the petitioner was inexcusable for not delivering the quotas for the months of January, February and March. The decree therefore compels a party, not in the wrong and against his wish and presumably to his disadvantage, to accept ore at times and in quantities uncalled for in his contract, for the purpose of aiding the party who, without excuse, refused to deliver the ore according to his agreement. In this view of the question involved the decree seems to be erroneous. Nor does this seem the less true because of the existence of the circumstance that by the assent of both parties the court of chancery had placed a manager in charge of the business whose duty it was to make deliveries of ore, and to collect pay for them; and it was the manager who stopped the deliveries during the three months.

It is obvious that the manager was not appointed to modify the terms of the contract between the parties, but for the purpose of executing that instrument. And the power of direction over his conduct which existed in the court of chancery would be exercised in the light of the rights of the parties under the provisions of their agreement. It has already appeared that, under the contract, the circumstances which surround the present transaction afford no ground for the present order. And if the manager be regarded, in respect to his previous conduct, as the representative of both parties to the contract, then no act on his part can be the subject matter of complaint by the petitioner nor can the result of such be visited upon the defendants in the shape of this adverse decree.

In any aspect in which the cause can be viewed, I think that *the decree is erroneous and should be reversed.*

LEHIGH ZINC & IRON CO. (Limited), *Appt.*,
v.
CHARLES W. TROTTER, *Respt.*

***Zinc ore** was to be delivered upon the cars at Franklin, New Jersey, and was **to be paid for at** a price to be determined by the **percentage of zinc oxide** which it contained when delivered. The vendee was to make the necessary assay. The vendee transported the ore on open cars to Bethlehem, Pennsylvania, a distance of sixty-two miles, and then endeavored to ascertain the amount of moisture which the ore contained. The results varied from month to month, between 0.36 and 3.04 per cent. *Held*, that these **results** were **not safe indications of** the **amount of moisture in the ore** when delivered at Franklin.

(Decided —— — 1887.)

APPEAL from an order of the Court of Chancery, denying a petition for an allowance or deduction from a price paid on a contract. *Affirmed.*

The opinion of Bird, *V. C.*, advising the order appealed from, is reported in 5 Central Reporter, 644.

The case is stated in the opinion.

Messrs. **C. D. Thompson** and **H. C. Pitney,** for appellant.

Messrs. **Cortlandt & R. Wayne Parker,** for respondent.

Dixon, *J.*, delivered the opinion of the court:

This appeal presents a question as to the proper mode of assaying ore, under the contract between Charles W. Trotter and Charles A. Hecksher, who assigned his rights to the appellant, which is stated at length in *Trotter* v. *Heckscher*, 2 Cent. Rep. 729, 732, 13 Stew. Eq. 612, 645.

In that case it was decided by this court that the contract allowed to the appellant a reasonable discretion as to when and where the assay should be made, and that the making of the assay at Bethlehem, in the method theretofore used was a proper exercise of that discretion.

In the assay then approved by us, no account was taken of the moisture of the ore, nor was any suggestion made that it was at all important.

But in April, 1883, it occurred to the appellant that, in handling, crushing, separating, and pulverizing the ore, preparatory to getting a sample for analysis, the moisture contained in the ore when delivered was evaporated, so that while the pinch of dust taken by the chemist might correctly represent the average of all the other ingredients of the ore, it did not represent the moisture; and consequently, when the chemist reported that in a specified weight of the dust he had found a specified weight of Zn. O., the percentage of Zn. O. thus indicated was not the true percentage of Zn. O. in the ore, but was greater than the true percentage, according to the amount of moisture which the ore contained.

Acting upon this idea, in December, 1884, the appellant took a separate sample of the ore from each case as it arrived at Bethlehem, and weighed it, then dried it in bulk at a temperature of about 96° F., and again weighed it, thus discovering that the ore had lost in drying 3.04 per cent of its weight; hence, the inference was drawn that the weight of Zn. O. found by the chemist in the pulverized sample should be reduced in the same proportion, in order to give the true percentage of Zn. O. in the ore, and so the reputed percentage of that month, December, 1884, which was 29.93, should become 29.02. Similar processes for the subsequent months gave somewhat similar results.

Inasmuch as the price of the ore was fixed according to its richness in Zn. O. increasing fifty cents per ton for each additional 1 per cent of Zn. O. above 26 per cent, the differences in percentage seemed important, and accordingly, early in 1885, the appellant presented to the chancellor (under the supervision of whose manager the ores were being delivered and the assays made), a petition asking that due allowances be awarded on account of this moisture. The chancellor denied the petition, and, we think, rightly.

According to the contract, the ore was to be delivered to the appellant on the cars at Franklin, New Jersey, and its price was to be fixed by its richness in Zn. O. when delivered. After receiving it at Franklin, the appellant transported it on open cars a distance of sixty-two miles to Bethlehem, Pennsylvania, before attempting to ascertain the amount of its moisture. It is evident that the amount of moisture in the ore at Bethlehem furnishes no safe indication of the amount at Franklin. It will vary with the constantly changing atmospheric conditions through which the ore has passed in transportation. This variation will indeed be confined to comparatively narrow limits, but it is because slight differences are important that the appellant filed its petition.

When the appellant seeks to substitute, for a method of analysis adopted by itself and approved by the other party to the contract, a new method not approved by the other party, and asks the court to sanction the substitution, upon the ground that the new method is more accurate than the old, it should satisfy the court that its ground is well taken. But we are not satisfied that such is the fact.

A supplemental petition filed by the appellant on July 8, 1886, states that its tests showed moisture in the ore varying from an average of 3.04 per cent of the whole weight in December, 1884, to an average of 0.36 per cent in August, 1885. Whether these differences were due to causes operating before the delivery at Franklin or to those operating afterwards, there is no testimony to show, and conjecture may at least as easily fasten upon the latter as upon the former. Moreover, it is not clear that the sample, when weighed by the chemist for analysis, is free from moisture. The petition avers that it containes "no appreciable moisture." But we understand that in the analysis as at first conducted no attention was paid to moisture, and it is not suggested that the method of analysis has been changed; hence, we are not informed that any (or if any what) effort was made to detect the moisture in the sample.

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*Head note by DIXON, J.

It seems plain that, unless it was weighed by the chemist in an atmosphere as drying as that through which the bulky sample, used for estimating the moisture, had passed, it would have absorbed more moisture proportionally than that bulky sample contained, and that the proportion would be greater than the mere difference in dryness of air would occasion; for the many particles of the pulverized sample would expose a relatively larger surface than the lumps of the bulky mass. Although the moisture thus adhering to the sample might be incapable of being separated and weighed by the chemist, yet still it might amount to some thousandths or even hundredths of the little pinch subjected to analysis, for we have already learned in this case that the assay of this ore is a very difficult process, and that elements which one chemist detects escape another equally skilled; hence, our conclusion, that there is nothing in the case, either of averment or of evidence, warranting the belief that injustice is done the appellant by refusing the allowance for which it prays, or any allowance based upon tests made in the manner above set forth.

The respondent, in answering the petitions filed, insists that the usage of those dealing in ores of this nature is so uniformly to disregard moisture, that the agreement of these parties must be construed in compliance with it, and hence that any tests for moisture naturally in the ore are excluded by the contract. We do not pass upon this claim, because it is not properly presented in the evidence, and the cause can be decided without it.

Let the order appealed from be affirmed.

NATIONAL BANK OF RAHWAY, *Plff. in Err.*,
v.
Rachel A. BREWSTER.

A **note** made **by a married woman to** a firm of which her **husband** is a member is void at law, and an **action at law** cannot be maintained thereon **by an indorsee.**

(Decided — — — 1887.)

ERROR to the Union Circuit Court, to review a judgment of nonsuit in an action on a promissory note. *Affirmed.*

The case is stated in the opinion.

Messrs. **Vail & Ward,** for plaintiff in error:

The note in suit was given by Mrs. Brewster for her own benefit, for materials used in the construction of her house; and no defense is made, except the technical one that her husband is a member of the firm who are the payees.

The defendant is clearly liable in law, unless protected by the last clause of section 14 of the Act in relation to the property of married women.

Rev. p. 636.

The contract was not made with Walter Brewster, but with Brewster & Co., from whom the material was purchased; and the case is analogous to that of a note made by an individual to a firm of which he was a partner. Upon such a note a suit at law could not be maintained by the payees against the maker; but the disability would be removed by indorsement to some third party.

See *Davis* v. *Briggs*, 39 Maine, 304, cited and approved in *Hapgood* v. *Watson*, 65 Maine, 510; *Ormsbee* v. *Kidder*, 48 Vt. 361; *Woodman* v. *Boothby*, 66 Maine, 389; *Walker* v. *Wait*, 50 Vt. 668; *Parker* v. *McComber*, 18 Pick. 509.

Mr. **R. V. Lindabury,** for defendant in error:

Cited *Woodruff* v. *Clark*, 13 Vroom, 198; *Seyfert* v. *Edison*, 16 Vroom, 393; *Rusling* v. *Rusling*, 18 Vroom, 1; *Ingham* v. *White*, 4 Allen, 415; *Kneil* v. *Egleston*, 1 New Eng. Rep. 455.

Runyon, *Chancellor*, delivered the opinion of the court:

This suit was brought in the Union Circuit, to recover the amount due upon a promissory note made by the defendant, a married woman, to a mercantile firm of which her husband was a member. The note was transferred by proper indorsement, before maturity, to the plaintiff. The circuit court nonsuited the plaintiff.

The plaintiff's counsel insist that although the payees of the note, the firm of which the husband was a member, could not have sued the defendant at law upon the note, the indorsees may do so. This proposition is based upon the notion that the only reason why a suit at law could not be maintained against the maker upon such a note is that a husband cannot maintain an action against his wife because of their unity in law, and that, therefore, if the note be held by a stranger, the difficulty is overcome. But at law, the contract between husband and wife is null and void, and the defect is inherent in the contract which therefore cannot be enforced at law.

In *Gould* v. *Gould*, 8 Stew. Eq. 37, *affirmed*, p. 562, a wife lent money to her husband's firm upon their promissory note. After his death, she brought suit at law against the surviving members of the firm. She was nonsuited, and it was held that in order to recover the money she must have recourse to equity.

The judgment of the Circuit Court should be affirmed.

For affirmance—**The Chancellor, Chief Justice, Depue, Dixon, Knapp, Magie, Parker, Reed, Scudder, Brown, Clement, Cole, McGregor.**—13.

For reversal—**None.**

PENNSYLVANIA.

SUPREME COURT.

Thomas FLANIGAN, *Plff. in Err.*,
v.
Rose Bella FLANIGAN, Admrx. of the Estate of Patrick Flanigan, Deceased.

A **husband** who was sick **agreed with** his **wife to divide** the **household goods and separate.** This was done. He went to his father's house and the father took away the son's part of the furniture. A few days afterward the son died. The **wife as** his **administratrix brought trover** against the father **for** the **furniture.** The **defense** was that the son **had given** the **furniture** to his father **in consideration of** the latter's **promise to pay** the **funeral expenses,** and that the promise had been fulfilled. *Held*, that the **question whether** the **furniture** had been **so given was for** the **jury,** and that it was error to admit testimony on the part of the plaintiff as to her faithfulness to her husband and the refusal of his family to let her see him before his death or to give up his body to her for burial.

(Argued Feb. 18, Decided March 21, 1887.)

JULY Term, 1886, No. 143, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to Common Pleas No. 3 of Philadelphia County, to review a judgment on a verdict for the plaintiff in an action of trover. *Reversed.*

This was an action of trover, begun by *capias*, by Rose Bella Flanigan, Administratrix of Patrick Flanigan, deceased, against Thomas Flanigan, to recover the value of goods alleged to have been appropriated by the defendant.

At the trial before FINLETTER, *J.*, the following facts appeared:

Patrick and Rose Bella Flanigan were husband and wife. The defendant was Patrick's father. Some time about the 12th day of December, 1883, Patrick being sick agreed with his wife that they should separate, and that he should go home to his father, and that the household goods should be divided between them. This was done, and the goods divided as agreed on, she taking the piano, and he the rest of the furniture. Patrick then went to live with his father. A short time after, Patrick died at his father's house.

The defendant alleged that before his death Patrick gave to him the furniture he had retained under the agreement with his wife, and requested him to pay the funeral expenses after his death; and that the expenses, amounting to $202, were duly paid by him.

The plaintiff alleged that Patrick did not give the furniture to his father, and having at the trial proved Patrick's ownership of the goods and the defendant's refusal to give them up, rested.

The defendant's evidence is sufficiently set forth in the opinion.

In rebuttal the plaintiff's counsel called Mrs. Deal who, being sworn, testified as follows:

I lived next door to Mr. and Mrs. Flanigan. I was often in the house.

Q. What knowledge have you of Mrs. Flanigan's sitting up with her husband, Patrick Flanigan?

Defendant objected.

Objection overruled. Exception. *First assignment of error.*

A. I know she sat up all night, and she carried the pillows and bolsters up and down stairs, and also a feather bed, when he did not feel well; and she often carried a feather bed down stairs for him; and went out at 1 o'clock at night to get liquor to make him punches, which he fancied. He took a fancy to doughnuts, and I went in there to make them, between 11 and 12 o'clock at night, at Mrs. Flanigan's desire. They lived like two children, and I never heard them have a word. He said: "I have the best of care, and she gives me better care than my mother could or would. I could not have a better wife."

The plaintiff also offered evidence of a demand on defendant's daughter for the body of the plaintiff's husband, as follows:

Plaintiff's counsel calls upon defendant's counsel to produce a letter, written by plaintiff to defendant, December 17, 1883, of which notice was given defendant's counsel, January 20, 1885, by John McDonald. Defendant's counsel does not produce the same. Thereupon the plaintiff's counsel offers in evidence a copy of said letter, as follows.

Mr. Flanigan, Stone Mason:
Clementine and Emerald Sts.

Dear Sir:

I respectfully claim the body of my late husband for the purpose of burial, and will thank you to let me know, by bearer, if you are willing for me to take it without trouble. As his wife, it is my right; and you must not do me the injustice of refusal. He will be buried from my father's house, 329 E. York St.

Your daughter-in-law,
(Signed,) Rose Bella Flanigan.
Dec. 17, 1883.

Plaintiff's counsel thereupon also offered in evidence the answer to the foregoing, as follows:

Belle Flanigan:

You will not get your husband's body. Go ahead with your trouble, if you like. You will never get Patrick's body.

Plaintiff's counsel also offered in evidence the envelope, wherein the answer was contained, bearing the following indorsement, viz:

Bella Flanigan,
Mr. Flanigan, Stone Mason,
Clementine and Emerald Sts. Philad'a.

Defendant objected. Objection overruled. *Second assignment of error.*

The court charged, *inter alia*, as follows:

"From the evidence it would appear that the defendant came to take his son and the furniture away. There is no evidence that the sick man desired it, nor that the defendant had any reason to do what he did. It was a case in which a man, without authority of any kind, takes possession of another man's property. The evidence is that the father went there for that purpose. You, therefore, start with a wrongful act! No one has a right to come to a man's house and take away his property without authority.

"The evidence tended to show that the defendant absolutely refused to allow her (the wife) to see her dying husband. The defendant forcibly carried away property which he had no right to take. The defense is that the husband, on his death bed, gave these things to the father, upon the condition that he would pay the funeral expenses.

"The witness said that the dying man said to his father: 'Take my furniture, and pay my expenses.' If that were true, it gave him no right to keep the furniture. He says, take the furniture, and pay the debts of my funeral. If the husband had said, 'I make you a present. I give you these upon condition that you pay my debts,' then of course they would have belonged to the father when he paid all the debts of the son; but the only witness who speaks of that does not bring it up to that point. Of the credibility of this witness it is a matter entirely for you to judge. It does not amount to a gift to the father; it simply amounts to this: that the goods were given to him in trust to pay his debts. That he has not done. I do not see that there is any defense, unless the jury are satisfied that there was an absolute gift, in so many words, from the son to the father. But I apprehend you will not find there was a gift of the goods. It does not amount to a gift, if you believe the daughter, and I do not see how you can under the evidence." *Third assignment of error.*

Verdict and judgment for plaintiff, for $590.

Mr. **John S. McKinlay,** for plaintiff in error.

Mr. **Joseph Mellors,** for defendant in error.

Mr. Justice **Trunkey** delivered the opinion of the court:

The first and second assignments of error must be sustained, for the reason that the testimony was irrelevant. That Mrs. Flanigan kindly treated her husband while they lived together had nothing to do with the issue. The testimony of Mrs. Deal was inadmissible to contradict Kate Flanigan, if that was the purpose for which it was offered, for Kate Flanigan testified to what had occurred at her father's house, and Mrs. Deal to what occurred at another time and place. The letters showing that the widow of Patrick Flanigan demanded his body, which was refused her, were written after the alleged conversion of the goods. Such testimony as is set out in these assignments might raise indignation in the minds of the jurors, and enlarge punitive damages; but the facts, not having occurred at the time of the alleged wrongful taking of the goods, were impertinent.

The third assignment must also be sustained. Patrick Flanigan and his furniture were taken to his father's house some days before Patrick's death. A daughter of the defendant testified that Patrick gave the furniture to the defendant, saying: "Father, I give you all my furniture, to pay all my expenses." She said this was on Wednesday, and Patrick died on the following Sunday. The learned judge of the common pleas disbelieved the witness, and did not see how the jury could believe her; but it was for the jury to determine her credibility, and whether Patrick gave the furniture to his father. If he did, the act of taking possession by the father was settled in the lifetime of the son. From the testimony the jury could well have found that the goods were taken on the same day that Patrick went to the defendant's house, and that Patrick was present when his goods were removed from his own dwelling. In that case, in absence of evidence to the contrary, the presumption is that Patrick went of his own will, and assented to the moving of the furniture, not that the father's act at the start was wrongful.

Saxon testified that he hauled the furniture to Thomas Flanigan's house. It appears in the testimony, set out in the bill of exceptions, that Saxon was asked if he did not say that he had been employed by the defendant, and he answered: "I do not remember. Mr. Patrick Flanigan employed me to take the furniture away." Were this a mistake, and even if the defendant had employed Saxon, the other evidence was such that the jury ought not to have been told, "The defendant forcibly carried away property which he had no right to take."

Did Patrick give the furniture to the defendant? We think there was sufficient evidence to require submission of that question to the jury. And if submitted, it should not be fogged with narrations of family difficulties which have no connection with the alleged act which is the foundation of this suit. The issue involves no extended inquiry into the conduct of the parties toward each other either before or after the alleged conversion.

Judgment reversed, and venire facias de novo *awarded.*

Lavinia E. PRENTICE, *Plff. in Err.*,

v.

A. J. PLEASONTON, Trustee under the Will of Joseph Dugan, Deceased, Garnishee of Alfred Pleasonton.

A fund held in trust under a will, and directed by a decree of the orphans' court, "to be paid to the defendant to be applied to his personal support and maintenance or in his discretion to the support and education of any children he may have, so as the same shall not be in any manner assignable or anticipated, nor liable to his debts or liabilities, or that the trustee may, if thought needful by him, apply the fund in like manner for the benefit of the said defendant and any of his children," is **not attachable.**

(Argued March 23, Decided April 4, 1887.)

JANUARY Term, 1887, No. 302, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to Common Pleas No. 2 of Philadelphia County, to review a judgment on a verdict for garnishee in attachment *sur* judgment. *Affirmed.*

November 24, 1886, the plaintiff issued an attachment in execution on a judgment against Alfred Pleasonton and A. J. Pleasonton, Trustee, under the will of Joseph Dugan, deceased, as garnishee. Interrogatories were subsequently filed by the plaintiff. In his answer to these, the garnishee admitted that he had funds in his hands belonging to said Alfred Pleasonton, under certain decrees of the orphans' court; but he averred that by the terms of said decree said funds were not liable to attachment.

The court discharged a rule for judgment taken upon the garnishee's answer to the interrogatories. The garnishee pleaded *nulla bona*, and the case was put at issue. On the trial the plaintiff offered in evidence the will of Joseph Dugan, which provided, *inter alia*, as follows:

"I give and bequeath to my said niece, Mrs. Caroline Pleasonton, one annuity of $4,000 per annum, to be paid to her during the term of her natural life, for her own sole and separate use, and upon her own receipt, notwithstanding her coverture, and free from the control of any husband whatsoever; said annuity to be paid her by my trustees, hereinafter named, out of the rents, dividends and incomes of the estate and property hereinafter devised and bequeathed to them, in half yearly payments of $2,000 each; the first payment to be made at the end of six calendar months from the date of my decease.

"If my said niece, Caroline Pleasonton, shall survive my said sister, Ann Dugan, then it is my will, and I do order and direct, that her annuity shall be increased by the additional sum of $4,000 per annum, so as to make the whole amount of her said annuity equal to $8,000 per annum; the said increased annuity to be paid to her at the same time and in the same manner as before provided for. If the death of my said sister shall occur before my own decease, then the first semi-annual payment to be made to my said niece, Caroline, will be $4,000; but if my sister shall survive me, and shall die before said Caroline, then the first payment to be made to her, after the death of my sister, shall include, in addition to the amount due upon the original annuity, such proportion of the additional sum hereby given as may be adequate to the time which shall then have elapsed from the death; and my said sister's representatives shall be entitled to receive the sum which will make up all arrearages of her annuity, calculated and apportioned to the time of her death.

"I do hereby further give and bequeath to my said niece, Caroline Pleasonton, in addition to the above annuity and increased annuity, and do order and direct to be paid to her in semi-annual payments the sum of $500 per annum for each and every of her children that shall, at my decease, be twelve years of age, or that shall afterwards attain to that age (as many sums of $500 as there shall be children of twelve years of age), to be applied by her to and for the clothing and education of her said children. The payment of each sum of $500 is to commence six months after the time of my decease, for each child then twelve years of age, and for the others six months from the time when each child attains the age of twelve years, and is to be continued until each child respectively shall reach the age of twenty-one, or before that age shall die, and is to be made by my trustees hereinafter named in semi-annual payments out of the dividends, interests and income of the estate and property hereinafter devised and bequeathed to them; and upon the receipt of the said Caroline, whether sole or covert. And in case of the death of my said niece during the minority of any of her children, I order and direct the same amount of $500 per annum to be paid to the surviving parent or guardian of each child so in his or her minority, for its education and clothing from its age of twelve years until such child shall attain the age of twenty-one years; if the father of the said children survives, his receipt to be sufficient; if not, then payment to be made to a guardian. And to each and every of the said children of my said niece Caroline, as they shall respectively attain the age of twenty-one years, I give and bequeath the sum of $1,000 per annum, if the income of my estate shall be sufficient for that purpose after paying all other charges, expenses and annuities herein provided for, said sum of $1,000 per annum to be paid in semi-annual payments by my trustees hereinafter named, out of the income, interests and dividends of my estates and property hereinafter devised to them, the first payment to be made to each child six months after he or she shall reach the age of twenty-one years, and to be continued until the period as hereinafter appointed for the division of my estate, unless sooner determined by the death of such child.

"I give and bequeath to Augustus James Pleasonton, the husband of my niece Caroline, an annuity of $2,000 per annum, to be paid to him during the term of his natural life, by my trustees hereinafter named, out of the rents, dividends and income of the estates and property hereinafter devised and bequeathed to them, in half yearly payments of $1,000 each; the first payment to be made in six calendar months from the date of my decease; and if he, the said Augustus James Pleasonton, shall survive his wife, my said niece, I do order and direct that his said annuity shall from the time of her death be increased to and stand at the sum of $5,000 per annum. In that event the arrearages of his annuity of $2,000 will be paid up to the day of her decease, and from that day forward, all future payments shall be at the rate of $5,000, and the proportion of my said niece's annuity, which, at the time of her death, may have accrued since the last payment to her, shall go to her representatives."

He then devised and bequeathed to the trustees, all of his estate not before devised: "In trust, after paying all my just debts, funeral expenses, and the pecuniary legacies herein bequeathed, to collect the rents, issues and profits of my real estate, and the interest, income and dividends of my personal property, and out of the moneys so collected to pay from time to time and until the period of the division of my estate shall arrive, the annuities hereinbefore bequeathed to my sister, Ann Dugan, my niece, Caroline Pleasonton, her husband, Augustus James Pleasonton, and to the children of my said niece. And if at any time it shall so happen that the said rents, issues, profits, incomes, interest and dividends are insufficient to pay the costs, charges, taxes and repairs upon and of my said estate, and the said annuities in full, then it is my will, and I order and direct that an equal deduction shall be made from the several sums payable to the children of my niece Caroline, or to any person for their benefit, to the full extent necessary to make the fund adequate to the rest of the annuities and expenses; and if such reduction and nonpayment shall still leave a deficiency, then a *pro rata* deduction shall be made among the other annuitants, in proportion to their several annuities, it being my intention that the said annuities shall never be permitted to encroach upon the capital of the estate. But the sums so reduced or withheld may be made up to the respective persons entitled when the funds again shall permit.

"And in trust to invest from time to time all such surplus moneys as may be in their hands in such stocks, public loans, mortgages, ground rents or other securities as to them may appear most safe and judicious, and to collect the interest and dividends thereof and the same to reinvest.

"And upon trust after the death of my sister Ann Dugan, and of my niece, Caroline Pleasonton, and of my niece's husband, Augustus James Pleasonton, and so soon as the youngest surviving child of my said niece Caroline shall attain twenty-one years of age (and not before) to divide the personal property, with all its accumulations, and to make partition of all the real estate in equal parts and shares, share and share alike, to and among the then surviving children of my said niece Caroline, and the children or lawful issue of any child of my said niece, who may then be dead, having left children or lawful issue him or her surviving; such children or lawful issue of a deceased child to take among them the same share (neither more or less) and interest which their parent would have taken if then alive.

"And, if my niece Caroline shall leave no children her surviving, or if her children who do survive her shall all die before their age of twenty-one years, and leaving no children or lawful issue them surviving, then in trust to divide my said estate real and personal in equal shares—share and share alike between my grandniece, Ann Eck, and my grandnephew, Joseph Eck; and if either of them should be dead, leaving lawful issue, such lawful issue to take among them the share of the deceased parent; but if no such lawful issue, then the whole to go to the survivor or the lawful issue of such survivor.

"And I do hereby authorize and empower my said trustees, and the survivors and survivor of them, and their successors in the trust, to sell and dispose of any of my unimproved lots of ground, upon ground rents so reserved as to be redeemable at the time when my estate is so as aforesaid to be divided. And I also authorize and empower them, the survivors and survivor of them and their successors in the trust, when partition and division of my estate is to be made as aforesaid, to sell and convey in fee simple such parts and so much of my real estate as may be necessary to enable them to effect entire equality of partition and division among the devisees.

"And in cases of sales on ground rent or for equality of partition, I give them full power to convey estates to the purchasers, entirely freed and discharged from all trusts created by this will, and from all liability on the part of the purchasers for the appropriation of the purchase moneys. But I expressly direct that, except in these cases thus provided for, my said trustees shall not sell or dispose of any part of my real estate, but shall reserve the same for partition among the devisees, keeping it at all times in due and proper repair, and paying all taxes, assessments and charges thereon.

"And for the purpose of making partition of the real estate as aforesaid, I do further authorize, empower and direct my said trustees, the survivors or survivor and the successors of them, to convey by deeds in fee simple duly executed to the persons entitled, such portions and parcels of my real estate as may be allotted to them respectively, and this allotment shall be made by my trustees according to their best judgment.

"And I do further order and direct my said trustees, when proceeding to make partition and division of my estate, if there shall be children of my niece, Caroline Pleasonton, to receive it, and any of those children shall be females, so to convey, transfer and settle the parts and portions which may be allotted to such female children that they may take, hold and enjoy the same, free from all liability for any debts or engagements of any husband, subject to their own control, and with power to devise the same, whether single or covert, and for this purpose I direct my trustees to make such conveyances and transfers to trustees, if necessary, to be selected with the consent and approbation of such females, and in such manner as may be advised by counsel learned in the law, and releases and discharges given to my trustees by the trustees for such females shall be as valid and effectual as given by the females themselves, or by them and their husbands if they are covert."

The plaintiff also offered in evidence a decree of the Orphans' Court of Philadelphia County, entered January 4, 1879, *sur* petition of Augustus J. Pleasonton, sole acting trustee under the will of Joseph Dugan, deceased, for an order increasing the allowance to the children of Mrs. Caroline Pleasonton, etc., as follows:

"It is ordered, adjudged and decreed, that the prayer of the petition be granted as follows, to wit: that the said trustee, after providing for the payment, as the same shall annually accrue of all annuities given under the said testator's will, and of all taxes and water rents and recurring charges upon the several properties belonging to this estate, and after retaining a balance sufficient to provide for recurring repairs of the said properties and taxes thereupon, and a further fund sufficient to meet all contingencies and extraordinary liabilities which may befall the said estate, the surplus of the said contingent fund which may remain unexpended at the end of each fiscal year of the said estate to be invested by the said trustee as part of the fund for accumulation of the said estate as directed by the will, the sum of $10,000 out of the annual income accruing from the said estate shall be divided into five equal parts and shares; and that one of the said parts or shares be paid over by the said trustee in half yearly payments * * * to Alfred Pleasonton, one of the children of Mrs. Caroline Pleasonton, deceased, the same to be applied to the personal support and maintenance of the said Alfred Pleasonton, or in his discretion to the support and education of any children he may have, so as the same shall not be in any manner assignable or anticipated, nor liable to the debts, contracts or liabilities of the said Alfred Pleasonton; or that the said trustee may, if thought by him needful, apply the said part of the said income in like manner for the benefit of the said Alfred Pleasonton and any children he may have."

* * *

"Provided, that if said trustee shall for cause satisfactory to himself, in the exercise of a faithful discretion, subject to the revision of the court, withhold any part of said allowances to prevent waste and improvidence, the part so withheld shall inure to the benefit of the party or parties from whom withheld, or his or her legal representatives, to be paid over or applied as aforesaid, whenever the same may be safely done, or if not so paid to go to his or her executors, or administrators."

The plaintiff also offered a decree of the same court, entered May 22, 1886, as follows:

"It is ordered, adjudged and decreed, that said trustee pay out of the income of said estate, subject to the restrictions and directions of the decree for allowance of January 4, 1879, the sum of $4,000 per annum, half yearly, instead of the sum of $2,000 per annum heretofore ordered, unto each of said petitioners and to the said Francis S. Pleasonton and Mrs. Anna Josephine Guest, respectively; provided, that the said children of Augustus Pleasonton, deceased, shall receive together said sum of $4,000, one half thereof to be paid to the said Stella Maud Pleasonton, and the other half to be paid to the guardian of the said Julia Aline Pleasonton until she reaches her majority, when her proportion shall be paid to her individually."

The court, FELL, *J.*, directed the jury to find for the garnishee.

Verdict and judgment accordingly.

The assignment of error specified the action of the court in directing the jury to find a verdict for the garnishee.

Mr. **N. Dubois Miller,** for plaintiff in error.

Mr. **F. C. Brewster,** for defendant in error.

Per Curiam:

The court correctly charged the jury to find a verdict in favor of the defendant, garnishee. The fund in the hands of the garnishee is not subject to the attachment of the plaintiff.

Judgment affirmed.

Walter BOSWELL. *Plff. in Err.*,
v.
William B. COLLINS.

1. Mere **technical error in** the **charge** of the court below is **not**, where substantial justice has been done, **ground for reversal**.

2. In an **action for damages for** the **breach of a contract to furnish cold storage for eggs**, it is error to instruct the jury that by removing the eggs to the warehouse the owner of them **impliedly warranted** them to be **sound**, and that it was his duty to examine every barrel and to put the warehouseman on his guard as to their condition; but if, in view of other portions of the charge and the whole evidence, no injustice has been done the plaintiff, such an instruction is not ground for reversal.

(Argued March 25, Decided April 4, 1887.)

JANUARY Term, 1887, No. 21, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Green and Clark, *JJ.*

Error to Common Pleas No. 3 of Philadelphia County, to review a judgment on a verdict for the defendant in an action of assumpsit. *Affirmed.*

The facts as they appeared at the trial were as follows:

The plaintiff, Boswell, was a produce commission merchant. In May, 1882, he bought, for the most part in the West, and carefully packed in oats, 140 barrels of eggs for the purpose of keeping them by means of ice storage until the winter months, when they could be sold at an advance. He first stored them in an ice house, built by H. G. Harris, who had loaned him some of the money to purchase the eggs. Finding that the ice in this ice house melted very rapidly and constantly required to be renewed the plaintiff applied to the defendant, who kept a warehouse in which he furnished what is known as cold storage. Plaintiff informed defendant that he wanted to keep the eggs during the summer, and might want to keep them until December, and that he wanted an even temperature.

The defendant said that he frequently received eggs on storage and that they had kept in a satisfactory manner, and that he would receive the eggs on cold storage at 20 cents per barrel per month, and that the warehouse would be kept at a temperature of about 52 degrees until October 1. Plaintiff accordingly had 132 barrels of the eggs carefully moved in the early morning in July, to defendant's warehouse, distant about forty squares, and delivered them to defendant, receiving the following receipt:

No. 1106 Philadelphia, July 24, 1882.

Received of Walter Boswell, in warehouse 238 and 240 North Front Street, 132 barrels eggs.
W. B. Collins.

The remaining eight barrels were taken by plaintiff to his own store and there unpacked and examined. They were found to be in good condition.

In the latter part of September defendant sent word to the plaintiff that the head of one of the barrels had fallen out. Plaintiff went to the warehouse and repacked the eggs in that barrel. The eggs in that barrel were found to be some in excellent condition, and some unsound. In November plaintiff went to the warehouse to remove some eggs and found that the temperature was high and the eggs were ruined. Upon making inquiry he was informed that the ice had been taken off in the middle of October and that therefore for about a month the eggs had not been kept cold. Even the oats in which they were packed could not be used.

The plaintiff's evidence further showed that eggs could be kept for the length of time these were stored if kept cold, and that the average loss on such eggs was usually from five to ten dozen in a barrel containing from seventy-five to eighty dozen. He also showed that the cost of these eggs when put in was eighteen to nineteen cents per dozen and that the market value of ice house eggs in November, 1882, was twenty-eight to thirty cents per dozen. He also showed, both by his own evidence and the evidence of the only man in his employ in October, 1882, that no notice had been received of any intention on the part of defendant to take off the ice.

The defendant's evidence contradicted plaintiff's on two points, viz.: 1, defendant testified that at the time he received the eggs he had told the plaintiff that his ice storage ran from the first of May until the first of October; and 2, defendant's clerk testified that in September, in obedience to instructions from his employer, he gave to a young man whom he found coming out of plaintiff's cellar a verbal notice that the ice storage would expire October 1.

The defendant also introduced expert testimony to show that in any event, even if the ice had been kept up, the eggs would have spoiled by reason of the length of time they were stored after a change from one ice house to another and that when the eggs were removed they were not fit for keeping longer, though fit for sale at once.

The court charged as follows:

"This is an action to recover damages for breach of contract. The contract was one for storage. It was not a contract to keep ice in the store house at all. It was a contract to keep the temperature at fifty-two degrees—to give what is known as cold storage. The terms of the contract are for the jury. The length of time it was to continue becomes very important. The plaintiff avers that it was a contract to keep the goods on cold storage until December. The defendant avers that it was a contract to keep them on cold storage until October 1. This is entirely for the jury. Whatever the time may have been practically, it was the business of defendant to keep a temperature of from fifty-two degrees to fifty-four degrees. He was not bound by any obligation to have anything to do or say about the goods after the time for which he contracted.

"[In a case of this kind the plaintiff must show that the eggs were in a fit and sound condition and were in such condition as to be kept at a temperature of fifty-two degrees. He must also establish that during the time they were stored they were injured by the act of defendant and by his act alone, because if they were injured by any other fact, such as inherent decay, etc., the defendant is not responsible.]

"The plaintiff should show by evidence that the eggs were in good condition. The plaintiff has shown that three fourths of the eggs came from the West. He has said that he assorted, picked and packed them; that they were stored until he took them out in July. [At this point it is the duty of the plaintiff to show you that Mr. Harris' ice house was a fit and proper place to store eggs and one that would keep them in as sound condition as when they were taken there. I do not recollect any evidence of that kind.]

"The evidence is that they were taken away from Harris' ice house, because at the time it was not a fit place.

"The plaintiff says that at the time the eggs were moved he repacked and examined some of the eggs and they were sound. He says he examined eight barrels, or rather that he sold eight barrels, and that he and the purchaser found them sound. Again; he says that he afterwards examined one barrel that had broken open in defendant's warehouse—critically examined it—and found the eggs sound. As to the eight barrels, you will recollect that the witness he called said the eggs were good enough to be sold, but that he could not say that they were fit to be stored. Impliedly, he said that these goods were not in a condition to be stored. Practically, he said that they were only fit to be sold.

"[The plaintiff said: 'I cannot say, when I stored the eggs with Collins, whether they were sound or not.' If he cannot say, how can he ask you to say on your oaths? Because, to find a verdict, you must say that at the time they were stored they were in a fit condition.]

"[As to whether Harris' ice house was a proper place, you must say; and you must take into consideration the fact that the eggs were removed for want of ice.] After you have examined plaintiff's testimony, unless you are satisfied that the eggs were sound when stored, it is not necessary to inquire into the defense; you must find for defendant.

"[When the plaintiff undertook to remove the goods from one storehouse to another, he impliedly warranted the eggs to be sound, and that they were to be stored in the usual course of business; and it was his duty to examine them. It was not sufficient to examine two or three barrels. He must open each barrel. It is an easy matter for a man who intends to store goods, which he impliedly warrants in good condition, to examine them. When a man makes a contract with another, it is his duty to put that other on his guard, and to put him in possession of all the facts with reference to the subject matter necessary to understand the subject matter. If the jury find that the previous storage of the eggs was a material fact, it was the duty of the plaintiff to notify defendant that the eggs had previously been stored, because it may well be that defendant would not have undertaken the storage if he had known that fact.] (*Fifth assignment of error.*)

"I have already alluded to the fact that the witness Liebig says that he will not swear that the eggs were in fit condition to store, and if you believe that witness, the evidence as to the soundness of the eggs fails. As to Harris' ice house, you have the evidence of a neighbor that while the eggs were stored there was no ice there. Again, you have the evidence that the eggs were removed in July, and carried forty-five squares. As to the effect of this, you must depend upon the evidence of persons who have had experience. You have first the testimony of Dr. Formad, and he tells you any egg shaken begins to be diseased, and the more you shake the egg, the more likely it is to spoil and become damaged. The testimony substantially was that the shaking of eggs breeds disease, and you may soon expect decay afterwards.

"One or two of the experts said that a temperature of fifty-two or fifty-four degrees is not cold enough to keep eggs, and that a removal of the eggs necessarily produces sweating. [If the testimony of defendant satisfies you that these goods were subject to any conditions that would produce decay within the time agreed upon the plaintiff cannot recover.]

"The defense is that at the expiration of the time during which defendant claims he was to keep the eggs, he gave notice that he would not replenish the ice. It is alleged by the plaintiff that he did not get the notice. If the defense rests on the notice, it is the business of defendant to make it clear. The evidence is that the notice was given at the place of business of the plaintiff. Defendant went there and found no one there, and gave to a workman coming out of the vault; and the evidence is that next day some one came to do just what the notice called upon him to do.

"The defendant produced a witness, not interested except that he is in the employ of defendant, and he says: 'I saw that barrel repacked; and the eggs were not examined, and the eggs broken gave evidence of being unsound.' If you believe that witness, the evidence on which plaintiff relies, that the eggs in the barrel were sound, fails. In considering the evidence, you will most readily give credence to the man who is frank and honest, but not to the man, who, in making a contract, reserves important information.

"[Plaintiff must establish that the goods were sound and fit to be kept, and that a temperature of fifty-two degrees was such a temperature as would keep sound goods in a sound condition, and that the damage arose solely from the act of defendant; and if the damage could have arisen in any other way, either from the fact that the eggs came from the West or were hauled from one store house to another, plaintiff cannot recover.]"

The plaintiff submitted the following points:

1. "If the defendant received goods on cold storage and subsequently allowed the ice in his warehouse to become exhausted, whereby the plaintiff's goods were injured, defendant is liable for the loss."

Ans. "The plaintiff's first point is affirmed, subject to the comments I have already made."

2. "Even if plaintiff failed to remove the eggs at the expiration of the time for which they were stored or after notice to remove, it was still the duty of defendant to keep them in the usual and ordinary method of keeping such goods until they could be sold; and if, instead of this, he kept them in a temperature at which they were certain to be destroyed, he is liable for their loss."

Ans. "Refused."

3. "If the natural and probable result of defendant's omission to renew the ice in the store house was an injury to plaintiff's goods, and such an injury did result, the burden is on defendant to show that the injury was not caused by the omission to renew the ice, but by other causes."

Ans. "The plaintiff's third point is affirmed if the jury finds that the eggs were sound when stored, and not injured by other means."

Verdict and judgment were for the defendant. *The assignments of error* specified the portions of the charge inclosed in brackets, and the answers to the plaintiff's points.

Mr. **Frank P. Prichard,** for plaintiff in error:

It is manifestly impossible for the owner to prove that the loss was occasioned solely by the warehouseman's negligence, or that no other cause could have caused the loss. To carry this ruling out to its logical conclusion, no owner of goods could recover from a warehouseman who destroyed them, unless he showed that it was impossible for the goods to have been destroyed by an accidental fire or flood, or that there were no conditions to which the goods were subjected, such as defective packing, etc., which might have contributed to the injury.

It is not sufficient for the defendant to show that other causes could have caused the loss, or even that other causes not within the plaintiff's control had actually contributed, unless he also shows the extent of the loss actually caused by such contribution at the time he committed the act complained of. *Beatty* v. *Gilmore,* 16 Pa. 463-468.

He who avers a fact in excuse of his own misfeasance must prove it.

To say that the very fact which increases the danger shall protect him who was the author of it, by rendering the necessary proof difficult, or cutting it off altogether, is too unreasonable to attract the deliberate sanction of tribunals created to watch over the interests of the community.

In *Powers* v. *Mitchell,* 3 Hill, 545, goods in a warehouse were injured through the warehouseman's negligence and were subsequently destroyed in the warehouse by a flood for which the warehouseman was not responsible. It was held that he was liable for the injury caused by his negligence, notwithstanding that the goods would in any event have been totally destroyed by the flood.

It was error to instruct the jury in effect that if the owner of goods makes a contract with a warehouseman for storage he warrants the soundness of the goods and is under an obligation to state every material fact which may affect the question of damages in case the warehouseman is negligent.

In considering the charge it must be remembered that the defendant's contract was not to keep the eggs sound, but to keep them on "cold storage," and the breach alleged is not the failure to preserve, but the failure to furnish cold storage, whereby they were lost. So long as defendant kept his contract, the plaintiff took the risks of injury from decay or like causes. As the goods were, therefore, to be at plaintiff's risk, so far as ordinary decay was concerned, he was not bound to examine them at all. In any event, he would not have been obliged to increase the risk of decay by opening every barrel. He was under no duty to defendant to examine the goods, nor did he warrant their soundness. Nor was the fact of the previous storage of the eggs a material fact, so long as defendant kept his contract.

Mr. **George S. Graham,** for defendant in error:

It is certainly true that when plaintiff brought his eggs to plaintiff's warehouse to be stored, he impliedly warranted them to be sound. This was an essential element of the contract, and especially so when the eggs were concealed from view, and not subject to inspection by defendant.

The damage to be recovered must always be the natural and proximate consequence of the act complained of.

Sedg. Dam. 3d ed. 65.

It is an ancient and universal rule, resting upon obvious reason and justice, that a wrong doer shall be held responsible for the proximate, and not the remote, consequence of his actions.

2 Pars. Cont. 455; *Jones* v. *Gilmore*, 91 Pa. 313.

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may be fairly considered as arising naturally from such breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

Jones v. *Gilmore*, 91 Pa. 313.

The damage alleged is the decay of the eggs. The plaintiff must connect the condition of the eggs with the act of the defendant, and show satisfactorily on his part that the condition is the result of defendant's act.

To do this it became absolutely necessary to establish that these eggs were good and fresh, and that, while in his possession he kept them in such a way as to properly preserve them; hence, the inquiry into the conditions in which the eggs were kept in plaintiff's own ice house became material; and the concealment of the true history of the eggs was an element of bad faith.

Per Curiam:

There is technical error in that portion of the charge covered by the fifth assignment of error, but in view of other portions of the charge and the whole evidence, no injustice was done to the plaintiff. No error is found sufficient to demand a reversal of the judgment; substantial justice was done by the verdict and judgment thereon.

Judgment affirmed.

Henry S. RHEIN, Exr. of Henry E. Rhein, Deceased, *Appt.*,

v.

Rebecca S. MILLER, Exrx. of Margaret Rhein, Deceased.

A bequest: "I give and bequeath to my beloved wife, Margaret, all my finished cabinet ware, on hand at the time of my decease, all my certificates of loan of the City of Reading, all my bonds and notes and all other evidence of indebtedness to me, that I have or may have at the time of my decease; and I also give and bequeath to my said wife, Margaret, all my household furniture and goods, of whatever kind or nature soever, of which I may die possessed of, for her use for and during her natural life, and after her death the same to go to my son," etc.,—is **an absolute gift** of the cabinet ware, certificates, bonds, notes and other evidence of indebtedness, to the wife.

(Argued March 1, Decided March 14, 1887.)

JANUARY Term, 1886, No. 371, E. D., before Mercur, *Ch. J.*, Gordon, Trunkey, Sterrett, Green and Clark, *JJ.*

Appeal from a decree of the Orphans' Court of Berks County, dismissing exceptions to an adjudication and awarding distribution. *Affirmed.*

The facts as they appeared at the audit of the second account of Henry S. Rhein, executor of Henry E. Rhein, deceased, before SCHWARTZ, *J.*, are thus stated in the adjudication:

"The decedent died testate in 1873, leaving to survive him as heirs at law: a widow, Margaret Rhein, and three children, namely: Henry S. Rhein, Rebecca S. Miller, who is also executrix of the said widow, now deceased, and Amelia S. Duth.

"Testator in his will first explains that he is of sufficient mental capacity to make a will, and that he had therefore provided for his children by transferring to each of them certain of his properties in lieu of their and each of their respective share or shares of their inheritance. After which he proceeds in language as follows:

"'Therefore I make this my last will and testament in manner following, to wit: and first, I direct that my body be decently buried and that my funeral be conducted in a manner corresponding with my estate and my situation in life; and I direct that all my just debts and funeral expenses be fully paid and satisfied as soon as conveniently may be after my decease. Item —I give and bequeath to my wife, Margaret, all my finished cabinet ware, on hand at the time of my decease; all my certificates of loan of the City of Reading, all bonds and notes and all other evidences of indebtedness to me that I have or may have at the time of my decease; and I also give and bequeath to my said wife, Margaret, all my household furniture and goods of whatever kind or nature soever, of which I may die possessed of, for her use for and during her natural life, and after her death the same to go to my son, Henry S. Rhein, if he be then living, and if he is not living the same shall go to the heirs of my said wife.'

"He also gave and devised to his said widow a lot of ground in the City of Reading. The residue of his estate he gave to his son Henry and appointed him executor of his said will and testament.

"The fund for distribution before us arose out of the bequests to his widow under the clause of finished cabinet ware, city certificates, bonds and other evidences of indebtedness.

"The principal contention is whether she had an absolute or only a life estate in said legacies.

"The chief object of the testator appears to have been to provide for the comfortable support of his widow.

"Henry S. Rhein contended that the widow had only a life estate in the bequests. In support of this proposition he further contended that the semicolon used in decedent's will between the words 'finished cabinet ware,' etc., and the words 'household furniture and goods,' constituted no part of decedent's will, and that in the construction of wills all punctuation should and must be eliminated. This proposition is not sustained by law. It is, however, true that punctuation must give way, wherever it interferes with a proper and reasonable construction of a will; but it is also equally true that when it aids, as in this case, to discover the intention of a testator, it takes hold for such purpose. Wigram, Wills, p. 29.

"Henry S. Rhein also offered considerable testimony to establish the intent of testator by and through surrounding family circumstances. He proved that he was a bachelor at the execution of the will and at his father's death. He also showed that for a number of years he managed and conducted his father's business and that the estate was mainly accumulated through his industry and management. No express contract is shown to have existed between the father and the son. The son resided with the father and conducted his affairs. Neither the will nor the evidence to establish the circumstances surrounding the family disclosed anything from which to find that the testator intended to give his widow a life estate.

"The terms of the will disclose that his sole object was to provide for the comfortable support of his widow. It is written in clear and proper English. The language used in bequeathing the cabinet ware, bonds, etc., is precise and admits of but one interpretation, namely: an absolute gift to her; nor is there anything in the testimony offered from which a contrary intent can be gathered.

"A testator's intention must principally be ascertained from the four corners of his will. It will not do for courts to permit a testator's neighbors and acquaintances through bias, interest or sympathy to make it for him after his death, or to assist the court to find his intentions. Rebecca S. Miller, as executrix of her mother, filed exceptions to the filing of the account, to the allowance of credit for compensation, counsel fees, bond assigned to her and mortgage assigned to her sister, Amelia S. Duth.

"The court, in a former proceeding, on the petition of said executrix, awarded her a citation upon the accountant to show cause why he should not pay over to her $8,895.61, it being the balance admitted to be in his hands by his account as filed on March 19, 1874, with all interest in his hands; or, in case the said balance consisted of the original evidences of indebtedness as composed by the inventory on said estate, or of other securities in their place, to assign and transfer the same to the petitioner, and also to show cause why he should not file a detailed statement of said balance, showing where it is deposited if in cash, or the character, date and amount of the several securities if the same be invested, together with the names of the persons to whom the same were loaned. Upon the hearing of the above citation the court discovered that it would be almost impossible to get at a correct result so far as the amounts in accountant's hands were concerned. We also did not feel at liberty to go into the inquiry necessary to solve the questions raised by the citation. It, therefore, ordered the filing of an account.

"The former account had been filed for more than ten years at the time of granting said citation. During the mother's lifetime all parties treated it as a life estate. The executor retained the corpus of the estate, with the consent and wishes of his mother. He paid her the interest regularly, as often as he received the same. He was for many years the main stay of the family. It was his energy, industry and business capacity that created the principal part of the estate in controversy.

"The dispute between him and his sisters sprang from his marriage. The sisters, after the dispute between them, submitted the will to counsel for interpretation, and, having learned its import, induced their mother to make her will in their interest. The executrix, after her mother's death, caused said citation to issue, and indirectly endeavored to inquire into matters and things which could not be inquired into under the ordinary practice of law.

"Accountant in his second account took credit for $2,000 for services rendered as accountant and $300 for professional services, both of which are objected to. The accountant in his first account did not ask for credit for compensation or counsel fees, to both of which he was entitled. He should, therefore, be allowed his reasonable commission for settling of the estate, as also reasonable compensation for the service he rendered his mother in the management of her said estate. His proper and ordinary compensation in the settlement of his father's estate is $475, and his services as rendered to his mother in the collection of her interest and the management of her estate is worth $697. * * *

"Upon proceeding to the examination of the account, the same was found to be correct, except as modified by the foregoing.

"Balance due the estate, as per account filed, $4,763.61.

To which add surcharge on account of compensation $828.00.

Balance in accountant's hands $5,591.61.

For which deduct register's cost for citation and recording report $6.35.

For distribution to estate of Margaret Rhein, deceased, $5,585.26.

"Decree *nisi* accordingly."

To this adjudication exceptions were filed by the accountant which specified the action of the court in not dismissing the citation issued upon the petition of Rebecca S. Miller; in ordering and decreeing that the accountant should make and file an account; in deciding that under the will the testator bequeathed to his widow an estate absolute in all his finished cabinet ware on hand at the time of his decease, all his certificates of loan of the City of Reading, all bonds and notes and all other evidences of indebtedness to the testator; in not deciding that by said will said widow was entitled only to the interest during her lifetime of the personal estate above mentioned; in not deciding that by said will testator bequeathed to the accountant all his personal estate absolutely, to take effect after the death of his widow; in not making an order and decree that said Henry S. Rhein was entitled to the balance in his account filed, of $4,763.61, absolutely, etc., and in not allowing the whole amount of the compensation claimed by the accountant as executor.

The court subsequently filed the following opinion:

"The question raised by the exceptions of

Henry S. Rhein is the construction of the will, whether the clause 'for her use for and during her natural life, and after her death the same to go to my son, Henry S. Rhein, if he be living; and if he is not living the same shall go to the heirs of my said wife, share and share alike,' relate to and qualify all the bequests made in this item preceding this limitation, viz.: 'I give and bequeath to my beloved wife, Margaret, all my finished cabinet ware on hand at the time of my decease, all my certificates of loan of the City of Reading, all bonds and notes and all other evidences of indebtedness to me that I have or may have at the time of my decease; and I also give and bequeath to my said wife, Margaret, all my household furniture and goods of whatever kind or nature soever of which I may die possessed of;' or whether it simply relates to and limits the bequest of the household furniture, made in and by the following clause, viz: 'and I also give and bequeath to my said wife Margaret all my household furniture and goods of whatever kind and nature soever, of which I may die possessed of.'

"These two sentences are separated by a semicolon. Each sentence is complete and perfect by itself. Separately read they make sense, the former constituting an absolute bequest and the latter a life estate. Neither is dependent upon the other, to render either intelligible or to get at the meaning and intention of the testator. In both the pronoun representing the testator, the verbs expressing his act and will, and the name of the legatee, are contained. And these two sentences are complete, perfect, intelligible and expressive of the meaning and the intention of the testator, whether they are separated by a semicolon, period or comma, or whether punctuation be entirely absent or now eliminated.

"Were the pronoun 'I' and the verbs 'give and bequeath' wanting, so that the second sentence read, 'and also to my said wife Margaret all my household,' etc., or were also the name of the legatee not expressed and the sentence read 'and also all my household furniture,' etc., then the second sentence would become a clause and a part of the first sentence and be meaningless without reference to it, and the whole bequest possibly limited to a life estate.

" 'It is only where the first sentence is complete and the other imperfect, or *vice versa*, so as not to be intelligible without referring to the first or the one that is complete in order to supply the defect, that the word "also" can ever have the meaning of the words "in like manner" given to it or in causing the one clause to govern and direct the other.' " *Evans* v. *Knorr*, 4 Rawle, 66.

"In such case the word also is used as a mere copulative. In the will drawn it is evidently used to point out a new bequest. It imports no more than the word 'item,' which *Judge* Agnew says is 'an usual word in a will to introduce new distinct matter.' *Horwitz* v. *Norris*, 60 Pa. 282.

"Notwithstanding the able argument for the exceptant in his behalf, and the sympathy for him heretofore expressed the rules relative to the construction of wills constrain me to leave the adjudication undisturbed.

"The exceptions in this behalf are, therefore, dismissed.

"All other exceptions, after due consideration, are also dismissed and the decree heretofore made allowed to remain."

This action by the court was assigned as error.

Messrs. **B. T. Shearer, S. L. Young** and **F. R. Schell,** for appellant:

Was the bequest of finished cabinet ware, loans, bonds, etc., to Margaret Rhein, the widow, absolute or for life only? The intention of the testator must govern. The whole will must be taken together, and effect given to every part.

Provenchere's App. 67 Pa. 66; *Schott's Est.* 78 Pa. 40; Dwar. Stat. 144.

A particular intent must yield to a general, if both cannot consist together.

Hitchcock v. *Hitchcock*, 35 Pa. 393; *Doebler's App.* 64 Pa. 9.

One part of a will may modify another. A devise or bequest may be changed by a subsequent disposition, so as to convert an absolute estate to a life estate only and *vice versa*.

2 Jarm. Wills, 48, 49; *Sheets' Est.* 52 Pa. 263; *Shreiner's App.* 53 Pa. 106; *Zerbe* v. *Zerbe*, 84 Pa. 147; *Ulrich's App.* 86 Pa. 386.

Punctuation is not authoritative in interpretation.

1 Redf. Wills, 434; *Arcularius* v. *Sweet*, 25 Barb. 405; *Arcularius* v. *Geisenhainer*, 3 Bradf. 64.

Every devise or bequest must have a limitation annexed to it, to show the quantity of estate given. This may be express or implied; but where there is an express limitation there cannot be an implied one. Expression is the exclusion of implication. *Expressum facit cessare tacitum.*

The circumstances of the testator, his family and the amount and character of his property shall be taken into consideration.

Dwar. Stat. 178; 1 Redf. Wills, 503, Prop. V. *Postlethwaite's App.* 68 Pa. 477.

Every interpretation that leads to an absurdity ought to be rejected.

Dwar. Stat. 128.

The testator begins his will by declaring that he has conveyed real estate to each of his children, naming them. After this, in the disposing part of the will, the daughters are not mentioned, showing that they were not in his mind when he came to determine who should have the property he then owned. The widow and his son Henry only were mentioned. It is clear, therefore, that he intended that his widow and his son should have all his estate. This is the general intent, and no particular part of the will taken alone must be construed, as the appellee claims, so as to defeat it.

The words "for and during her natural life" apply to the whole bequest preceding those words.

Where a testator divides his will into sections, numerically arranged, and in some instances places the words of limitation at the end of each section, it seems they will be considered as applicable to the several devises contained in that section and not be confined to those in immediate juxtaposition.

2 Jarm. Wills, 74, 75, ed. of 1880.

"And" is a connective conjunction. It signifies that a sentence is to be added to what precedes. The fact that the will was written by a lawyer is important.

Sheet's Est. 52 Pa. 257; *Ulrich's App.* 86 Pa. 386; *Zerbe* v. *Zerbe*, 84 Pa. 147.

Written or printed words represent sounds, and thereby convey ideas; punctuation marks do not.

Punctuation is a modern contrivance introduced during the sixteenth and seventeenth centuries. Acts of Congress and of State Legislatures are not punctuated.

Punctuation marks are intended to represent or indicate the pauses in the sentences uttered by the speaker.

When the words used are plain and the meaning clear, punctuation is of no assistance and can give no aid in construction. Only in cases where there is an ambiguity, punctuation may aid.

In the interpretation of a will, punctuation may perhaps be resorted to when no other means can be found, of solving an ambiguity; but not in cases where no real ambiguity exists except what punctuation itself creates. A single dot over a comma, so easily inserted by mistake or design and so difficult, if not impossible in most instances of proof or disproof, can never be allowed thus to overturn the natural meaning of the written words, whether taken by themselves or in connection with the whole instrument.

Arcularius v. *Sweet*, 25 Barb. 403.

The will in our case was dictated by the testator to the lawyer who wrote it. No direction was given as to punctuation. When finished it was read to him. He heard the words only, and he heard these, "for her use for and during her natural life." But the punctuation he did not hear, knew nothing of it, and it forms no part of the expression of his intention.

If that paragraph of the will be read regardless of punctuation, the meaning of the words is plain, clear, free from all ambiguity, and punctuation is not needed to ascertain the intention of the testator. It was so understood by him, and he intended to give an estate for life only to the widow.

The principle of estoppel applies. The widow construed the will so that after her death Henry should have the whole estate. He had a right to act upon this, to arrange his business and domestic matters accordingly, which no doubt he did, for the orphans' court says: "The dispute between him and his sisters sprang from his marriage." Had he remained single no dispute would have occurred, for then his sisters would have expected to inherit, not only what Henry received from his father but also what he since earned and accumulated himself. The daughters are bound by the acts of the mother. If she acted so as to be estopped from claiming the principal, they cannot claim it.

Horwitz v. *Norris*, 60 Pa. 282, has no application to our case. In that case the will was divided into paragraphs, each separate and complete in itself. Each paragraph commences with the word "item." The court says "Item is the usual word in a will to introduce new matter."

All contained in one item is therefore to be taken together; and none of it considered as new matter. In our case the whole bequest is in one item and the household furniture is not introduced as new matter under a separate item.

Messrs. **H. D. Green** and **A. G. Green,** for appellee:

The will gives the widow an absolute estate.

This view is consistent with the several rules of construction recognized as applicable to the interpretation of wills. It allows the intention of the testator to govern and to be gathered from the four corners of the will.

Provenchere's App. 67 Pa. 463.

It sustains the general intent, which is to provide for the wife.

Schott's Estate, 78 Pa. 40; *Hitchcock* v. *Hitchcock*, 85 Pa. 393; *Doebler's App.* 64 Pa. 9.

It takes into account the circumstances surrounding the testator at the time of making the will.

Postlethwaite's App. 68 Pa. 477.

It leads to no absurdity, and moreover works no injustice or inequality to Henry S. Rhein, the appellant. And lastly, the construction for which we contend is assisted by the punctuation, without the punctuation producing any ambiguity.

Hawk. Wills, p. 8; *Arcularius* v. *Sweet*, 25 Barb. 404; *Evans* v. *Knorr*, 4 Rawle, 66; *Horwitz* v. *Norris*, 60 Pa. 282.

Per Curiam:

We think the learned judge gave a correct construction to the will of Henry E. Rhein. It follows that there was no error in decreeing the appellee the sum found to be in the hands of the appellant as executor. He has no just cause to complain of any part of the decree.

Decree affirmed and appeal dismissed, at the costs of the appellant.

Rebecca S. MILLER, Exrx. of Margaret Rhein, Deceased, *Appt.*,
v.
Henry S. RHEIN, Exr. of Henry E. Rhein, Deceased.

Personalty which a testator gave his wife absolutely was during her life treated as given for life only, and by a family arrangement was **retained by** their son, his **executor,** until her death, when she bequeathed her whole estate to her daughters. The son claimed the personalty under the testator's will. The court found that he had acted **in good faith** and had rendered valuable services to the estate. *Held*, that he was **entitled to commissions** and a counsel fee.

(Argued March 1, Decided March 14, 1887.)

JANUARY Term, 1886, No. 379, E. D., before Mercur, *Ch. J.*, Gordon, Trunkey, Sterrett, Green and Clark, *JJ.*

Appeal from a decree of the Orphan's Court of Berks County, dismissing exceptions and awarding distribution. *Affirmed.*

The facts are stated in *Rhein* v. *Miller*, *ante*, 490.

The exceptions filed by Rebecca S. Miller to the adjudication were as follows:

1. The law does not warrant the executor in filing a second account in the register's office, of the same assets as are contained in his former account. Such a proceeding subjects

an estate to double costs and charges, delays its settlements and answers no legitimate or proper purpose.

The exceptant, therefore, objects to the second account as filed on account of its irregularity, and asks the court to rescind its former order, directing the filing of such second account and set aside the same.

2. The court erred in allowing the executor $475 as commissions, he having by his original account inferentially disclaimed compensation for the settlement of the estate, which involved no particular labor or trouble, and consisted, so far as appears, of filing an inventory and account on the same day, and of the payments in said account.

3. The court erred in allowing the executor $697 for services rendered as trustee or agent for the widow of the decedent, in paying the interest due her annually.

4. The court erred in allowing the executor $300 for money paid to counsel, not for services rendered for the estate, but in defending the executor's claim to the reversion, he alleging that the estate given to the widow by the will was his, subject to the interest to the widow for life.

5. The court erred in not surcharging the executor with interest on the amount on his hands from October 1, 1883, beyond which time no interest was paid, although the fund has been and is now on interest, either in loans or in real estate, bought by him in his own name.

The court dismissed the exceptions, and confirmed the adjudication.

The assignments of error specified the action of the court in dismissing the exceptions, and in finding, in the opinion of the court adjudicating upon the second account, the following facts:

1. That the executor retained the fund, with the consent and wishes of his mother.

2. That he paid the interest to her regularly —as often as he received the same.

3. That he was for many years the mainstay of the family.

4. That it was his energy, his industry and business capacity which created the principal part of the estate in controversy.

5. That the dispute between him and his sisters sprang from his marriage.

6. That the sisters, after the dispute between them, submitted the will to counsel for inspection, and having learned its import, induced their mother to make a will in their interest.

7. That the executrix, after her mother's death, caused said citation to issue, and indirectly endeavored to inquire into matters and things which could not be inquired into under the ordinary practice of law.

Messrs. **H. D. Green** and **A. G. Green,** for appellant:

A trustee who uses the fund in his own business, forfeits his right to commissions.

Sharp's Est. 2 Phila. 280.

A trustee who litigates in opposition to the trust cannot be allowed commissions.

Greenfield's Est. 24 Pa. 232; *Witman's App.* 28 Pa. 376; *Landis* v. *Scott,* 32 Pa. 495.

A trustee who has disclaimed a right to commissions will not be allowed to claim them, because his final account is excepted to.

Barton's Est. 1 Pars. 24.

Messrs. **B. Y. Shearer** and **S. L. Young,** for appellee.

Per Curiam:

Although, in an opinion just filed on an appeal by the present appellee from this same decree, we have held that he put a wrong construction on the will of his father, yet he appears to have acted in good faith, and, with the assent of the widow and all the heirs, for some ten years performing useful and valuable services. Such being the undoubted facts, we think it would now be inequitable and unjust to deprive him of the reasonable compensation awarded by the orphans' court.

The specifications of error are not sustained.

Decree affirmed and appeal dismissed, at the costs of the appellant.

George PEARSON, *Plff. in Err.*,
v.
Benjamin SHARP *et al.*, Exrs.

1. A **deed** absolute on its face **may be shown by parol** evidence **to be a** mere **security** for money advanced or for the performance of a definite obligation.
2. It does not follow from the possession of a **power of sale by** the **grantee** in such a deed that the power is to be exercised otherwise than by foreclosure.
3. *Todd* v. *Campbell,* 32 Pa. 255 and *Lance's App.* 3 Cent. Rep. 622, 112 Pa. 468, distinguished.

(Argued Jan. 21, Decided March 14, 1887.)

JANUARY Term, 1887, No. 40, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Green, *JJ.*

Error to the Common Pleas No. 1 of Philadelphia County, to review a judgment on a verdict for the defendants in an action of ejectment. *Reversed.*

The opinion states the facts.

Messrs. **Sharp & Alleman,** and **J. S. Freeman,** for plaintiff in error:

In order to convert a deed absolute on its face into a mortgage, by parol evidence, such evidence must be clear, explicit and unequivocal; and the parol defeasance must be shown to be contemporaneous with the deed. A deed absolute on its face may be shown to be in reality a mortgage, not only by direct evidence but also by facts and circumstances from which such a result may be inferred. The facts and circumstances must be clearly inconsistent with the deed being an absolute conveyance.

Burger v. *Dankel,* 100 Pa. 113; *Plumer* v. *Guthrie,* 76 Pa. 441.

In this case there is not only direct evidence of a contemporaneous parol agreement that this deed was to be simply security for a loan, but also a series of corroborating circumstances which can only be explained upon this theory.

The proof is clear, explicit and unequivocal.

If land be conveyed in consideration of a preexisting debt due from the grantor to the grantee, and it is the understanding of the parties that the debt shall survive, the deed is but a mortgage; and this understanding may be proved by parol. The retention of possession by the grantor is a circumstance of great weight in determining whether a conveyance absolute in form was intended to pass the estate, or to be only a security for the debt.

A chancellor will not decree a deed absolute on its face to be a mortgage on proof of the mere verbal declaration of the parties; but facts and circumstances must be shown inconsistent with the idea of an absolute purchase.

The existence of such facts may be shown by the admission of the grantor; but it is the facts, not the admissions, which raise the equity.

Todd v. *Campbell*, 32 Pa. 250; *Plumer* v. *Guthrie*, 76 Pa. 441; *Rhines* v. *Baird*, 41 Pa. 256.

Mr. **Edwin S. Dixon**, for defendants in error:

The law in this State is too well settled for discussion, that where the grantee has power to sell the transaction cannot be a mortgage.

Lance's App. 8 Cent. Rep. 622, 112 Pa. 468.

Mr. Justice **Gordon** delivered the opinion of the court:

On the 7th of April, 1870, the plaintiff, George Pearson, owned and occupied a lot of ground, situated at the northwest corner of Vine and Sixtieth Streets, in the City of Philadelphia. On this lot Pearson had previously erected two houses, in one of which he resided with his family; and at the time above mentioned he had commenced the erection, on the same lot, of several other houses.

At the date stated he, the said Pearson, executed and delivered to Joseph F. Heathcote, whose executors are the principal defendants in this case, a deed in fee for the premises above described, which, on the trial of this case in the court below, was interposed as a complete defense to the plaintiff's action. To rebut this defense the plaintiff offered evidence to prove that this deed, although absolute on its face, was in fact but a security for money advanced by Heathcote to Pearson, and that he had been reimbursed by rents received from the property; but the court below, being of the opinion that in this particular the plaintiff had failed to establish what he proposed, directed a verdict for the defendant.

We are not satisfied with the rectitude of the conclusion thus adopted by the learned judge who tried this case. While we admit all that has been said in *Plumer* v. *Guthrie*, 76 Pa. 441; *Berger* v. *Dankel*, 100 Pa. 113, and other similar cases, concerning the character of the evidence that must be adduced in order to establish a parol defeasance, yet we are not to ignore the well established doctrine, supported not only by the cases cited, but many others, that although a deed may on its face appear to be indefeasible, an oral defeasance may, by proper proof, be established. That is to say: the conveyance may be shown to be a mere security for money advanced, or for the performance of some definite obligation.

We do not, indeed, understand the doctrine here stated to be denied; on the other hand, the rule being admitted, it is denied that the evidence produced by the plaintiff is sufficient to bring his case within the rule. We are, however, of a different opinion. A very careful examination of the proofs and offers convince us that the deed of the 7th of April, 1870, was executed by Pearson to Heathcote for the purpose of security only. On this point two witnesses are especially clear; they are Christian Kneass, the scrivener under whose supervision the deed was prepared, and Annie E. Walls, a niece of the plaintiff. The first of these speaks positively of the deed as intended by the parties as security for money advanced by Heathcote to Pearson. He says, when speaking of what occurred at the time of the preparation of the conveyance:

"From what I can recollect of the interview, Mr. Heathcote said he wanted a deed drawn for the property at Sixtieth and Oregon (Vine) Streets. He stated that Mr. Pearson was a drinking man, and he did this because he wanted to protect Mr. Pearson. No money passed between them in my office at the time the deed was executed. Mr. Heathcote had advanced Mr. Pearson some money. He, Mr. Pearson, was indebted to Mr. Heathcote. This deed was made for the purpose of of protecting Mr. Pearson. It was also made because Mr. Heathcote had advanced Mr. Pearson some money. The principal reason was to secure himself, because Mr. Pearson's habits were bad."

It will be observed from this testimony that the parties did not intend a purchase and sale of the property, and that the deed, according to the express declarations of Heathcote, was intended as security for the money which he had advanced; and it is further to be noted that no money was paid, no obligation given, no price fixed upon the property, nor was there anything else done which would have given the matter the appearance of a sale. So far, then, as this testimony goes it is express and positive, and leaves no room for doubt or hesitation; and had it gone one step farther, and revealed the fact that Heathcote was to reconvey on receipt of his advancements, no one could hesitate to pronounce the transaction a mortgage. But Annie E. Walls, the other witness whom we have mentioned, supplies what is wanting for the perfection of the plaintiff's case. She details with particularity the transactions which led to the making of the deed, and says:

"It was finally agreed between Heathcote and Pearson that Pearson should deed this lot to Joseph F. Heathcote, as security for the money advanced and to be thereafter advanced for the purpose of erecting buildings on this lot, and when the amount loaned by Heathcote to Pearson was paid, with interest, Heathcote agreed to reconvey and redeed this lot back to the plaintiff, Pearson; and if Pearson did not or could not pay Heathcote his money with interest, at a favorable time the lot and buildings were to be sold, and the proceeds taken first to pay Heathcote the amount due him, and balance to go to and be paid to Pearson."

She further testifies that subsequently she frequently heard the parties say, in her presence and in the presence of each other, that the property had been conveyed solely for the security of the grantee, and was to be reconveyed to Pearson as soon as Heathcote was paid. If this witness is to be believed, a parol defeasance is established; and were we to adopt the judgment of the court below, we must in effect anticipate the operation of the Act of

June 8, 1881, which, when the deed in controversy was executed, was not yet enacted.

But beside the evidence to which we have adverted, there were offers of testimony ruled out which, as corroborative of the preceding evidence, were relevant and important. These offers embraced the letter signed "Sister Mary;" the evidence of John W. Neilds, William Suplee, Christopher Grimes, Thomas Carr, Patrick McDonald, Mrs. Appleton, Robert Pearson, Alfred Pearson, Kate R. Wilson, James Sharkey and Thomas Clegg. All these proposed to show the continued possession of Pearson, and the position of Heathcote as a mere mortgagee; all were designed to exhibit such circumstances, conditions and declarations as were inconsistent with the idea of absolute title in Heathcote.

It is urged, however, that from the testimony of Mrs. Walls it is obvious that Heathcote had, even by the oral arrangement, the power to sell; and that, hence, under the rule as stated in the cases of *Todd* v. *Campbell*, 32 Pa. 255, and *Lance's App.* 3 Cent. Rep. 622, 112 Pa. 456, the transaction cannot be regarded as a mortgage, but rather as an oral trust which the Act of 1856 avoids.

But we cannot see the applicability of the cases cited, to the facts developed in the present contention. In *Todd* v. *Campbell* the facts were not sufficient to raise a trust of any kind; while in *Lance's Appeal* the evidence as well as all the circumstances showed clearly that it was not otherwise intended from the beginning, than that Bonnell, Lance's vendee, was to have the power to sell, not only for the purpose of paying the indebtedness of Lance to himself, but also in order to relieve the property from its liens. Here, on the other hand, there is nothing of the kind; for it is obvious that the parties, being ignorant of the legal effect of their own arrangement, assumed that Heathcote possessed that power, although both were aware that when his advancements were paid his right in the property ceased. Moreover, it does not follow, that even had he possessed that power it was not to be exercised only by way of foreclosure and if so, the parol defeasance would not be thereby affected.

What we had said sustains all the exceptions of the plaintiff in error; and, as a consequence, *we reverse the judgment of the court below and order a new* venire.

SUPERVISORS OF SAUCON TOWNSHIP, *Plffs. in Err.*,
v.
Charles BRODHEAD.

SAME *v.* SAME.

1. A writ of **certiorari to review** a decree confirming a **report of viewers** laying out a public road, taken more than **two years after** the final **confirmation** of the report, will be **quashed.**
2. A **writ of error** to review an order granting a writ of **alternative mandamus**, is premature, and will be quashed.

(Decided March 21, 1887.)

JANUARY Term, 1887, Nos. 320, 315, E. D. *Certiorari* to the Quarter Sessions of Northampton County, to review a judgment confirming the report of viewers; and error to the Common Pleas of Northampton County, to review a judgment granting a writ of alternative *mandamus*. *Writ quashed.*

Some of the inhabitants of Saucon Township, particularly of the University District, deeming it necessary to have a well defined public highway to lead from the southern line of the Borough of South Bethlehem at Birch Street westwardly, to a point on the line of Chestnut Street, known as the western terminus of Packer Avenue, petitioned the court of quarter sessions on June 2, 1884, to appoint proper persons to view and lay out the same according to law.

Charles Brodhead was not a petitioner for the road.

An order appointing viewers was accordingly made.

The viewers reported as follows:

"That they gave due written notice to the owners of the lands through which the proposed route was intended to pass, of the time and place of meeting to perform the duties of their appointment, as appears by the hereunto attached affidavit.

"That on Saturday, June 14, 1884, at 2.30 in the afternoon, in accordance with said order and notice, the viewers met on the premises in Saucon Township for the purpose of performing the duties imposed upon them by the said order.

"That the following named persons were present, to wit: Howard Knecht, William Henn, James Bœhm, James R. O'Brien, W. A. Wilbur.

"That, after having been duly and severally sworn according to law, proceeded to view the premises and assess the damages; and, after having carefully viewed the same, we find and report that there is occasion for a public road, to be located in the manner described in said order, the courses and distances to be as follows: commencing at a point the southeastern extremity of Birch Street, being in the southern line of the Borough of South Bethlehem, then south eighty-eight degrees, west, 1,132 feet, thence south 75¼ degrees, west 468 feet, to a point known as the western terminus of Packer Avenue, as will more fully and at large appear by the annexed map or plan of said road, as laid out by the undersigned viewers.

"That the said viewers having decided in favor of locating said road, in manner as aforesaid, endeavored to procure from the persons over whose lands such location was made, releases for damages arising from the opening of said road, and were refused by said owners, and therefore failed to procure such releases.

"That thereupon the said viewers proceeded to view the said premises and assess the damages which the said persons who refused to release as aforesaid, will sustain by reason of the opening of said road. The viewers aforesaid find that by reason of said opening it will take and occupy portions of lands belonging to the Lehigh University, and portions belonging to Charles Brodhead, and that the said University and the said Charles Brodhead therefore sustain damages as follows, to wit: Lehigh University $100; Charles Brodhead $136.50."

The report was presented and confirmed *nisi* June 16, 1884. It was confirmed absolutely September 1, 1884; and the court directed the road to be opened thirty feet wide and according to the report.

On December 15, 1884, the Supervisors of Saucon Township obtained a rule to show cause why the confirmation of the report should not be stricken off, and the report set aside.

On July 25, 1885, upon discharging the rule the court, SCHUYLER, *P. J.*, delivered the following opinion:

This report is palpably defective in that it does not state affirmatively, as required by the rule of court, that notice had been given to the Supervisors of the Township of the intended view; and if an exception to this effect had been filed in proper time it would have been our plain duty to have set the report aside. But this was not done. The report was confirmed absolutely September 1, 1884. Two days thereafter an order to open the road was issued and promptly served on the supervisors. In pursuance of this order the Supervisor in whose district the road was located proceeded in the following month of October to open the road with a force of twenty men. The petition on which the present rule is grounded was not presented until December 15, 1884. This, we think, in the absence of any excuse for delay, was clearly too late. It is true as argued by the learned counsel for the rule, that the Supervisors have had no day in court; but the answer is that they might have had, if as soon as they heard of the proceedings, they had moved to have them set aside. *Vigilantibus, non dormientibus, leges subveniunt.*

The objection that the report does not show that the road is laid out over the lands, of Charles Brodhead and of the Lehigh University is at variance with the fact. This sufficiently appears from the draft which is a part of the report. *Road in Bart Township,* 13 Serg. & R. 84.

It also sufficiently appears, we think, that the road is in Saucon Township. The viewers report that "they met on the premises in Saucon Township." The order to open the road was directed to the Supervisors of that Township, and the road was actually opened by one of their number. It is true, according to the draft, that the viewers in running the line of the road adopted the southern line of the Borough of South Bethlehem for a considerable distance. Ordinarily the line returned by the viewers is to be regarded as the center line of the road; but evidently the Supervisors did not so regard the present line, for it is not pretended that any part of the road actually opened by the Supervisors is within the corporate limits of the Borough of South Bethlehem. Under no circumstances, therefore, can that borough be held for any part of the damages.

On August 10, 1885, Charles Brodhead presented to the Common Pleas of Northampton County a petition in which he recited the proceedings in the quarter sessions to the assessment of damages to him, and alleging that the Supervisors of Saucon Township had failed and refused to pay the damages, prayed that a *mandamus* might issue commanding them to pay.

The common pleas granted a rule to show cause why a writ of alternative *mandamus* should not issue as prayed.

The Supervisors filed the following answer:

"First, Lower Saucon Township is not liable to make payments of said damages because no road damages have been assessed by the viewers laying out the road mentioned in said petition against said Township. Neither the petition for the appointment of the viewers to lay out the public road therein mentioned, nor the report of the viewers, does locate said road in said Township. The petition states 'to lead from a point the southeastern extremity of Birch Street, being the southern line of the Borough of South Bethlehem, thence westwardly along what is known as the western terminus of Packer Avenue,' and the report of the viewers laying out said road states, 'commencing at a point the southern extremity of Birch Street being on the southern line of the Borough of South Bethlehem, thence south eighty-eight degrees, west 1,132 feet, thence south 75¼ degrees, west 468 feet, to a point known as the western extremity of Packer Avenue.' The report does not state that the road is laid out through lands of Charles Brodhead.

"Second, because the draft attached to the report of viewers shows that the road is not laid out through the territory of Lower Saucon Township. It exhibits the fact that the road is laid out on the borough line. It does not show that it is the dividing line between the Borough of South Bethlehem and Lower Saucon Township.

"Third, because the road as laid out, the report shows, passes entirely over and upon the road bed known as Packer Avenue, being over and upon another road bed; and the law prohibits laying a new road upon the road bed of another road already opened or along the line of such a road.

"Fourth, the Supervisors of said Township never had any notice of the time of the meeting of viewers who laid out said road."

On January 24, 1887, the rule was made absolute and a writ of alternative *mandamus* issued.

On February 12, 1887, the Supervisors obtained a *certiorari* to review the proceedings in the quarter sessions, and a writ of error to review the proceedings in the common pleas.

Upon the former writ *the assignment of error* specified the action of the quarter sessions: 1, in confirming the report of the viewers, because it did not affirmatively set forth that notice of the view had been given to the Supervisors of Saucon Township, wherein the proposed road was to be located; 2, in not referring the report back to the viewers, and in not granting a review; 3, in assuming jurisdiction of the petition and proceedings for laying out a road on, along, or at the side of Packer Avenue, a street already dedicated and opened of the width of sixty feet; and 4, in confirming the report of viewers at the same term of their appointment, and in not quashing the proceedings for the road, because they were illegal.

Upon the latter writ *the assignments of error* specified the action of the Common Pleas in awarding the *mandamus*, and in subsequently overruling a motion to quash the *mandamus*.

Mr. **A. S. Knecht,** for plaintiffs in error.

Mr. **J. Davis Brodhead,** for defendant in error:

The writ of *certiorari* in this case was taken more than two years after the report of the viewers was confirmed, and more than two years after the road was actually opened by the plaintiffs in error, and should be quashed.

Act of April 1, 1874, P. L. 50; *Re Road in Wilkins Township*, 5 Cent. Rep. 701.

Further, there were no exceptions filed to the report of viewers; and none of the assignments of error were properly "presented to the consideration of the court below, and for that reason will not be noticed here."

Road in Allen Township, 18 Pa. 463.

Mr. **Knecht,** in reply:

A defendant has no day in court so long as he has no knowledge of any proceedings against him.

Appeal of Cent. R. R. Co. 102 Pa. 38.

The Supervisors petitioned the court not only to strike off final confirmation, but also for a review. They were entitled to a review under Act of June 13, 1836, P. D. p. 1510, § 103.

The rule was dismissed July 27, 1885, for application of review. The *certiorari* taken February 12, 1887.

A final decree is that which ends a case in the court below.

Act of March 16, 1868, § 1, P. L. p. 46; *Hilbish* v. *Catherman*, 60 Pa. 444.

The case was not decided finally in the court below until July 27, 1885, when the court discharged the rule.

The rule entered December 15, 1884, to strike off final confirmation of the report and grant a review suspended the decree of confirmation, which did not become final until July 27, 1885, when the rule was discharged.

Per Curiam:

These cases were argued together. The *certiorari* issued more than two years after the final confirmation of the report of the viewers; and there is no final judgment in the case in which the writ of error issued. Neither writ can be sustained, therefore.

Writ in each case quashed.

Sarah WELSH'S APPEAL,
Wesley BOWMAN'S APPEAL,
ESTATE OF Moses EVERETT.

1. Nothing less than clear and undoubted evidence should be held sufficient to extend the **lien of debts against** the **real estate of a decedent.**
2. In this case conversations between an administrator *d. b. n.* and the widow and heirs, *held*, too indefinite to amount to a **waiver of** the **limitation of** the **Act of February 24, 1834.**

(Argued March 2, Decided March 14, 1887.)

JULY Term, 1886, No. 205, 206, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Appeals from a decree of the Orphans' Court of Columbia County, confirming an auditor's report with modifications, and awarding distribution. *Affirmed.*

Moses Everett died July 8, 1877, leaving to survive him a widow, Letitia Everett, and six children, viz.: T. V. Everett, James, Henry C., Albert, Mary M. and Clara J., intermarried with one Melick. A few days after his death letters of administration were granted to T. V. Everett and H. R. Kline. Mr. Kline was the active administrator in settling the personal estate. Both T. V. Everett and Kline died before filing an account. J. Howard Kline, administrator of H. R. Kline, filed the account of the latter as administrator of Moses Everett, which account was finally confirmed December 10, 1881, showing a balance due accountant of $148.48.

In this account credits are claimed for payments made on two notes drawn by Moses Everett to Sarah Welsh dated respectively, April 15, 1873, and April 18, 1874, each for the sum of $100, by H. R. Kline, subsequent to the death of Moses Everett and prior to the death of H. R. Kline, last payment being made March 28, 1881, and indorsed on the notes.

Letters of administration, *d. b. n.*, in the estate of Moses Everett were granted to J. Howard Kline December 2, 1881. On December 13, 1884, said administrator *d. b. n.* presented his petition to the orphans' court praying for an order for sale of real estate for payment of debts. The schedule of debts attached to the petition contained among others the claim of Sarah Welsh. Sale was ordered, and on January 27, 1885, the real estate was sold for the sum of $2,497 and report thereof confirmed by the court February 7, 1885.

The accountant filed his first and final account to September Term, 1885, No. 25, to which three exceptions were filed September 30, 1885, in substance claiming that accountant had not charged himself with all that had come into his hands or that he should have received. Subsequently, by leave of court, another exception to the accountant's charge for commission of $126.30 and counsel fee of $80 was filed.

William Chrisman, Esq., was appointed auditor on exceptions, and to make distribution of the balance in accountant's hands. Before the auditor no evidence was given in regard to matters in the three exceptions first filed; and the surcharge therein claimed was disallowed by the auditor, and his finding confirmed by the court. The exception as to commission and counsel fee was overruled by the auditor, but the report of the auditor was modified, by the court deciding that $125 was a liberal allowance for the compensation of the administrator and the attorney, and surcharged accountant with the difference of $81.30.

In the matter of the distribution among other claims presented for payment out of the fund for distribution was that of Wesley Bowman, on book account, amount, $39.08, and Sarah Welsh, being the balance of the two notes above named.

First note due April 18, 1874, amount $100; payments made by the administrators, April 16, 1879, $30, and March 28, 1881, $40. Second note due April 15, 1875, amount, $100; payments made by the administrator, April 16, 1879, $31 and March 28, 1881, $40. Balance found due by audit on both notes at time of distribution, $184.55.

The auditor found as facts that the claims presented and allowed by the auditor were known to the widow and heirs, and the correctness of the same acknowledged by them before the Statute of Limitations could have been pleaded against any of them, as was also their expressed desire to have them paid, coupled with which was their request to have proceedings to sell real estate postponed to enable them to raise the money to pay the debt. This request was first made of J. H. Kline, the present accountant, prior to July 8, 1882, and repeatedly from that time forward, both before and after the sale of real estate was ordered. That claimants had not been guilty of laches, and that under the circumstances in this case they were not barred by the Statute of Limitations, and allowed the claims so presented, among them that of Sarah Welsh and Wesley Bowman, rejecting only one, and that because it had been barred prior to the death of Moses Everett. Counsel for widow and heirs objected to the allowance of all accounts and claims presented by the several creditors as being barred by the Statute of Limitations.

The auditor's first report was presented and confirmed *nisi* by the court upon February 13, 1886, and without any expression of opinion of the court, was, upon the first day of April, 1886, referred back to the auditor with directions to receive further testimony upon two points: first, the time when the administrator *d. b. n.* paid any debt due from the estate of the intestate for which he claimed credit or to be allowed in distribution; second, when as near as can be ascertained, did conversations take place between the widow of Moses Everett and his heirs, and the administrator *d. b. n.* in reference to the debts and postponing the time of sale of real estate? Which of the heirs, if any, were present and took part in such conversation? Which of the heirs assented to a postponement of the time of sale of real estate to a time later than the 8th day of July, 1882, and in what way such assent was given.

He reported the testimony of J. Howard Kline as to two conversations had with the widow and two of the five heirs, prior to July 8, 1882.

Some time in December, 1881, according to his testimony "I had a conversation with Mary, Henry and the widow. Henry and the widow said the debts should or ought to be paid, but they didn't know how to pay them. * * * They had no money then * * * they said they ought to be paid, but they did not say we will pay them * * * said they ought to be paid but did not promise to pay them. * * * At that time we talked of the real estate and I said the real estate would have to be sold unless they could negotiate a loan,—no day at that time fixed for selling the real estate."

"About July or August, 1882, I next had a conversation with the heirs, the same ones as before, Mary, Henry and the widow. About the same talk was brought over at that meeting. Nothing new from what took place before," except that "I began to ask them about the claims and they said they were correct."

The auditor's second report was confirmed *nisi* May 8, 1886.

Same exceptions were filed to both reports and both argued and disposed of by an opinion and decree of court filed July 5, 1886, modifying the report of the auditor by the rejection of certain claims of creditors presented to the auditor, among them that of Sarah Welsh and Wesley Bowman and the surcharging accountant with $81.80 on account of charge in account by administrator for services and counsel fee, as above stated.

In the course of the opinion the court said: "All of the claims presented before the auditor for distribution were simple contract debts, and were all due at the time of the death of Moses Everett, and several of them some years before. At the time of the sale of the real estate they were all barred by the six years' Statute of Limitations. Payments made by an administrator, on a debt due by the decedent, do not keep alive or renew a debt against the estate; nor do promises or admissions made by him have that effect. Giving notice of the claim by a creditor and making demand of payment, or placing the evidence of the claim in the hands of the administrator does not stop the running of the statute.

Steel v. *Steel*, 12 Pa. 66; *Fritz* v. *Thomas*, 1 Whart. 66; *Clark* v. *McGuire*, 25 Pa. 259; *Sarett's Estate*, 1 Pa. C. C. R. 600.

"These debts had each and all of them ceased to be a lien on the real estate of the decedent at the time of the sale. After a lapse of five years by the twenty-fourth section of the Act of February 24, 1834, all debts cease to be a lien on the land of a decedent unless an action be brought within that time or a copy of the claim be filed in the office of the prothonotary as therein required.

"Notice of the claim amounts to nothing. In *Bindley's App.* 69 Pa. 295, it was held that presentation by a creditor of his claim before an auditor making distribution under a previous sale and the receipt of a dividend did not continue the lien. The leaning of the court, says Sharswood, *J.*, through the whole current of the numerous decisions upon the subject, has been to favor the heir and to require of the creditors the vigilant prosecution of their demands in the mode pointed out. It is evident that no admission, however solemn, will dispense with an action.

"Even where an action is brought within the five years, yet if the land is not taken into execution within that time the lien is gone. So, if the five years expire between the time when the sale is ordered by the orphans' court, and the day of sale, the lien is gone as against the heirs.

Maus v. *Hummel*, 11 Pa. 228; *Bindley's App. supra.*

"It does not appear that the heirs or any of them said anything to any of their creditors to induce them to forbear filing a lien. None of them made any promise to any of these creditors to pay them, or that the lien of debts should remain.

"The fact that they had communication with the administrator in 1881, and afterwards, in which they expressed a desire if possible to save the farm from sale, and that they made ineffectual efforts to raise money, did not continue the lien. And if they had made individual promises to pay the debt of any person, the only fect would have been to hold the person so promising and not the estate.

"Giving to the loose conversation between the administrator and the widow and some of the heirs all the weight they are entitled to, they do not amount to a waiver of the provisions of the Act of 1834, limiting the lien of debts against the real estate of a decedent. It is possible that such a waiver may be made, but as was held in *Wallace's Appeal*, 5 Pa. 106.

"'But although the power to postpone the operation of the statute by parol must be asserted, it should not be forgotten that the proof showing an exercise of this power ought to be clear and undoubted. An agreement to the effect averred here ought to be incontrovertibly shown by the party who sets it up before the antagonist party be held bound by it.'

Wallace's App. 5 Pa. 107.

"The law clearly pointed out the remedy for securing the debts of their creditors. They knew in 1881 that the personal estate had been exhausted. It must be presumed that they knew that unless they brought an action or filed a copy of their claim as required by the statute, they would have no lien upon real estate. Having failed to avail themselves of the plain provisions of the law and lost their lien by their own laches, they have no claim on this fund and no ground for complaint. Now, July 5, 1886, the exceptions to the report of the auditor allowing to John Stiner and others in the list of creditors, Nos. 1 to 12 inclusive, amounting to $385.40, is sustained and the report in respect thereto is set aside."

Mr. **C. W. Miller,** for Sarah Welsh, appellant:

The Acts of 1797 and 1834 are not enlarging but restraining Acts. That they were enacted to set dead men's estates at rest, and enable heirs and others interested to measure with certainty the value of property inherited has been decided. In the presentation of claims against decedents before an auditor, on distribution in the orphans' court, claimants are no better off so far as being required to comply strictly to the requirements of the Act of Assembly limiting liens and actions, than in actions at law, is now well settled; and it can no longer be argued with propriety that administrators and executors as such are invested with such power and authority as to breathe new life into dead claims. But the appellant in this case claims relief from a different source.

While the Statute of Limitations can be pleaded, and when pleaded is a bar to recovery in the orphans' court as well as in suits at law, it need not be pleaded by parties interested, but if waived by the parties interested, it is binding upon them, and not in their power to wait until the time has passed when the creditors could have put themselves upon record as the law compels them to do, and say to them: "I did not mean to waive any legal right I had; you have been guilty of laches, and now I want the money. If you were too easy, and lacked a knowledge of business and the law, you must suffer."

Wallace's App. 5 Pa. 105.

From the time of the decision in *Wallace's Appeal* in 1847, up to *McClintock's Appeal* (29 Pa. 360) in 1857, the matter of waiving the limitation by heirs does not appear to have been raised, and from 1857 up to *Yorks' Appeal* there was no occasion for raising the question. The decision in *Yorks' Appeal* (1 Cent. Rep. 354, 659) was to protect creditors and heirs from wrongs that might be practiced upon them, certainly not to enable them to do injustice to others.

The nature of the exceptions filed to the administrator's account clearly shows that the position taken by the widow and heirs in the distribution by the auditor was an after thought. That the heirs were acting in concert in the matter and for mutual benefit in having the sale postponed, and in their endeavors to raise the money to pay the debts and secure it by mortgage on the premises clearly indicated that it was a family arrangement. Arrangements of this kind should be favored for the same reason that the court in *Shartel's Appeal*, 64 Pa. 25, held that "All compromises and settlements by families are maintained not only as beneficial in themselves but as conducive to peace and harmony, where it especially ought to exist." The auditor's finding was a rational conclusion from all the facts submitted to him, and should not have been disturbed by the court below.

Messrs. **E. R. Ikeler** and **Grant Herring,** for appellees.

Per Curiam:

These cases were argued together. They are from the same decree. The court correctly held that all the evidence was insufficient to prove a waiver of the limitation of the Act of 1834. Nothing less than clear and undoubted evidence should be held sufficient to extend the lien of debts against the real estate of a decedent. The assignments of error are not sustained.

Decree affirmed in each case, and the appeals dismissed, at the costs of the respective appellants therein.

James E. NEALL, *Plff. in Err.*,
v.
Albion W. HART *et al.*

1. An **information** charging that the defendant, by misrepresentation and trickery, defrauded the prosecutor in the sale of curbing and stone and appropriated the same to his own use, is **sufficient to sustain a warrant for** the **arrest** of the defendant, **charging that** the **defendant defrauded** the **prosecutor of moneys due** for labor and stone.
2. In an action of trespass for **false imprisonment** against the prosecutor and a justice of the peace, the **statements** made by the prosecutor to the justice, at the time the warrant was issued, are **admissible to prove probable cause,** or disprove malice, in mitigation of damages.
3. The **evidence** in this case held sufficient to show **probable cause.**

(Argued Feb. 9, Decided March 14, 1887.)

JANUARY Term, 1887, No. 64, E. D., before Mercur, *Ch. J.*, Gordon, Trunkey, Sterrett and Green, *JJ.*

Error to the Common Pleas of Chester County, to review a judgment on a verdict for the defendants in an action of trespass. *Affirmed.*

This was an action by James E. Neall against Albion W. Hart and Charles M. Griffith, to recover damages for illegal arrest and false imprisonment.

At the trial before FUTHEY, *P. J.*, the following facts appeared:

In May, 1886, James E. Neall, the superintendent of the Pennsylvania Granite Company, purchased from Albion W. Hart a quantity of curbing. He failed to pay for the curbing and Hart, on May 18, 1886, made complaint before Charles M. Griffith, a justice of the peace, charging "That James E. Neall, by misrepresentation and trickery, has defrauded me in the sale of curbing stone and has appropriated the same to his own use."

Upon this complaint the justice issued a warrant for the arrest of Neall. The warrant charged Neall with "defrauding him (Hart) of moneys due for labor and stone." On May 19, 1886, Neall was arrested and brought before Griffith, and in default of $400 bail was committed to the jail of Chester County. The constable came to West Chester with Neall, and an application was made to the court, and Neall was discharged from custody about 9 o'clock in the evening, on the ground that the complaint and warrant charged no offense known to the criminal law.

Nothing further was ever done by the justice in the criminal proceeding and it was never returned to the quarter sessions. Neall then brought this action of trespass against Hart and Griffith.

The defendants proposed to show the statements that Hart made to the justice upon which he issued the warrant. Objected to by the plaintiff, as being irrelevant, the offense charged not being a crime at law, and it being immaterial whether there is probable cause or not, as it would not be justification. Objection overruled. Exception. *First assignment of error.*

The defendants proved also, under objection and exception, the price paid by the Granite Company for their property. *Second and third assignments of error.*

The court charged, *inter alia*, as follows:

The foundation of the present action is that 'Squire Griffith had no authority to issue a warrant for the arrest of the plaintiff. It is admitted as being the law that if the justice acted within his jurisdiction, he is not liable, unless malice should appear. There is no evidence in the case that would impute dishonest or wrongful motives on the part of either the justice or the prosecutor. The justice appears to have fairly and deliberately heard the case, and determined it according to the best of his judgment.

The question therefore resolves itself into one of jurisdiction. If it is shown that the justice had jurisdiction of the matter, the plaintiff cannot recover.

Justices of the peace are entrusted with certain duties of a limited character; and in viewing their proceedings it is well, perhaps, not to be too hypercritical. In this case it appears that Albion Hart made certain statements to the justice, constituting what is termed the information; that upon this information the justice issued the warrant of arrest; held the hearing; and, in default of bail, committed the plaintiff to jail.

The language of the affirmation made by Hart is that "James E. Neall by misrepresentation and trickery has defrauded me in the sale of curbing stone and appropriated the same to his own use."

The language of the warrant, based upon this affirmation, is not quite as full as that of the affirmation itself; but the two papers must be taken together, in order to clearly understand the nature of the case that was heard by the justice.

The commitment of the justice has not been produced; but in its absence the presumption arises that it substantially followed the language of the statement given to the justice, upon which the information was based, and that the plaintiff was committed for the offense therein charged against him.

These papers are not drawn with the skill of a lawyer, or one especially familiar with such matters; but, after a careful examination, I instruct you that they substantially charge an offense against the criminal law; that [a fair reading of these papers does charge a crime against James E. Neall—the offense of obtaining possession of the property of Albion Hart by means of false pretenses; that he appropriated the proceeds of the same to his own use, and that a fair reading also charges him with embezzling moneys belonging to Albion Hart, one of the defendants in this action.] * * *

It is your duty to consider the circumstances under which this stone was purchased. [Was it a mere debt? If a mere debt was incurred by Mr. Neall, or the company he represented, the justice would have had no authority to institute a criminal proceeding. It becomes important to ascertain whether the stone was taken away before Mr. Neall complied with his part of the contract, in respect to the payment in cash. If it was, then it was removed against the will of Mr. Hart, and would be a misappropriation of his property;] but if not, and the agreement was that it should be paid for at some future time, the relation of creditor and debtor was simply established between the parties, and it would not have been a misappropriation of Mr. Hart's property.

The stone belonging to Mr. Hart was shipped to Philadelphia, and subsequently sold with other property belonging to the Pennsylvania Granite Company. Mr. Hart testified that he repeatedly asked Mr. Neall for payment, but that the reply always was that he had not received the money.

You will determine whether the fact stated by Neall: that he had not received the money from the sale of the stone, is of any importance, if you believe Hart's testimony that the payment was to be cash on the delivery of the stone.

If you find that Neall did receive the money from the company, the question arises as to whom it belonged. [Whose money was it? Was it Mr. Hart's money he received? If it was Hart's money that Neall received from the company, and refused to pay to Hart, when Hart learned the fact of its receipt and demanded payment, then Neall would be guilty of embezzling money to which Hart was entitled.]

You will therefore determine from the evidence in the case whether the relation of creditor and debtor existed between the parties, or whether the criminal law was violated. In order to ascertain this fact, you will ascertain whether Nr. Neall removed Hart's property, contrary to the provision of their agreement; that it was to be paid for in cash on delivery. If so, the stone still remained Hart's property, and the proceeds of its sale, when received by Neall, should have been paid to Hart; and, under these circumstances, failing to make the necessary payment, Neall would render himself liable to a prosecution for embezzlement.

In this view of the case [the next question for you to determine is whether there were such circumstances surrounding the transaction as warranted the prosecutor in making the complaint, and the justice in issuing the warrant of arrest, thus placing the plaintiff in the position of a criminal.]

In cases where the facts are not disputed, the court determines whether they are sufficient to constitute probable cause; but where the facts are in dispute, it is the duty of the jury to ascertain what the facts are, and then the court decides whether or not, under a given state of facts, probable cause is shown to have existed at the time of the arrest.

I instruct you that if you find the stone was sold to the Pennsylvania Granite Company, or Mr. Neall, as its representative, or individually, and the relation of creditor and debtor was created between the parties, the action would have been simply on a debt, and the justice would have had no jurisdiction to entertain criminal proceedings against Mr. Neall; but if you find that the stone was to be paid for in cash, and that it was removed without payment being made, the stone, or its proceeds, still remained the property of Mr. Hart; and if the money was received by Neall and not paid to Mr. Hart, then the prosecutor was warranted in making the complaint, and the justice authorized to issue the process and hold Neall for trial in default of bail.

The question as to whether Neall could have been convicted on the charge in court is not material; because juries decide the guilt of a defendant from all the evidence in the case, and a defendant may be acquitted, although there may be ample evidence to justify a prosecution.

The jurisdiction of the justice is the only question involved in the case. If it was simply a debt between the parties, the justice would have had no jurisdiction to institute a criminal proceeding. If he did so, under such circumstances, he would be a trespasser in law; and those who made the complaint would be placed in the same position. If, however, it was a case where the criminal law had been violated, so far as it could be made *prima facie* to appear, neither the prosecutor nor the justice could be held liable to damages in an action for false imprisonment; and there would be nothing in the case to warrant the conclusion that they had acted in a wanton or wrongful manner.

This is the case you have been called to try. It is simply a question of jurisdiction. If the justice had no jurisdiction, under the principles of law, as I have explained them, the plaintiff is entitled to recover.

[If you find the facts to be as I have stated that the defendants contend, I instruct you that there was probable cause for the prosecution, and the plaintiff cannot recover.]

In cases of this kind the damages are compensatory or such as will compensate the plaintiff for any loss he may have sustained; nominal damages, for some trifling sum, and exemplary damages, which are usually given for the purpose of setting an example to others.

[If you render a verdict in favor of the plaintiff, there is no evidence to warrant your giving him exemplary damages.] The circumstances, as developed by the evidence, would warrant simply either nominal or compensatory damages, but ordinarily compensatory damages are allowed in such cases.

Verdict and judgment were for the defendants.

The remaining assignments of error specified the portions of the charge included in brackets. The answers to the points raised substantially the same questions.

Messrs. **John Sparhawk, Jr., R. Jones Monaghan,** and **J. Frank E. Hause,** for plaintiff in error:

Trespass is the proper remedy where an arrest has been made on a warrant which charges no crime.

Maher v. *Ashmead,* 30 Pa. 344; *Baird* v. *Householder,* 32 Pa. 168; *Kramer* v. *Lott,* 50 Pa. 495.

The distinction is between irregular process, or that which is absolutely void, and process erroneously issued, but not void.

The general rule is that false imprisonment lies for arrest under process irregularly issued, but not for arrest under process erroneously issued. It seems, however, that the irregularity must have been apparent upon the face of the process itself, or upon inspection of the record. There is an important distinction between erroneous process and irregular process. The first is the act of the court; and even after it has been set aside or reversed, whatever was done under it while in force may be justified. But irregular process is the act of the prosecutor, and when once set aside is considered as having been a nullity from the beginning, and forms no justification to him for anything done under it. In some instances process is on the face of it, to all intents and purposes, a nullity; as, where it issues in a case plainly out of the jurisdiction of the court or magistrate issuing it.

1 Waterman, Trespass, § 307.

A justice of the peace and his jurisdiction are creatures of statute. A justice's court is not one of general, but of special and limited jurisdiction.

In such case there are no presumptions in favor of jurisdiction; but such jurisdiction must appear on the record.

It is a general rule that whenever a person justifies under any authority whatever, he must show every matter and part of the authority under which he justifies. This rule is especially applicable to persons whose powers are solely derived from statute. If they proceed in a matter not within their cognizance, or without having acquired jurisdiction over the party in the forms prescribed by law, any judgment which they may render will be absolutely void. This doctrine is not peculiar to courts held by justices of the peace in civil cases, but applies to all courts and officers exercising a special and limited jurisdiction. They must pursue their authority, or their acts will be void.

The principal distinction between courts of general and those of limited jurisdiction is that in the one case jurisdiction will be presumed until the contrary appears, while in the other no such presumption is indulged; but they must show their authority in every case.

In pleading the judgment of a superior court, it is enough to say that judgment was rendered: and it will lie on the other party to show a want of power. But in pleading the judgment of an inferior tribunal, the authority to decide, as well as the judgment, must be alleged.

Id. § 54.

Whenever any persons assume to act under a special and limited power conferred by law, their doings may be avoided by showing that they had no jurisdiction, or that they exceeded the limits of their authority, and that they thereby became trespassers.

Id. § 56.

When a magistrate or other officer, having a special and limited jurisdiction, issues a warrant to take the person or property of another, he must show upon the face of his proceedings that he has jurisdiction; nothing will be intended in his favor; and it must appear that he has jurisdiction over the subject matter, the person and the process.

Id. § 359.

Every person who interferes with the liberty or property of another is *prima facie* a trespasser, and is liable to an action unless he can show legal justification for his act.

Dicey, Parties, 450.

In a proceeding which is entirely illegal and void the magistrate is clearly liable.

1 Waterman, Trespass, §§ 57, 362, 364.

Where a justice of the peace has no jurisdiction whatever, and undertakes to act, his acts are *coram non judice* and void, equally so as if he were not a justice. If he has jurisdiction, but errs in exercising it, then his acts are not void but voidable only. In the former case he is personally liable, in the latter not.

3 Wait, Act. & Def. 316; *Hill* v. *Bateman*, 1 Str. 711.

The defendant, Hart, is clearly liable, as well as the justice.

Although the making of an affidavit upon which the plaintiff was unlawfully arrested, will not render the defendant liable, if he made it without knowing or having any intention that it should be so used; yet, if the imprisonment be the necessary or probable consequence of orders given by the defendant, he will be liable therefor, although he did not directly order it, or contemplate the possibility of its occurrence.

1 Waterman, Trespass, § 302; *Parsons* v. *Lloyd*, 2 W. Bl. 845.

If the warrant be set aside, the attorney who procured it, and his client who authorized him to procure it, will be liable for false imprisonment, as was held in the principal case.

Bigelow, L. Cas. Torts. 279.

The tort consists not in any immediate violence to the plaintiff's person, but in communicating an improper direction to the process of the law. The defendant is liable in trespass if he direct the constable to make the arrest, or if he come armed with void process, for that is as none.

1 Smith, L. Cas. 557.

Neither the information, warrant, nor evidence, discloses a case amenable to the criminal law pending before the justice when the arrest and imprisonment occurred.

Messrs. **Chas. H. Pennypacker** and **D. Smith Talbot,** for defendants in error:

The question as to what occurred at the office of the justice was an important one. The statements of the parties were essential to an understanding of the case. Their intent and meaning may not be clearly expressed in the papers, but, taken with them, they import an offense against the criminal law, of which the justice had jurisdiction. An offense was substantially charged upon the face of the papers. A failure to sustain the charge upon a hearing had does not render the defendants liable. As it is the duty of every citizen to aid in enforcing the criminal laws of the State against those by whom they are willfully disobeyed, so it is the business of our courts of justice to see that the person thus undertaking to vindicate the law shall not suffer in consequence of such an attempt, even although it may have proved abortive. So where it appears that the defendant acted merely through mistake, or where the prosecution resulted from the mistake of the justice of the peace before whom the information was made, the action cannot be maintained.

Gilliford v. *Windel*, 108 Pa. 145.

The law favors honest efforts to bring the guilty to justice; and where a citizen proceeds by complaint before a magistrate, although the prosecution be unwarranted in fact, if his motives were pure, he will be protected.

McCarthy v. *De Armit*, 99 Pa. 70.

Mr. Justice **Gordon** delivered the opinion of the court:

Several exceptions were taken to the rulings of the court below on the admission and rejection of evidence, and are here now assigned for error. We cannot sustain them. "The gist of false imprisonment is unlawful detention; and the general rule is that malice will be inferred from the want of probable cause, so far at least as to sustain the action." *Mr. Justice* Trunkey in *McCarthy* v. *De Armit*, 99 Pa. 68.

From what is here said it is obvious that Neall's action was open to defeat by proof of probable cause for the prosecution; and further, that even in the absence of probable cause, it was important to disprove malice in fact, and that if for no other purpose than in mitigation of damages. Hence, the statements made to the justice by the prosecutor, and by which he was induced to issue the warrant were relevant. As to the assignments embracing the rejected offers: inasmuch as we cannot perceive how the price paid by the Granite Company for its property could possibly affect the case trying, we cannot sustain them.

The remaining exceptions relate to the charge of the court and its answers to the points and, although numerous, may all be considered under two general heads:

1. Was the court right when it said to the jury: "The next question for you to determine is whether there were such circumstances surrounding the transaction as warranted the prosecutor in making the complaint to the justice in issuing the warrant of arrest, thus placing the plaintiff in the position of a criminal?"

We are constrained to answer this interrogatory in the affirmative. A justice of the peace is not to be presumed to be learned in legal technicalities; hence, if the information set out a cheat of any kind, it was sufficient on which to ground a warrant. But that information alleged "that James E. Neall, by misrepresentation and trickery has defrauded me in the sale of curbing stone, and has appropriated the same to his own use." This charge, as here set forth, is not very definite, forasmuch as it is difficult to say whether it was intended to charge embezzlement, or obtaining goods on false pretenses; but that a cheat of some kind is thereby charged, no one, we think, will deny; and if so, it was sufficient to warrant the justice's action, and it was the business of the prosecuting officer when the case reached his hands to determine what should be the character of the indictment.

2. Was the court right in its instruction to the jury, that if the stones were to be paid for in cash before removal, they continued the property of Hart, although Neall had possessed himself of them, and their sale by the latter, and appropriation of the money arising therefrom to his own use, would constitute such a fraud as justified Hart in making the complaint on which the arrest issued? This in effect raises the question of probable cause which, as we think, was properly submitted.

If the testimony of Hart and J. W. Morgan is to be believed, there was such cause for the prosecution if nothing more. The plaintiff obtained a delivery of the curbing on the cars, under a contract to pay when so delivered, and then, taking advantage of the defendant's performance, he shipped the curbing to market, under the pretense that he would pay the next day, but instead of doing so he sold the curbing, and refused payment altogether. Let it be that this was not embezzlement in its technical sense, yet were the prosecutor's goods gotten under pretense of a contract and through a lie.

In the case of *Commonwealth* v. *Burdick*, 2 Pa. 163, *Mr. Chief Justice* Gibson makes use of the following language: "But I think it, at least, doubtful whether a naked lie, by which credit has been gained, would not, in every case, be deemed within our statute, which declares it a cheat to obtain money or goods by any false pretenses *whatsoever*."

If, then, so great a jurist as the one cited was inclined to the opinion that a deliberate lie would support an indictment charging a false pretense under our statute, we may well excuse a layman and a country justice for coming to a like conclusion. In other words, on the strength of such authority, we may well conclude that Hart and Griffith had probable if not actual cause for what they did.

The judgment is affirmed.

Jacob F. SCHMEHL *et Ux.*, *Appts.*,
v.
Malvina BICKEL.

1. The orphans' court has no jurisdiction to decree the **payment of a legacy by a devisee,** unless the legacy is charged upon land.
2. **By a devise:** "I order that my son David my dwelling and piece of land containing about twenty-six acres more or less, as his own property, but (*aber*) my son David shall keep my dear wife as long as she lives, or pay to her annually $72, and my son David must, after my wife's death, pay to my daughter $1,200, as follows" etc., the **legacy** to the daughter is **not charged upon** the **land.**
3. *Query* **whether by** an assignment, including the land, by the son for the benfit of creditors, **notice of** the daughter's **claim at** the **assignee's sale and** a subsequent **conveyance** by the purchaser expressing the land to be **subject to** the **charge,** the **legacy** to the daughter becomes **charged upon** the **land.**

(Argued March 2, Decided March 14, 1887.)

JANUARY Term, 1887, No. 96, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Appeal from a decree of the Orphans' Court of Berks County, dismissing a petition for a citation. *Affirmed.*

The facts as they appeared by the petition, answer and depositions, were as follows:

William Trout, of Maidencreek Township, Berks County, by a codicil to his will dated December 20, 1863, and proved January 7, 1864, provided as follows: "It is my will and I order that my son David, my dwelling and piece of land, containing about twenty-six acres, more or less, as his own property, but (*aber*) my said son David shall keep my dear wife as long as she lives, or pay to her annually seven-two (72) dollars, and my said son David must after my wife's death, pay to my daughter $1,200 as follows: $500 one year after my wife's death, and then $100 annually with interest."

In his will dated May 17, 1862, he had previously provided, *inter alia*, as follows: "I devise to my son David the house, garden, containing 146 perches; further, it is my will that my dear wife Maria shall have the right to live in my house wherein we now live, as long as she lives, on the twenty-six acres, but my son David shall farm the land, and pay all the taxes and expenses from * * * the same as long as she lives, and shall haul her wood and coal for fuel to her house as much as she needs; * * * further, it is my will, that if my said wife shall not or does not wish to stay in the said house or place, then my son David shall pay to her annually the sum of 150 dollars, out of the 26 acres of land; * * * further, it is my will that my son David, after the death of my wife Maria, can have the first opportunity to accept the twenty-six acres of land, more or less, according as he desires."

He then appoints his son David executor.

On May 2, 1878, David Trout made a deed of assignment for the benefit of creditors, to James W. Schmeck, by which the twenty-six acre tract, *inter alia*, was conveyed to the assignee, who, under an order of court, pursuant to the Act of February 17, 1876, sold all the assignee's real estate, including the twenty-six acre tract, devised to him by his father's will, to Charles Levan, for $2,500. There was no reservation of dower or legacy in the deed of the assignee to Levan, but Esther Schmehl, the daughter mentioned in the will caused the following notice to be read at the sale:

Notice to Purchasers:

Notice is hereby given that the real estate about to be sold by James Schmeck, assignee of David Trout, was devised to the said David Trout by his father, William Trout, subject to a testamentary charge, or *ausbehalt*, of $72 per year, payable to Maria, widow of said William Trout, deceased; also subject to the payment of $1,200 to Esther, wife of Jacob F. Schmehl, after the decease of the said Maria; and that the said charge of $72 per year for the past three years is now due and owing to the said Maria Trout, widow of William Trout, dec'd.

Esther Schmehl.

After Levan became the owner of the premises, February 12, 1879, he paid the arrears of dower due the widow of William Trout, under her husband's will, and also continued to pay the sum of $72 annually to her as long as he continued to own the property. When he sold it to his daughter, Malvina Bickel, the respondent, October 6, 1881, who accepted the deed, and is now in possession under it, the grantor inserted in said deed that the conveyance was "in consideration of the sum of 5,675 dollars, less a dower of 1,200 dollars," etc., and in the latter part of said deed that it was "subject nevertheless to the payment of a dower of $1,200, the interest thereof to be paid to the widow of William Trout, during her natural life, and after her death the principal to the heirs and legal representatives of the said deceased." The deed is recorded in Deed Book Vol. 140, p. 650.

On the 6th of April, 1883, Maria Trout, the widow of William Trout, died; and on the 17th of May, 1883, Esther Schmehl, with her husband, Jacob F. Schmehl, presented their petition for a citation, after a request to pay the legacy and arrears had been met with the reply on the part of the respondents that they were in nowise liable to do so, as the claim was no charge on the land under this will.

As the codicil to the will provided that of the $1,200 directed to be paid to Esther Schmehl, $500 should be paid "one year" after the death of the testator's wife, the present proceeding was commenced a year too soon, owing to the omission in petitioners' copy of the will of the words "one year." But as both parties desired at the time to have the question, as to the liability of the respondents to pay, judicially determined, they agreed in writing to waive the irregularity, and that the proceeding should go on as if the claim was then demandable.

Upon dismissing the petition, SCHWARTZ, *J.*, after stating the facts, filed an opinion as follows:

"The question raised by the pleadings is, Did the testator charge the legacy of $1,200 to testator's daughter, Esther Schmehl, upon the above mentioned lands devised to David Trout?

"In this case, as in *Cable's Appeal*, 91 Pa. 327, there is no express charge. It is, however, contended that a charge is necessarily implied from the words of the devisor already quoted. It is a settled rule that in order to create a charge upon lands there must be express words or a necessary implication from the whole will, that such was the intention. There is nothing in any part of the will from which such an implication can arise. The direction of the testator to pay the $1,200 to his daughter, Esther Schmehl, is simply a personal obligation on the part of the devisee, arising upon his acceptance of the devise of the land.

"It has, however, been further contended that the legacy to Esther Schmehl should be held to be a charge upon the land: first, because when this property was sold by the assignee for creditors of David Trout, notice was given to purchasers that it was subject to the charge of said legacy of $1,200; second, because Charles Levan, the purchaser at assignee's sale, when he conveyed to Malvina Bickel, the respondent, sold subject to the charge of said legacy.

"The jurisdiction of the orphans' court is confined to charges created in last wills and testaments. And as I have already stated that this legacy, in my opinion, is not a charge of the lands under the provisions of the will of William Trout, deceased, the orphans' court cannot entertain the matter in controversy. This is all that the court decides in these proceedings. I express no opinion as to whether or not the respondent can be compelled to pay the legacy by proceedings in the court of common pleas. The proceedings are dismissed, at the costs of the petitioners."

The assignments of error specified the action of the court in dismissing the appellants' petition for a decree as therein prayed for; in deciding that the $1,200, which David Trout, the devisee, was directed to pay to Esther Schmehl by the codicil to this will of William Trout was no charge on the land devised, and that the orphans' court had no jurisdiction; and in not making a decree for the payment of the $1,200 to Esther Schmehl, as directed by said codicil.

Messrs. **Rothermel Bros.** and **A. G. Green**, for appellants:

In *Ripple* v. *Ripple*, 1 Rawle, 386, a testator had devised three fourths of a tract of land to his son followed by the directions: "My son Philip is to keep and provide for my beloved wife and my eldest daughter during their natural lives." It was held that, although that land devised is not expressly charged with the maintenance of the wife and children; yet if such intention can be clearly collected from all the parts of the will considered in reference to the testator's circumstances, the charge will attach to the land.

In *Hoover* v. *Hoover*, 5 Pa. 351, a devise by a testator to his son, "yielding and paying out of the same $7,250, was held to charge the land."

In *Swoope's Appeal*, 27 Pa. 58, a devise to a son, "he paying thereout unto my other children" certain sums of money, was likewise held to be a charge on the land devised.

In *Hart* v. *Homiller*, 20 Pa. 248, after giving his son Samuel the use of certain real estate during the life of his wife, and upon her death devised to Samuel at a valuation to be made—testator directed this valuation to be included in the rest and residue of his estate, which he devised to his six children, Samuel being one, held, to be a charge on the land.

In *Gilbert's Appeal*, 85 Pa. 347, a devise to a son at $33 per acre, the proceeds thereof to be divided into eight equal shares distributed equally to her children, was held to be a charge.

To the same effect are *McFait's App.* 8 Pa. 290; and *Drake* v. *Brown*, 68 Pa. 223.

As to preference in favor of wife, see *McGlaughlin* v. *McGlaughlin*, 24 Pa. 22; *Clery's App.* 35 Pa. 58; *Field's App.* 36 Pa. 11.

Mr. **Cyrus G. Derr,** for appellant:

A devise with directions that a devisee shall pay certain sums to legatees does not create a charge on the land.

Wright's App. 12 Pa. 256; *Miltenberger* v. *Schlegel*, 7 Pa. 241.

Such direction imposes but a personal obligation upon the devisee.

Walter's App. 95 Pa. 305; *Brandt's App.* 8 Watts, 198.

Following a devise were the words: "But the said John and Edward Cable is to pay;" it was adjudged by this court that no charge was created.

Cable's App. 91 Pa. 327.

The language in this case "And my son David must after my wife's death pay" etc., is not stronger than that in *Cable's Appeal.* Between the language "he is to pay" and "he must pay" there is no material difference.

If, however, the said legacy of $1,200 should be adjudged to have, by the terms of the said will, been charged upon the said land, yet the assignee's sale, pursuant to an order of the court issued under the Act of February 17, 1876, devested the lien thereof and passed the property to Charles Levan the purchaser at the said sale unincumbered thereby. The language of the said Act is: "Which sale or sales after being confirmed by said court shall discharge all liens against the real estate so sold, excepting that where the lien of a mortgage upon real estate is or shall be prior to all other liens * * * the lien of such mortgage shall not be destroyed."

The lien of a legacy charged upon land is discharged by a judicial sale of the land, although the legacy is payable by installments, some of which are not due at the time of the sale.

Hellman v. *Hellman*, 4 Rawle, 440; *Loback's Case*, 6 Watts, 167; *Barnet* v. *Washebaugh*, 16 Serg. & R. 410.

The legacy in question not having been made a charge on the land by the said will, or if so, then, having been discharged by the judicial sale aforesaid, the orphans' court has no jurisdiction of the matter; for that court has no jurisdiction of a proceeding for the recovery of a legacy, unless the same is charged on realty. Section 59 of the Act of February 24, 1834, provides that "When a legacy is or shall be hereafter charged upon or payable out of real estate, it shall be lawful for the legatee to apply, by bill or petition, to the orphans' court having jurisdiction of the accounts of the executor of the will by which such legacy was bequeathed; whereupon, such court, having caused due notice to be given to such executor, and to the devisee or heir, as the case may be, of the real estate charged with such legacy, and to such other persons interested in the estate, as justice may require, may proceed according to equity, to make such decree or order touching the payment of the legacy, out of such real estate, as may be requisite and just."

Galloney's App. 6 Pa. 37; *Hamilton* v. *Porter*, 63 Pa. 332; *Walter's App.* 38 Legal Int. 241.

The orphans' court has no jurisdiction, except such as is expressly conferred by statute; and as there is no statute authorizing the said court to decree the payment of a legacy by a devisee when such legacy is not charged upon the land, the court had no jurisdiction in this case.

Per Curiam:

It is clear that the legacy in question was not charged on the land, either by express words or by necessary implication. It follows that the orphans' court had no jurisdiction, and the proceedings were properly dismissed.

Decree affirmed and appeal dismissed, at the costs of the appellants.

Seth K. GRIM To Use, etc., *Plff. in Err.*,
v.
The THOMAS IRON CO.

The **purchaser of iron ore, under a contract** by which he retains part of the price and promises the vendor to pay it to a third person, not a party to the contract, if such third person owned the land from which the ore was taken, but if not then to have nothing to pay, is **not** thereby **estopped from setting up his own title to the land** as a defense to an action of assumpsit by the third person for the sum so retained.

(Argued Feb. 28, Decided March 14, 1887.)

JANUARY Term, 1886, No. 245, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Berks County, to review a judgment on a verdict for the defendant in an action of assumpsit. *Affirmed.*

At the trial before SASSAMAN, *J.*, the following facts appeared:

By deed of November 18, 1860, Tilgham Schaeffer granted to the Thomas Iron Company the exclusive right to all the iron ore contained in a certain tract of land containing ten acres, more or less, situate in Maxatawny Township, etc., at a royalty of twenty-five cents a ton. March 25, 1861, Samuel Thomas (in behalf of the Thomas Iron Company) contracted in lieu of royalty to pay him a round sum of $1,500 for all the iron ore in the tract.

After the sale and transfer of the iron ore Schaeffer's interest in the premises was sold under proceedings in the orphans' court, and purchased by Seth K. Grim and Daniel Clader. They believed that through this sale they acquired a good title to the iron ore, as well as to the surface. In 1869 they brought ejectment against Thomas *et al.* for the iron ore.

The case was tried in 1875, and resulted in a verdict for the defendants. The supreme court affirmed the judgment. *Clader* v. *Thomas*, 89 Pa. 343.

April 7, 1879, Seth K. Grim made a lease of the iron ore under a small corner of this tract to one Jonathan Baer. Subsequently Baer began to mine iron ore, and sold some of it to the Thomas Iron Company. Before it was all delivered, and before the time for payment, the Thomas Iron Company discovered that it had been mined on a corner of the Schaeffer tract, the iron ore of which belonged to them. They then made an agreement with Baer "that they would retain the royalty of the ore, and if Grim owned the land they would pay him, if not, they had nothing to pay."

Grim claims that the title to the tract belonged to his father's estate, and brought this suit in the name of Seth K. Grim, to the use of his brothers and sisters and himself, for, as stated in the narr. "the price and value of iron ore mined upon the premises of the plaintiffs for the royalty of the same."

The only evidence offered to sustain the suit was the lease of Grim to Baer, evidence of the quantity sold by Baer to the Thomas Iron Company, and their agreement that "they would retain the royalty, and if Grim owned the land they would pay him, if not, they had nothing to pay."

Baer in this lease covenanted to render an account of iron ore received at the expiration of six months, and thereupon "agree to pay for each and every ton of said iron ore the sum of fifty cents gross weight (2240) pounds for each and every ton of iron ore which is taken out; as ground leaf they agree to fifty cents as before mentioned and payable every six months at the furnace where said ore ship there to, that the said Seth K. Grim to draw the money as ground leaf from said furnace."

Under objection and exception the defendant was permitted to prove by a witness "That he knows the tract; lives there upon it; is sixty-two years old; was born there; his father owned it before him; that the place where Baer mined ore was part of the Schaeffer tract, and was always in their possession, to be followed by evidence of a recorded grant of ore to Samuel Thomas. This for the purpose of showing that the title to the tract is in Samuel Thomas and not in the plaintiff, and that the royalty is not payable to the plaintiff."

The defendant asked the court to direct a verdict in its favor.

The charge of the court was as follows:

"I can readily see how the title to lands can be questioned in an action of ejectment with an issue joined on a plea of not guilty, or in an action of trespass *quare clausum fregit* on an issue joined by the plea of *liberum tenementum.* In the determination of such an issue many questions for mesne profits or damages may settle injury to lands, either by acts of trespass or mere acts of use and enjoyment, in violation of the rights of him who has the right of title and possession.

["This is an action of assumpsit, to recover money assumed to be due for royalty arising out of the working of an ore lease to which the plaintiffs were neither party nor privy, while the title and the royalty is claimed by other parties, which I believe to be fatal to plaintiff's claim here. These views lead us to affirm the defendants' point; and by this affirmation, your verdict is directed in favor of the defendant."]

The assignments of error specified the admission of the testimony mentioned, and the portion of the charge inclosed in brackets.

Messrs. **James H. Marx** and **Frank R. Schell,** for plaintiff in error:

The promise of the defendant need not be made immediately to the plaintiff himself; for if made to one person for the benefit of another, the latter may, notwithstanding, maintain the action.

2 Lev. 210; Cowp. 437; *Wynn* v. *Wood,* 97 Pa. 216.

This court has uniformily discountenanced all proceedings in equity to try the title to lands.

Meck's App. 97 Pa. 313; *Richards* v. *Cherrington,* 12 W. N. C. 140; *Long's App.* 92 Pa. 171.

According to the evidence of the plaintiff, he, through his tenant, Baer, was in the undisturbed, peaceable possession of this land. That adverse possession under the rulings of this court operated as a disseisin against all other claimants. The evidence further established the fact that the Thomas Iron Company, before any ore was shipped to it, agreed to retain the royalty and pay the same to Grim. Upon the faith of this contract, Baer went to work and delivered the ore. Every principle of an estoppel should prevail against the defendant and prevent the setting up of title in itself.

Lehman v. *Kellerman,* 65 Pa. 489.

It would be monstrous to allow such evidence to be given in an action of assumpsit. The plaintiff comes into court seeking to recover a debt due him. Without any notice, the defendant sets up title to itself, and that too in a personal action.

Messrs. **Jeff. Snyder,** and **Geo. F. Baer,** for defendant in error:

Baer's occupancy was a mere trespass. The defendant had that constructive possession which the law casts upon the owner—the only kind of possession which can well be taken where the surface belongs to another. It could have maintained trover or replevin for any ore taken away; for it has been decided that such "an action does lie in favor of the owners in possession actually or constructively, against a *tort feasor*, or one who has no right of possession, who enters casually or temporarily."

Brewer v. *Fleming,* 51 Pa. 102.

If we had been suing to recover the royalty, it would have been necessary under the ruling of *Clement* v. *Wright,* 40 Pa. 250, to show title, not for the purpose of trying it but to show the constructive possession which flows from it. It was therefore clearly competent to defend a suit by showing our title and possession.

But it is said the question should have been submitted to the jury. There was nothing for the jury to pass upon. The plaintiffs never had possession and showed no title. Baer's entry under the Grim lease was a trespass. If they have a title to the iron ore, they must bring ejectment and get its value in the form of mesne profits.

Per Curiam:

It is true there is a class of cases in which a third person may maintain an action on a promise made to another. Hence, it has been held if one deliver money or personal property to another, under the promise of the latter to deliver it over to a third person who has a beneficial interest therein, or to convert it into money and pay him the proceeds, the third person may maintain an action therefor against the promisor. *Wynn* v. *Wood*, 97 Pa. 216.

That, however, is for a breach of the contract, according to its terms. Here the attempt is to maintain an action on a conditional contract, according to the terms of which, and under the unquestioned facts, the defendant is not liable to any person. There was, therefore, no error in giving binding instructions to the jury.

Judgment affirmed.

Cephas GEHR *et al.*, *Plffs. in Err.*,
v.
Amanda MILLER *et al.*

One **verdict and judgment in ejectment,** obtained on the ground of the relationship of the successful party to the person last seised, is **not a bar to a subsequent ejectment** by the unsuccessful party, **or conclusive evidence** of the fact of relationship.

(Argued March 4, Decided March 14, 1887.)

JANUARY Term, 1887, No. 19, E. D., before Mercur, *Ch. J.*, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Berks County, to review a judgment on a verdict for the plaintiffs in an action of ejectment. *Affirmed.*

The facts as they appeared at the trial before ERMENTROUT, *J.*, were as follows:

Catharine Gehr died in 1877, intestate, unmarried and without issue, seised of a tract of 231 acres of land situate in Maxatawny Township, Berks County. Her next of kin surviving her, of the blood of her father, the first purchaser, were Baltzer Gehr, of Crawford County, nephew and namesake of her grandfather, Baltzer Gehr of Berks County, and Hannah Nicely and Maria Rothermel, nieces of her grandmother. Her real estate descended to these three persons, related to her in the same degree.

Hannah Nicely and Maria Rothermel died shortly after Catharine Gehr; and their representatives took possession of the tract of land and denied the relationship of Baltzer Gehr. In order to establish the relationship, Baltzer Gehr brought ejectment against the Nicely and Rothermel representatives. The sole question in the suit was whether the plaintiff, Baltzer Gehr, of Crawford County, was the nephew of Baltzer Gehr of Berks County, as he claimed to be. The verdict and judgment established the relationship (*Sitler* v. *Gehr*, 105 Pa. 604), and put the plaintiff in possession of an undivided one third of the land.

The Nicely and Rothermel representatives thereupon brought an ejectment against the heirs of Baltzer Gehr (who had in the meantime died), for the same undivided third, and on the trial proved their relationship. The defendants then offered the record of the former ejectment, accompanied by the charge of the court, for the purpose of showing that the verdict and judgment in that case established the fact that Baltzer Gehr of Berks County was the uncle of Baltzer Gehr of Crawford County, as conclusive of that fact between the same parties in the pending action. The court admitted the record, simply as persuasive evidence in a second ejectment, but refused to permit the plaintiffs to show the main point of their offer, namely: that the fact of Baltzer Gehr's relationship was established by the former proceeding between the same parties.

Upon discharging a rule to show cause why a new trial should not be granted the court below filed the following opinion:

"Neither plaintiffs nor defendants filed any exceptions to the charge of the court. The previous verdict and judgment were competent evidence, and the effect of this verdict of the jury as 'persuasive evidence' was correctly stated in the charge. During the course of the trial it was repeatedly stated to the jury that by the previous verdict the jury then trying found from the evidence then given that Baltzer Gehr of Berks County was the uncle of Baltzer Gehr of Crawford County. We see no reason why the parties plaintiffs to this action are concluded from denying the fact of such alleged relationship, or producing evidence to show that such relationship did not exist. We do not see how the former charge of the court was admissible for such purpose, or how it could have such an effect.

"It is the province of the jury and not of the court to pass upon and settle the weight of testimony and credibility of witnesses. Under the testimony submitted the jury found that the alleged relationship between Baltzer Gehr of Berks, and Baltzer Gehr of Crawford County, had no existence.

"We do not consider it right to disturb their finding."

The assignment of error specified the rejection of the defendant's offer (the record of the former ejectment having previously been admitted in evidence) to prove, by the charge of the court in the former ejectment, that the verdict and judgment in the case establish the fact that Baltzer Gehr of Berks County was the uncle of Baltzer Gehr of Crawford County, whereby the parties to this action are concluded from denying that fact in this proceeding.

Messrs. **John F. Smith, Isaac Hister,** and **Humes & Frey,** for plaintiffs in error:

Whenever ejectment is a substitute for another form of action, one verdict and judgment have the same conclusive effects as would follow a final decree in such other action.

One verdict and judgment are conclusive in equitable ejectment, because that ejectment is merely a substitute for a bill in equity which would be conclusive.

The plaintiff having a remedy, either by bill in equity or by ejectment, cannot by the selection of his remedy have one or two chances of recovery at his option. If he select ejectment, it will simply be regarded as a substitute for the other form of action.

Seitzinger v. *Ridgway*, 9 Watts, 496; *Peterman* v. *Huling*, 31 Pa. 433; *Meyers* v. *Hill*, 46 Pa. 11; *Trefts* v. *Pitts*, 74 Pa. 343; *Winpenny* v. *Winpenny*, 92 Pa. 440.

It cannot be said that the conclusiveness of one equitable ejectment depends upon the fact that originally we had no separate court with chancery powers, and that therefore a plaintiff invoking the equitable powers of the court, was of necessity driven to ejectment. If that were the true reasoning, the effect of investing our courts with separate equity powers would have been to take away the conclusive effect of one equitable ejectment.

Church v. *Ruland*, 64 Pa. 440.

A controversy which involves the relationship of parties claiming real estate, as next of kin to a decedent, is determinable either in ejectment or upon an inquiry in the orphans' court on a petition for partition.

The orphans' court is by statute clothed with authority to distribute the estates of decedents. Among the persons entitled to the same, and by these terms are embraced, creditors, heirs, next of kin, and legatees.

Kittera's Est. 17 Pa. 416; *Ashford* v. *Ewing*, 25 Pa. 213.

The orphans' court has authority to determine the title of contesting parties as an incident of distribution.

Souder's App. 57 Pa. 498; *Dundas' App.* 73 Pa. 480; *Otterson* v. *Gallagher*, 88 Pa. 355; *Williamson's App.* 94 Pa. 231.

When the seisin of the decedent of real estate is admitted, the orphans' court has jurisdiction to determine who are the heirs.

1 Rhone, Orphans' Court, 530, § 28; *Davis's Est.* 9 W. N. C. 380; *Armstrong's Est.* 10 W. N. C. 571.

After a partition proceeding erroneously instituted, ejectment cannot be maintained.

Seider v. *Seider*, 5 Whart. 222.

Even parties claiming as widow and heirs of a decedent cannot maintain ejectment against each other, but must in the first instance resort to partition in the orphans' court or in the concurrent jurisdiction of the common pleas.

Gourley v. *Kinley*, 66 Pa. 270.

It follows that as the ejectment involved simply the relationship of the plaintiff to the decedent, one verdict and judgment are conclusive of that controversy between the parties, and that the plaintiff is entitled to an undisturbed partition with his coheirs.

It was proper for the defendant to put in evidence the charge of the court in the former ejectment, for the purpose of showing on what point the case was decided.

Coleman's App. 62 Pa. 272; *Eckman* v. *Eckman*, 68 Pa. 468; *Follansbee* v. *Walker*, 74 Pa. 309; *Carmony* v. *Hoober*, 5 Pa. 305.

The fact that the equity claim was decided in a former action of ejectment may be shown by parol testimony, and need not appear by the record, unaided by other evidence.

Meyers v. *Hill*, 46 Pa. 9; *Trefts* v. *Pitts*, 74 Pa. 343.

The Act of Assembly of 1807, providing that two verdicts shall settle the right, has nothing to do with this contention, because only applicable to that class of cases wherein ejectment is purely a possessory action; and not where it is a substitute for another method of trial.

Messrs. **Wharton Morris, Wm. H. Livingood, Geo. F. Baer** and **A. G. Green,** for defendants in error:

The question here raised was long since settled in *Mehaffy* v. *Dobbs*, 9 Watts, 363.

If a party having no title under the Intestate Act petition for an inquest, his allegation of title as a tenant in common, if disputed, must be first established by ejectment in the common pleas; but if admitted, the decree founded on it is conclusive.

Herr v. *Herr*, 5 Pa. 428.

From these authorities it is evident that Baltzer Gehr could not apply to the orphans' court to have a disputed question of relationship determined. His only remedy was a common-law action of ejectment, in which, under the statute, two verdicts are necessary to settle the title. The reason why one verdict is conclusive in an equitable ejectment is that the question to be decided by it arises out of a contract relation between the parties or their privies. In all other cases to establish a complete title to land, two concurrent verdicts are necessary.

Per Curiam:

This being an action of ejectment, one verdict and judgment thereon is not conclusive on the parties. It was not brought on a legal title to enforce specific performance of a contract. It therefore has not the legal incidents pertaining thereto. It follows the plaintiffs below were not precluded in this case, from controverting the evidence on which a recovery was had in the former trial.

Judgment affirmed.

Jonathan HORN, Admr. of George Buck,
Deceased, *Plff. in Err.*,
v.
James Monroe BUCK.

In assumpsit by an **executor for** the unpaid balance of **purchase money of land conveyed by** the **testator to his son,** the **question whether** the son was to pay the full money consideration mentioned in the deed or was to have the land **partly as a gift, is** a question **for the jury.**

(Argued March 2, Decided March 14, 1887.)

JANUARY Term, 1887, No. 221, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Berks County, to review a judgment on a verdict for the defendant in an action of assumpsit. *Affirmed.*

The facts as they appear at the trial in the court below were stated in the charge to the jury, which was as follows:

"This action is brought by Jonathan Horn, administrator of George Buck, deceased, against James M. Buck, to recover from him the purchase money of a farm, for which a deed was given on the first of April, 1881, to the said George Buck, for the sum of $5,818.44.

"The evidence discloses that in 1879 the defendant James Buck, came to Jacob A. Fister, who was then a justice of the peace in Albany Township, requesting him to draw a deed from his father, George Buck, to himself, for the farm on which they were then living, at the rate of some $45 an acre.

"Such a deed was drawn, and was taken by Fister over to old Mr. Buck, and there are two different statements in regard to what occurred there. Fister stated that the old man said he was not ready to sign the deed yet; there was no bond or mortgage there. The daughter says that the old gentleman declined to sign it because he said it was too dark. At all events it was not signed at that time. The matter was then postponed, and it was not until the first of April, 1881, when James M. Buck, the defendant, came to Fister and told him that they were now ready to have the deed executed. They went over to see the old man, and then some conversation took place between the old man and the young man in the presence of Fister. Fister saw no money on that occasion, nor is it claimed upon the part of the defendant that the money was paid down at that time. It seems that there was a claim of one Beaver, from Kutztown, a judgment of some $697, away back in June, 1876. Precisely what took place in the conversation between the old gentleman and James is not very definitely sworn to except as to a part of it; but the young man said if the deed was fixed, he could raise the money to pay the claim, and if it was not fixed the sheriff would come. Then the old gentleman said: 'If that is so it must be fixed;' and the deed was then signed.

"This is the testimony given by Mr. Fister, and from this the plaintiff claims that there was no money paid, and that the son was bound to pay the consideration money of this property at some future time. He gives in evidence, as a matter of corroboration, the judgment which was held by Joshua Beaver against George Buck, of what is known as June Term, 1876, for $697.40. That judgment was satisfied on the 8th of April, 1881, shortly after this deed was given. There was a mortgage given on the 5th of April, 1881, by James Buck, the son, to Jeremiah S. Trexler, of Kutztown, for $900. It is claimed upon the part of the plaintiff that the proceeds from the mortgage went to pay the judgment of Beaver's. Now that is not all the testimony that is submitted upon the part of the plaintiff to show that the defendant in this case is responsible for the consideration money of that deed. He gave in evidence the inventory that was taken after the old man's death, which showed an estate of only $5.63; in other words, that the old gentleman left no estate. He claims that there were no other debts, which he knew of, that the old gentleman owed, and that there was no other money paid by the defendant except the $900, which it was necessary to raise for the purpose of paying off the claim of Beaver.

"The defendant presents as it were two grounds of defense: the first is that he has actually paid for this land, the payments running through a number of years. His daughter, Isabella, was present when the deed was signed, as she is one of the witnesses to the deed; and she states that at that time her grandfather said: 'Now this land belongs to you. Now take care of it. You have paid more than this.' She says her grandfather had a book. Her father had paid him money some three or four times that she had seen. They had a settlement together a few days after this deed had been executed, and the old gentleman's remark at that time was: 'Now you take care of this land. You have paid more than this for it,' and that the book with other papers was thrown into the fire and burned after that. That is her statement in regard to it.

"William Miller was called. He says: 'I knew George Buck, the father of the defendant. Soon after the defendant had bought the property he said I should buy a piece of this land from Monroe, that the land was his and he could pay what he owed Beaver. I knew that Monroe had bought half a year, or a year, or a month after Monroe had bought the property. I bought from Monroe and paid him cash for it. I bought and paid him $1,000.'

"Now this was offered for the purpose of showing that the old gentleman said to William Miller that the land was his son's, and that the son still owed some debts or had some obligations to pay, and that by his purchasing this property, the son could 'pay off his indebtedness.' Daniel Miller, who was the brother-in-law of the defendant, and who was the administrator of his father, says that he paid sone $1,700 to Buck's wife, who was his sister, less $500, which had been advanced previously. This was offered for the purpose of showing that there was money in the possession of the son and his wife, from which they could have made advancements to the old gentleman.

["Maria Wharton was also examined. She says that she knew George Buck, that is the old gentleman; saw him often about a year before he died, and had a talk about the farm. He said Monroe had bought the farm. He did not say what he paid. He said he gave it to them, it was all their's. Now that testimony is offered for the purpose of showing that the old gentleman gave the farm to the son and that the deed was the conveyance of a gift. That is, it gave the title by giving the deed and the possession of the property; that it was a gift of this property to his son.]

"John Kemp was called, who was once tax collector, and he said he had a talk with the old gentleman about the tax, and the old gentleman said to him that he had sold to Monroe.

"Rebecca Miller was examined. She says that she knew the old man, and had heard him say: 'I gave my house to Monroe;' and that he was to pay his debts, and if he did not take care of it he could not help it. He always said it was his. He said Monroe had to pay his debts.

"Now that is all that there is in this case. You start with this deed. [There is a receipt in the deed acknowledging the receipt of the consideration money of this property. That, in the first instance, would be regarded as proof that the money had been paid, or if not paid, that the party had actually given the property and made use of this deed as the means of effecting that gift.] Then you have the testimony of the others to whom I have referred, the daughter, and these other witnesses whose testimony I have read to you, and you are to consider the whole evidence and find this fact: Did Monroe pay for this property? Has the plaintiff shown you such evidence as would induce the jury to believe, that at that time when this property was conveyed to Monroe the old man intended this as a sale of the property, for the full consideration mentioned in this deed, and taking into consideration the other evidence, the evidence of Fister, was that to be paid by Monroe?

["Or, taking into consideration the other evidence in the cause, did the old man give this property to Monroe by this deed? Did he intend it, beyond the payment of his debts, as a gift to Monroe? Now just as you find these facts, so your verdict will be. If you find that Monroe was to pay the full consideration as mentioned in this deed, and if you find that he did not pay it, then for such sum as he did not pay the plaintiff will be entitled to a verdict with interest from the first day of April, 1881. On the question whether the old gentleman intended that Monroe should pay his debts, and that through this deed this property should be given to Monroe, you will take into account all the evidence to which I have referred, and any other evidence in the case which the jury will remember, to which I have not referred. If you find that the old gentleman intended to give this property to his son, James M. Buck, then your verdict will be in favor of the defendant."]

Verdict and judgment were for the defendant.

The assignments of error specified the portions of the charge inclosed in brackets.

Messrs. **D. N. Schaeffer** and **Geo. F. Baer,** for plaintiff in error:

The consideration mentioned in the deed, as already stated, is a money consideration. Mrs. Wharton's testimony was not offered to show that this money consideration mentioned in the deed was a mistake, and that the old gentleman intended that the conveyance should be for another consideration, nor does her testimony warrant any such instruction.

The court had no right to instruct the jury, because she testified that the old gentleman said that the property belonged to Monroe, that they could find that the conveyance was a gift of the farm to the son. If any part of the consideration in the deed was for natural love and affection, that could have been shown by parol evidence. But the defendant offered no such testimony. He, however, could not show by parol evidence that there was no consideration of money, as that would be in direct contradiction of the deed.

Hayden v. *Mentzer*, 10 Serg. & R. 333; *Lewis* v. *Brewster*, 57 Pa. 410; *Buckley's App.* 48 Pa. 491; *Taylor* v. *Preston*, 79 Pa. 436.

A receipt in a deed can only be either an acknowledgment of the payment of the consideration, or, after being varied or explained, the passing of a gift. It cannot be both. It must be the one or the other. A receipt is, like any other parol admission by the party, open to contradiction, explanation or correction. It may be shown that it was given under a mistake, either of fact or law.

Moore v. *Commonwealth*, 8 Pa. 260; *Bell* v. *Bell*, 12 Pa. 235; *Russell* v. *First Presb. Church*, 65 Pa. 15.

The same liberty extends to receipts indorsed in deeds.

Whart. Ev. § 1065.

The court should therefore have instructed the jury that the receipt was only an acknowledgment of the payment of the money therein stated; and that having been rebutted by the plaintiff, the court should not have instructed them, without proof contradicting or explaining its contents, that they could also find that it was evidence of a gift of the property to the son.

Messrs. **J. H. Marx** and **Garrett B. Stevens,** for defendant in error:

A conveyance made by deed of bargain and sale, although purporting to be for a consideration of money, may be shown to have been in part thereof intended and given as a present from father to son. Such evidence would be in necessary contradiction of the deed.

Hayden v. *Mentzer*, 10 Serg. & R. 333, decides merely that one cannot show that there was no consideration of money, as that would annul the deed. Such would, however, not be the case where the consideration proved is merely different from the one expressed in the deed.

See also *Jack* v. *Dougherty*, 3 Watts, 151.

In *Lewis* v. *Brewster*, 57 Pa. 410, the consideration expressed in the deed, was $300. The grantee was permitted to show that there was no money paid, that it was a gift to her, a daughter-in-law. The court said: "Evidence may be given of a consideration not mentioned in a deed, provided it be not inconsistent with the consideration expressed in it. If the deed appears to be a voluntary conveyance, a valuable consideration may be proved by parol. And there seems to be no reason why what appears to be a valuable consideration should not be proved by parol to be a gift for a good consideration."

It is always esteemed unfair to select a single sentence or two in a charge and insist on it as error, without reference to other portions which explain its meaning and exhibit its bearing. We must look at the state of the case before the jury to determine its effect.

Watts v. *Cummins*, 59 Pa. 88.

It is neither analysis nor criticism, but rude surgery—mere amputation.

Reeves v. *Delaware etc. R. R. Co.* 30 Pa. 454.

It would be treating the courts of common pleas and their suitors with great unfairness if we should take a detached sentence without reference to other parts of the charge, and the testimony in the case.

Kerr v. *Sharp*, 14 Serg. & R. 399; *Carothers* v. *Dunning*, 3 Serg. & R. 373.

The court is responsible for the general effect of the charge, on the minds of the jury; and this is to be judged of, not by sentences culled here and there, but by salient points of the charge, and the thoughts that permeate it through and through. If as a whole the charge was calculated to mislead the jury, there is error on the record; if not, there is none.

Reeves v. *Delaware etc. R. R. Co.* 30 Pa. 454.

Per Curiam:

The uncontradicted evidence is that the defendant paid no money to his father at the time the deed was executed. The contention is whether he was to pay the full consideration mentioned thereafter, or was the land a gift to the son. This is purely a question of fact for the jury, to which it was properly submitted.

Judgment affirmed.

APPEAL of Salmon B. ROWLEY *et al.*

1. In an **action to compel a company** defendant **to recognize plaintiff as a stockholder,** and to give him a certificate for stock subscribed for by him, an **answer** by a defendant who is president of the company that plaintiff agreed that his subscription should be for the use and benefit of said defendant and that he would transfer the same to him and that plaintiff was never the real owner of any shares, is **responsive to the bill.**
2. An **affidavit** by such defendant that the statements made in the charter of the company was true, **annexed to** such **charter** which contained plaintiff's name as a subscriber and stated the number of shares subscribed for by him, is **sufficient corroboration of plaintiff's testimony to overcome** the **answer.**
3. The **charter** itself, as against him who made oath that the statements therein are true, is written **evidence** of a high character to repel an allegation which is irreconcilable with those statements.

(Argued Jan. 10, Decided March 21, 1887.)

JANUARY Term, 1886, No. 168, E. D., before Mercur, *Ch. J.*, Gordon, Trunkey, Sterrett and Green, *JJ.*

Appeal from a decree of the Common Pleas No. 2 of Philadelphia County, in favor of complainant in a bill in equity to enforce recognition of complainant as a stockholder in respondent corporation. *Affirmed.*

Bill in equity filed by William Tillyer against Salmon B. Rowley, Francis W. Kennedy and the Hero Fruit Jar Company. Heard on bill, answer, replication and proofs taken by a master.

The facts appear from the following opinion by MITCHELL, *J.:*

The bill sets out the incorporation of the respondent company; that complainant was one of the original corporators and subscribed for 100 shares of stock; that he has tendered the amount of the subscription already due, and is ready and willing to pay the rest; and that in violation of his rights respondents refuse to receive his subscription and issue his stock. The bill also set out that complainant was a director and was excluded from his proper rights to examine the books, etc. This part of the bill, however, is not now pressed, as the term for which complainant was elected a director has expired since the bill was filed.

The three respondents filed separate answers, that of Kennedy disclaiming any interest in the suit and any personal knowledge of the plaintiff's title to the stock claimed. The answer of the other respondents, the Company by Rowley as president, and Rowley for himself, are in substance the same. They do not deny that complainant was an original subscriber to stock, but set up an agreement with Rowley, Kennedy, and four others (among whom complainant is inferentially included, for it is not in any place categorically averred that he was one of the four), by which the whole of the stock was to belong to Kennedy and Rowley, who were to be the Company, and the other four were to be mere figure heads, without any rights of their own, and put up merely to make an apparent compliance with the requirements of the statute under which the Company was to be incorporated.

The case having gone to an examiner, the complainant put in evidence the charter of the Company, and testified to the facts substantially as set forth in his bill, and also explicitly denied being a party to or having any knowledge of the agreement set up in the answers. The respondents offered no testimony, but rested on their answers.

Upon the case, as thus presented, we find the following facts: the complainant was a subscriber to 100 shares of stock in his own name and his own right; that he has tendered the amount of his subscription due at the time of filing his bill, and therefore that, upon payment of that installment and anything that may become due since the filing of this bill, he will be entitled to a certificate or other proper evidence of his ownership of the stock, and all the other rights of a stockholder.

1. The complainant's case is made out *prima facie* by his testimony. The answers do not deny the facts of subscription, tender, etc., as averred in the bill, but set up a certain agreement between complainant and others which alters complainant's rights, as they would be on the facts on the bill. It is not, therefore, a denial by answer responsive to the bill, entitled to the weight of such answer in equity, but new matter in confession and avoidance, putting the burden of proof of the agreement on those averring it.

2. Even if the answer should be treated as a denial responsive to the bill, we think the complainant's testimony is supported by such corroborative evidence as to overcome the answer even under the strictest rules of equity practice.

The certificate of association for the purpose of obtaining a corporate charter sets forth, *inter alia*, that, "The undersigned, having associated themselves together for the purpose of manufacturing and selling glass," etc., "and desiring that they may be incorporated," etc., "do certify * * * that the names and residences of the subscribers and the number of shares subscribed by each are as follows: * * * William Tillyer, 100 shares."

This certificate was signed by six subscribers, including the respondents, Rowley and

Kennedy, three of whom, again including the respondents, Rowley and Kennedy, made affidavit before the recorder of deeds "that the statements made in the foregoing instrument are true."

This was a statement under oath by the respondents, in a solemn instrument required by law for the purpose of obtaining a charter. The Governor's order was based upon it, and recites that "Having examined the within application and found it to be in proper form," etc., he directs letters patent to be issued thereon according to law.

We regard this as ample corroboration of the facts, as they are set out in the bill and testified to by the complainant.

3. So far we have considered the answers as they stand, but we are also of opinion that the defense set up by them, even if clearly made out, could not be permitted in a court of equity. The Act of April 29, 1874, grants certain privileges to five or more persons associated for any of the purposes named in the Act; and the certificate of the respondents already referred to sets forth the names, etc., of six persons as actually associated for the formation of the defendant corporation. The answers aver boldly that this was done "in order to comply with the requirements of the Act of Assembly," and go on to say that complainant (and the three others in like situation) "had no right or interest in the said shares" subscribed for, and "simply consented to the use of his name." The use of his name for what? To make a sham compliance with the requirements of the Act.

This defense, if true, was a plain fraud on the law. If the facts as now alleged by the respondents had been truly set forth in their application, the Governor would not have granted them a charter. By joining in an application which set forth the complainant and others as corporators according to law, the respondents estopped themselves from contesting the truth of that fact.

It is of no avail to say that many corporations are formed where a few leading corporators hold practically the whole stock. The law does not fix the amount of stock which each must hold, but it does fix explicitly the number who shall unite in the association. By the Act of May 13, 1876, three persons may form a banking company; by the Act of May 1, of the same year, it requires ten to form an insurance company. The Act of 1874, under which defendant company was chartered, requires five.

It is not for the court, still less for these respondents, to say that these requirements are mere formalities, and that a mere nominal compliance will be sufficient. The law fixes the number plainly and imperatively, and although the interest of some of them may be small, it must be real. Even, therefore, if the agreement set up in the answers were fully proved, the respondents could not be permitted, against the policy of the law, to make it available as a defense.

On each of the above grounds there must be decree for the complainant.

And now, April 25, 1885, this cause came on to be heard on bill, answer, replication, and proofs, and was argued by counsel; whereupon, on consideration by the court, it is ordered, adjudged, and decreed as follows:

1. That the said Hero Fruit Jar Company, defendant, be required to receive from the plaintiff the sum of $2,000, and to execute and deliver to him a certificate or other proper evidence of his ownership of 100 shares of the stock of the said Company, and the said payment to be made and received as an installment of 20 per cent on the said 100 shares of stock subscribed for by the plaintiff, and mentioned in the bill, said amount to be paid to and received by the said Francis W. Kennedy, or whoever may now be treasurer of said Company defendant.

2. That the said Hero Fruit Jar Company, and the said Salmon B. Rowley, president, and Francis W. Kennedy, treasurer thereof, and the officers, agents, and employees of the same be, and they hereby are enjoined and perpetually restrained from refusing to recognize the plaintiff as the owner of said 100 shares of stock in said Corporation, and from refusing to pay him any dividends which may have been heretofore, or may hereafter be declared thereon, and from interfering with his rights and privileges as such owner, in any way whatsoever.

The assignments of error specified the action of the court:

1. In finding that the complainant was a subscriber to 100 shares of stock in his own name and in his own right.

2. In finding that the answers of the defendants the Hero Fruit Jar Company and S. B. Rowley were not responsive to the bill.

3. In finding that the complainant's testimony was supported by such corroborative evidence as to overcome the effect of the answer.

4. In finding that the certificate of incorporation was ample corroboration of the statements contained in plaintiff's bill.

5. In holding that the transaction stated in defendant's answers was a fraud in the law.

6. In directing the defendant, the Hero Fruit Jar Company, to receive from the plaintiff the sum of $2,000, and to execute and deliver to him a certificate or other proper evidence of his ownership of 100 shares of the stock of said Company, said payment to be made and received as an installment of 20 per cent on the said 100 shares of stock subscribed for by plaintiff.

7. In directing the defendants to recognize the plaintiff as the owner of 100 shares of stock, and to pay him such dividends as may be declared thereon.

8. In not dismissing the plaintiff's bill with costs.

Messrs. **John G. Johnson** and **Samuel Dickson,** for appellants:

An answer which is limited to stating the whole transaction is as truly responsive as one which is limited to a categorical denial of the plaintiff's averments.

Eaton's App. 66 Pa. 483; *Cresson's App.* 91 Pa. 168; *Burke's App.* 99 Pa. 350; *Audenreid's App.* 89 Pa. 114; *Campbell* v. *Patterson*, 95 Pa. 447.

There is nothing in the transactions stated in the defendant's answers which is contrary to public policy.

The defendants do not deny that six persons associated themselves together to form a corporation, the Hero Fruit Jar Company, under the provisions of the Act of April 29, 1874, and that each one of the six is liable to the full extent of his subscription, and that in all matters relating to the relations of the Corporation to the Commonwealth, and to creditors and other persons dealing with the Corporation, the defendants are estopped from denying the relations established by the certificate of incorporation; but in the present case the Commonwealth, creditors and parties dealing with the Corporation, upon the faith of the articles, are not interested. The question simply is whether, as between the parties themselves, any agreement which affects no persons other than themselves shall be enforced according to its terms, or whether the plaintiff, under a plea that an agreement which he has made is a fraud upon the statute, shall obtain the aid of a court of equity to enforce a right which only finds its existence in the repudiation of the solemn agreement of the parties. It cannot be pretended that Rowley could not have purchased Tillyer's stock after the Company was organized; and if so, how is any public policy infringed by enforcing an antecedent contract to sell?

Messrs. **Geo. Tucker Bispham** and **Wayne MacVeagh,** for appellee:

I. It will be seen from the decisions that when the plaintiff in his bill alleges the existence of certain facts, everything in the answer is responsive which denies or otherwise calls in question those facts.

Eaton's App. 66 Pa. 483; *Cresson's App.* 91 Pa. 168; *Burke's App.* 99 Pa. 350; *Eberly* v. *Groff*, 21 Pa. 251; *Pusey* v. *Wright*, 31 Pa. 387.

The decisions are not authority for the position that when a plaintiff states his case upon certain facts, the defendant may obtain the advantage of a responsive answer by alleging the existence of other facts, and connecting them with the facts averred by the plaintiff merely by the statement that they are part of the transaction to which the plaintiff in his bill refers.

II. But it is not at all necessary to the appellee's case to rely upon the above position that the answers are not responsive. Even though their responsiveness be conceded, still the testimony of the appellee, abundantly supported as it is by corroborative circumstances, must prevail.

III. The vice of appellants' argument is that it first assumes the existence of the agreement, and then affirms that the appellee attempts to repudiate it. But the fact is the alleged agreement had no existence, excepting so far as it is possible to establish it by the answers. The bill ignored it, and the testimony of the appellee denied it. The bold demand of these appellants, then, is, after acknowledging themselves parties to a fraud, that they be permitted to establish by their testimony the fact of the fraud, in order to avail themselves of the benefit of it, as a defense to an honest and legitimate claim of the appellee. They practically concede the righteousness of the appellee's demand by their assertion that "each one of the six is liable to the full amount of his subscription;" for it is elementary corporation law that when the corporation may enforce the subscription, the subscriber has a right to his shares; this right of the subscriber constituting in the main the consideration by virtue of which the corporation may enforce his subscription.

Taylor, Corp. § 40, note.

Mr. Justice **Trunkey** delivered the opinion of the court:

The bill sets forth, among other things, that the capital stock of the company consists of 5,000 shares of the par value of $100 each; that the plaintiff as one of the original stockholders, subscribed for 100 shares, and that the defendants have refused to give him a certificate and have confederated to deprive him of his rights as a shareholder.

With reference to that, in the answer, Rowley denies that the plaintiff was ever the real owner of any shares, and says that the plaintiff consented to the use of his name as subscriber for 100 shares of stock under an agreement that upon demand he would transfer and assign the same to said Rowley as the true and equitable owner, which he has since refused to do.

The answer shows that at the time the plaintiff subscribed he agreed that his subscription should be for the sole benefit of Rowley. Admitting the act of subscribing, it declares that the act was accompanied with an agreement that the subscription was wholly for the use of one of the defendants. This is not subsequent matter alleged in avoidance; if true, it is a material portion of the facts in the case of the plaintiff, which he accidently omitted. We think the answer is responsive. *Eaton's App.* 66 Pa. 483; *Burke's App.* 99 Pa. 350.

We are of opinion that the learned judge of the common pleas rightly ruled that "The complainant's testimony is supported by such corroborative evidence as to overcome the answer, even under the strictest rules of equity practice."

In pursuance of the statute, the charter of the intended Corporation was subscribed by six persons, and in it were written the names and residences and the number of shares subscribed by each, and the number and names of the directors for the first year. Rowley, Francis W. Kennedy and Henry H. Kennedy deposed that the statements made in the charter are true. How could they have made the affidavit if they knew or believed that four of the persons were not good faith subscribers, that in fact Rowley and F. W. Kennedy owned the entire stock, and that three of the five directors named owned no stock and had no interest in the Corporation.

The charter, with the requisite affidavit, is in evidence. That oath was essential in obtaining the charter. The statements, acknowledgments and affidavit, prescribed by law, are not formal and idle. Although the burden is on the plaintiff, the testimony of one witness has corroboration fully equal to the testimony of another. Indeed, the stronger evidence is the charter itself. As against him who made oath that the statements therein are true, it is writen evidence of high character, to repel an allegation which is irreconcilable with those statements.

It being determined that the plaintiff is a stockholder as alleged in the bill, we express no opinion on the question raised in the fifth assignment of error.

Decree affirmed and appeal dismissed, at costs of appellant.

PHŒNIX IRON CO. *et al.*, *Pffs. in Err.*,
v.
Lawrence LEWIS *et al.*

1. In an action of ejectment to recover possession of the underlying mineral ore, from the owner of the surface, the defendant claimed title to the ore under a **release** alleged to have been executed by a former owner of the mineral right to a former owner of the surface, nearly forty years before suit brought, and **lost or destroyed.** *Held*, on the facts of the case, that **secondary evidence** offered to prove the contents of such instrument was **properly rejected.**
2. Where the plaintiff in ejectment for unmined mineral ore shows title to the mineral right, the fact that defendant, who is entitled to the surface, has been in **possession of the land for any length of time, without taking possession of** the **mineral by mining** it, **cannot constitute an adverse possession** in his favor as **against** the **owner of** the **mineral** right.

(Decided March 15, 1886.)

ERROR to the Common Pleas of Berks County, to review a judgment on a verdict for plaintiffs in an action of ejectment to recover possession of iron ore in a tract of land in possession of defendants. *Affirmed.*

This action was brought by Lawrence Lewis and others against the Phœnix Iron Company, Daniel K. Hagy and others. The plaintiffs at the trial in the court below, before HAGENMANN, *J.*, offered in evidence a deed dated December 7, 1772, from Thomas Rutter and wife and Samuel Potts and wife, to Henry Stauffer, which conveyed the premises of which the tract in question is a part, reserving to the grantors the iron ore contained in said tract. Plaintiffs showed title, by divers mesne conveyances and descents cast from said Rutter and Potts, to the entire ore reserved in such tract of land including the ore under the tract in controversy. Defendants showed a clear title by divers mesne conveyances from Henry Stauffer, to the surface of this tract of land and claimed title to the underlying ore under the following alleged facts:

In 1847, when Robert M. Lewis and Lawrence Lewis were the owners of the mineral reserve, and Henry Boyer was the owner of the surface of the land, the former, as alleged by defendants, released the mineral reserve for valuable consideration to said Boyer. March 1, 1854, Boyer, being then the owner of the surface and minerals made a lease of the surface and iron ore for twenty-eight years and nine months to one Buck who, February 2, 1857, assigned the same to the Phœnix Iron Company.

In 1857 Henry Boyer died, and in the following year his executors, acting under the direction of his will, sold the tract of land in question and assigned the lease made to Buck to Daniel B. Boyer and Charles Hagy. In 1868 Daniel B. Boyer sold his interest in the tract to Charles Hagy. In 1875 said Hagy died, leaving a widow and children, defendants in this suit, who in July, 1883, renewed the lease with the Phœnix Iron Company for thirty years from the date of its expiration.

The lease from Henry Boyer to Robert S. Buck was duly recorded in Berks County, as was also the lease from the Hagy heirs to the Phœnix Iron Company. During the entire period covered by these leases, the tract has been assessed for taxation, exclusively, to Henry Boyer and his successors, including the Hagys.

Defendants further allege that after the death of Charles Hagy, the title papers of the tract, comprising the deeds of Charles Hagy and the alleged release of the mineral reserve given by the Lewises to Boyer and the lease from Boyer to Buck, were left with Levi Koons, a justice of the peace of Boyertown, Berks County, where the mines are situated, Koons being the agent of the Hagy heirs for the collection of the royalty on the lease for the ore mined by the Phœnix Iron Company.

Koons died September 25, 1882; and upon searching for the title papers of defendants in this action, the only paper which could be found was the lease from Henry Boyer to Buck.

It was admitted that defendants had been in possession of the surface of the whole tract since 1847, but denied that they had mined any coal out of the bed in question, except just previous to the commencement of this suit.

The defendants offered to prove by Walton K. Hagy, one of the defendants, that he saw a release, signed, or purporting to be signed and sealed, by Robert Lewis and Lawrence Lewis, dated about the year 1847; that he saw the paper last with the title papers of this ore tract at Boyertown in the month of July, 1882; that the papers, that is to say, the deed from the executors of Henry Boyer to Charles Hagy and Daniel Boyer, the lease which is in evidence, and the said release were then in the possession of Levi Koons, who was at the time the agent of the heirs of Charles Hagy to collect the royalty accruing upon the lease of the mineral tract in suit here, from the Phœnix Iron Company, one of these defendants and the lessee of the Hagys; that Levi Koons died in the month of September, 1882, and that the witness called upon the widow of the said Levi Koons for the papers and caused a thorough search for them to be made; and that the deed and the release, together with some papers belonging to other third parties, were not to be found; and that the only paper which he received was the lease which has been offered in evidence; this to be followed with the evidence of other witnesses in proof of the same facts.

The plaintiffs objected: 1, because the witness is incompetent, being a party to the record and in interest, and Lawrence Lewis and Robert Lewis, the persons named, being dead, and their heirs at law and devisees being plaintiffs in this action; 2, before the loss of a deed can be shown and secondary evidence of its contents offered, there must be previous proof of its due execution, which includes proof of its delivery; 3, that since the passage of the Act of 1866, whereby the Acts of 1793 and the Act of 1786, have been made perpetual, the evidence of lost deeds and their contents must be obtained and given in accordance with those Acts; and that this is exclusive of all other ways, because it is the best evidence.

The Court: Counsel for defendants asks the court to make a ruling upon the offer as presented as a whole; as a whole it is overruled, and exception noted for defendants. *First assignment of error.*

The defendants offered to prove by Harriet Koons that she is the widow of Levi M. Koons, late of Boyertown, Berks County; that he died in September, 1882; that immediately before his death, and at the time of his death, he was the agent of the Hagy heirs, the defendants in this suit with the Phœnix Iron Company, for the collection of rent or royalty accruing upon a lease of the minerals or iron ore on the tract in dispute in this case, said lease having been made by Henry Boyer to Robert S. Buck, March 1, 1854, it being in proof in this case that the rights thereunder have devolved upon the Phœnix Iron Company as assignee of the lessee, and the Hagys as assignees of the reversion; that the title papers of the Hagys to the mineral tract in dispute here were in the possession of her said husband as their said agent; that among the title papers was a release, old in appearance, and dated in 1847, and signed and sealed by Robert Lewis and Lawrence Lewis by which release the said Robert Lewis and Lawrence Lewis released and conveyed to Henry Boyer all their right, title and interest in the iron ore in the tract described in the writ in this case, and which right or interest to said iron ore had been reserved in a deed from Thomas Rutter and Samuel Potts to Henry Stauffer, in 1774; that the paper was without any erasure or alteration; that it was light blue in color; that it had the appearance of old age; that it was with the title papers of the Hagys; that she heard it read in the month of July, 1882, w en it was in the possession of her husband, ar that she personally read it, and from the rusal of it became acquainted with its c ents; to be followed with proof that in , Henry Boyer, the releasee, was the owne the land described in the writ, and that f the time of the execution of the release, enry Boyer and his assignees, up to this ti , have been in possession of the minerals in he tract described in the writ, and have leased the same, the same having been taken out and mined by their lessees, and they having paid the taxes on the same continually and exclusively during the entire period from the execution of the said release up to the present time.

Objected to by the plaintiffs: 1, because the witness is incompetent to testify as to the purpose for which the parties came there to see her husband. If what was said and done there is pertinent to the issue now trying, she might testify as to what was said and done, but she cannot testify as to the purpose of the parties who participated in that transaction; 2, it is proposed to prove by this witness that one of these papers was a release. Now, as to whether an instrument is a release, a bond or other legal instrument, is a matter of inference to be drawn from the language of the paper by the court, and not to be testified to by witnesses. The offer, therefore, is not to prove contents, or the language, or the language as near as the witness can recollect it, but to prove the legal effect and consequence of the paper; 3, it is proposed to prove that Robert Lewis and Lawrence Lewis executed the paper in question, by showing, by the witness, merely that the paper purported to be a paper signed by them, whose only knowledge as to the paper is, according to the statements in the offer itself, her having heard it read and having read it herself in July, 1882, after the decease of the parties who are said to have been designated therein, the relators, and in the absence of the plaintiffs in this case, and in the absence of all other persons whose acquiescence or consent might be held lawfully to be binding upon the plaintiffs; 4, there is no proof of the genuineness of the instrument which it is proposed to show that the witness saw; 5, the preliminary proof of loss and of search does not fulfill the requirements of the law and is not such as will warrant the court in admitting secondary evidence of the contents of the alleged paper in question, or pretended release; 6, that the testimony is generally incompetent, inadmissible and irrelevant.

The Court: It is not pretended by the defendants that the witness on the stand saw the execution of this instrument, nor does she know of its delivery, nor is she acquainted with the handwriting of the releasors.

Defendant's counsel: That is all true.

The Court: We will permit you to show by the witness what paper she saw there in July, 1882, of which you propose to prove the contents.

Defendant's counsel: The defendants desire to add to the offer that the release, the contents of which are now offered to be proved, is the same release testified to by Mrs. Koons as having been in the possession of her husband Levi M. Koons, together with a deed and a lease, and letters testamentary and a will, as the agent of the heirs of Charles Hagy, deceased; and we also propose to prove by her that she, having read the said release, as stated in our offer, recollects its contents.

The Court: The defendants request the court to give a ruling to their offer in the whole; as it stands, the offer is overruled, and exception noted for defendants. *Second assignment of error.*

The defendants offered in evidence a lease, dated the first day of July, 1852, between Robert M. Lewis and Lawrence Lewis, lessors, and David Reeves, Robert S. Buck, Samuel J. Reeves and R. C. Nicholls, recorded, etc., which lease refers to a plan or plot of lots embraced in the lease; and the lease itself states that it grants the right of the lessors to the minerals in the mines in Colebrookdale, Berks County, and the plot shows the lots in which they claim to have a mineral right in Colebrookdale.

Objected to by the plaintiffs: 1, because the evidence of a lease by the Messrs. Lewis, of mineral rights other than those which constitute the subject matter of this action, does not legally or logically prove or conduce to prove that they had no title in the ore which forms the subject matter of this action; 2, because it is generally irrelevant and incompetent.

Offer overruled; exception for defendants. *Third assignment of error.*

Defendants offered to prove that for the last thirty years and upwards the reputed ownership of the minerals in the lot described in the writ was in Henry Boyer and those claiming under him (that is, Charles Hagy and Daniel Boyer, and later Charles Hagy, and since his death his heirs) for the purpose of proving an element of adverse possession.

Plaintiffs objected: 1, because the offer does not prove an element of adverse possession; 2, because a reputation which may have been created by Henry Boyer as against the real owners of the minerals, who reside at a distance from the neighborhood, and may have been so created by design, cannot be used in a court of justice for the purpose of assailing the title of the rightful owner; 3, because the evidence of reputation of ownership is not competent testimony in this case as against the plaintiffs; 4, because it is generally irrelevant and incompetent.

Objection sustained; exception for defendants. *Fourth assignment of error.*

Defendants proposed to prove that the tract described in the writ was sold by the executors of Henry Boyer; and the announcement was made at the sale that it was clear of everything, that it was without any reservation of any kind, and that the whole thing, including the mineral, was sold.

Objected to by plaintiffs: 1, because the title which passed by executors' sale must be measured by the title which Henry Boyer owned at the time of his disease, and cannot be enlarged by anything that the executors of Henry Boyer may have said or done at the time of the sale of the property; 2, no declarations made by the executors, or their agent, or by any other person at the time of the sale of the said property, and in the absence of the ancestors of the plaintiffs, who then owned the mineral right, can be given in evidence as against the title of the plaintiffs; 3, the testimony is generally incompetent and irrelevant.

Offer overruled, and exception noted for defendants. *Fifth assignment of error.*

Defendants offered in evidence the deposition of Charles K. Hagy, taken on the 21st day of April, 1885, at the office of Charles VanWert, in the City of Minneapolis, and State of Minnesota, by a virtue of a commission issued from the Court of Common Pleas, of the County of Berks, to Charles VanWert, and on file in this case; offered for the purpose of showing that his father, Charles Hagy, and Daniel Boyer, and the heirs of Charles Hagy, were the owners of the minerals described in the writ, from 1858 up to this time, and that they have been in actual possession of the said minerals during that time—for the purpose of proving adverse possession.

The portion of the deposition relied on is the following: "The tract adjoins what is known as the old mine hole, in Boyertown, and from 1858 up to the time of my father's death, was in his possession, the mines being operated by his tenants during that period; he paid the taxes during that period; and since his death his heirs have been in possession by tenants and paid the taxes."

That part of the deposition offered was objected to by the plaintiffs: 1, because the testimony of the witness was not responsive to the questions which he was answering; the question did not indicate to the plaintiffs or give them any notice that such an answer would be made; and therefore it was impossible for the plaintiffs to frame a cross interrogatory in order to elicit the extent of the witness' knowledge of the matter concerning which he was testifying; 2, the testimony in itself indicates that the witness was not speaking from actual knowledge of the matter concerning which he was testifying; 3, it appearing that the witness had for a number of years been residing in a remote State, many hundreds of miles removed from the locality of the subject matter of this action, it is manifest that he can have no personal, actual knowledge concerning the matter to which he testifies; but that he must be testifying from hearsay, if his testimony has any foundation whatever; 4, the testimony is also objected to on the ground that the witness is an interested witness, and a party to the record, and therefore is incompetent to give the testimony in question; 5, the matter is generally irrelevant and incompetent.

Offer overruled; exception noted for defendants. *Sixth assignment of error.*

The defendants offered in evidence a deed, dated the 15th day of October, 1847, from Henry Boyer, of Boyertown, to Robert M. Lewis and Lawrence Lewis, both of the City of Philadelphia, recorded in deed book 54, p. 91, for 145 perches of land; consideration, $400.

To be followed with proof that this 154 perches is part of the tract which in 1801 was acquired by Henry Boyer.

The purpose of the offer is that the deed, from Henry Boyer to Robert Lewis and Lawrence Lewis, making no reference to any reservation of ore or mere surface right of Henry Boyer, but purporting to convey a fee simple to the lot and everything that it contains, is evidence tending to negative the claim of the plaintiffs that in 1847, Robert and Lawrence Lewis were the owners of a right to the ore in the tract contained in the deed, which is part of the Henry Boyer tract, the remainder being the land described in the writ.

Plaintiffs objected: 1, because the offer is irrelevant; 2, because under the terms of the deed of Stauffer to Rutter and Potts, September 24, 1774, Rutter and Potts and their heirs and assigns covenanted to pay and make good any damages to Stauffer, his heirs and assigns, which might at any time be caused by digging, searching for, or breaking the ground, or hauling away ore, should any be discovered, and the purchase from an assignee of the Stauffer title of the strip of ground referred to was not and could not be an admission of want of title in the purchasers to the iron ore, and is not inconsistent with the title shown by the plaintiffs, to wit: the title to the iron ore and minerals under the tract.

Offer overruled; exception noted for defendants. *Seventh assignment of error.*

Defendants, *inter alia*, presented the following point:

1. If the jury believe that in 1854, and from

that time up to the bringing of this suit, Henry Boyer and those claiming under him, including the heirs and devisees of Charles Hagy, deceased, the defendants here, were the owners of the tract of land on which the ore in suit here is situated, and claimed to own not only the surface but the ore likewise; that they leased the ore to Robert S. Buck, March 1, 1854, in good faith, claiming to be the owners thereof, and that the lease was recorded; that the claim of ownership by Henry Boyer, the lessor, and his successors in title, was a matter of general reputation in the neighborhood of the tract during all that time; and that the said lessee and his assignees entered into the possession of said tract in pursuance of said lease, and held exclusive, peaceable, hostile, notorious, visible and continuous possession from 1854 to the present time, the defendants have shown a good title by adverse possession, and the verdict should be in favor of the defendants.

The court in the charge to the jury answered the above point of defendants as follows:

"We then proceed to consider the second ground upon which a defense can be set up. Have the defendants shown a right by adverse possession? The court says to you that there is no evidence in this cause to show that there has been an adverse possession taken by any one for a period of twenty-one years, from 1774 down to the bringing of this suit. The lease given in evidence made by Henry Boyer to Robert S. Buck in 1854, and entered of record, is not such adverse and hostile possession as will devest the rights of the plaintiffs in the iron ore contained in this tract of land. One person may be the owner of the surface of the land, and another may be the owner of the mineral right; and the fact that the person who is entitled to the surface is in possession for any length of time, without interfering and taking possession of the mineral right, does not give him a right by adverse possession. The possession of the owner of the surface may run with his land; and until he has in some way taken possession of the mineral, and he can only take possession of it by mining, or doing some act in the way of mining, that will interfere with the owner of the mineral right, he cannot be said to be in possession adversely to the owner of the mineral right.

There being, therefore, no right shown by the defendants under a grant, nor any evidence in the case which would justify the court in submitting to you the question of adverse use or occupation of the iron ore right, the verdict of the jury will have to be for the plaintiffs; and this is a full answer to defendants' first point." *Eighth assignment of error.*

The court directed a verdict for plaintiffs, and defendants took this writ assigning errors as above noted.

Messrs. **J. H. Jacobs, B. Frank Dettra** and **H. Willis Bland,** for plaintiffs in error:

I. The release was an ancient document, and its due execution was not necessary to be proved.

When ancient instruments are more than thirty years old, they prove themselves.

1 Greenl. Ev. § 21.

A deed thirty years old, accompanied by possession, proves itself, and is regarded as an ancient deed.

Bowser v. *Cravener*, 56 Pa. 132.

If a deed is thirty years old, it may be admitted in evidence without any further proof of its execution.

1 Phil. Ev. p. 404.

Ancient writings which are proved to have been found among deeds of evidences of land may be given in evidence, although the execution cannot be proved.

1 Phil. Ev. p. 404.

Some account ought to be given of the place where the deed was found; and the finding of it among deeds of evidence of land is a presumption that they were fairly and honestly obtained, and preserved for use, and are free from suspicion of dishonesty.

1 Phil. Ev. p. 404.

Where proof of execution would have been dispensed with, in case the original had been produced, proof of execution is unnecessary.

Goodier v. *Lake*, 1 Atk. 246; 1 Stark. Ev. 392.

In *McReynolds* v. *Longenberger*, 57 Pa. 13, the proposition was to prove ancient receipts appearing to be more than thirty years old, accompanying the muniments of title, to the land, and found with them by the witness when he received the title papers, and which were retained by him until his house was burned; the court below held this not sufficient proof of execution to admit secondary evidence, and the supreme court in reversing, through *Judge* Thompson, says: "They would have been evidence without preliminary proof of execution, had they been produced and offered as such in court, and for the reason that they were ancient receipts."

If the instrument is lost, the party is required to give some evidence that such a paper once existed, although slight evidence is sufficient for this purpose, and that a *bona fide* and diligent search has been unsuccessfully made in the place where it was likely to be found.

1 Greenl. Ev. § 558.

It must appear that the instrument comes from such custody as to afford a reasonable presumption in favor of its genuineness.

1 Greenl. Ev. §§ 21, 142; 1 Phil. Ev. p. 404.

If a document has been placed in the hands of a custodian, he must be required to make due search; and the fruitlessness of such search must be shown, before secondary evidence can be let in; and where such person is dead inquiry must be made of his legal representatives.

1 Whart. Ev. § 144; *Krise* v. *Neason*, 66 Pa. 253.

It is plain that the proof of loss of a document necessarily involves some descriptive proof of the document itself, although not to the degree of precision subsequently necessary in order to establish a title under it; and a strong probability of its loss has been held sufficient to let in secondary evidence of its contents.

Bouldin v. *Massie*, 7 Wheat. 122, 154, 155 (20 U. S. bk. 5, L. ed. 414, 422 and editorial note).

If the ground for admitting the secondary evidence is that the original has been lost, it ought to be shown that every reasonable inquiry has been made; and the last person in whose possession it is traced should be called to give some account of the instrument.

1 Phil. Ev. p. 399; *Caufman* v. *Presbyterian Cong.* 6 Binn. 59.

It is sufficient if the party has done all that could reasonably be expected of him under the circumstances of the case, in searching for the instrument.

Kelsey v. *Hanner*, 18 Conn. 311.

The degree of diligence in the search depends much upon its peculiar circumstances; and it is a question for the court as to whether the loss of the instrument has been sufficiently proved to admit secondary evidence.

1 Greenl. Ev. § 558.

The party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him. But the object of the proof is merely to establish a reasonable presumption of the loss of the instrument.

1 Greenl. Ev. § 558, p. 645.

It is sufficient if the party offering parol proof show such diligence as is usual with good business men under the circumstances.

1 Whart. Ev. § 142. See cases cited, note 1.

Where a document is lost or destroyed without any suspicion of spoliation attaching to the party offering to prove it by parol evidence, then such parol evidence is admissible to prove its contents, it appearing that due but fruitless efforts have been made to produce it in court.

Enders v. *Sternbergh*, 2 Abb. App. Cas. 31; *McReynolds* v. *Longenberger*, 57 Pa. 13; *Kaul* v. *Lawrence*, 73 Pa. 410; 1 Whart. Ev. § 129.

The court must be satisfied that original writing is not producible and would be evidence if produced in order to give secondary evidence of its contents.

1 Whart. Ev. § 141; *Caufman* v. *Presbyterian Cong.* 6 Binn. 59.

The witness must have read it or heard its contents from its author, and be able to speak at least to the substance of such contents.

1 Whart. Ev. § 140; *Cox* v. *England*, 65 Pa. 212.

It is not necessary that the witness should testify to the provisions of the lost instrument; it is presumed to have been in the usual form.

Emig v. *Diehl*, 76 Pa. 359; *Brown* v. *Day*, 78 Pa. 141.

If an ancient deed, is found in the proper custody and is corroborated by evidence of ancient or modern corresponding enjoyment, or other equivalent acts, it is to be presumed that the deed constituted part of the actual transfer of property therein mentioned.

1 Greenl. Ev. p. 144; *McReynolds* v. *Longenberger*, 57 Pa. 13; *Bertie* v. *Beaumont*, 2 Price, 303.

II. A party to a suit is a competent witness, at common law, to prove to the court that an instrument which it is necessary to produce at the trial is destroyed or lost, so as to let in secondary evidence; and there in no distinction in this respect between cases where the action is upon the instrument, and those where the question arises indirectly; and it is of no importance in the order of exhibiting the evidence, which fact is first proved, whether that of the existence and contents of the instrument, or the fact of destruction or loss.

Fitch v. *Bogue*, 19 Conn. 285; 1 Greenl. Ev. 14th ed. 1883, § 349; *Robinson* v. *Freeman*, 13 W. N. C. 565.

III. The offer covered by the fourth assignment of error, to prove the reputation in the neighborhood, of the ownership in the mines, was clearly competent. When a party sets up a title to ownership by adverse possession, he must prove such a state of things as would be likely to give notice to any other person whose title is to be affected by his adverse holding. As an element of this kind of proof, reputed ownership in the adverse holder is admissible.

Earl of Sussex v. *Temple*, 1 Ld. Raym. 311; 1 Greenl. Ev. § 101; *Davis* v. *Butterbach*, 2 Yeates, 211; *Sampson* v. *Sampson*, 4 Serg. & R. 330.

Adverse possession may be held of minerals.

Arnold v. *Stevens*, 24 Pick. 106; *Caldwell* v. *Copeland*, 37 Pa. 427; *Armstrong* v. *Caldwell*, 53 Pa. 287; *Barnes* v. *Mawson*, 1 Maule & S. 77; *Caldwell* v. *Fulton*, 31 Pa. 475.

Occupation by tenant is sufficient.

Pipher v. *Lodge*, 16 Serg. & R. 214, 233–236; *S. C.* 4 Serg. & R. 310; *Watson* v. *Gregg*, 10 Watts, 289; *Union Canal Co.* v. *Young*, 1 Whart. 410; *Jones* v. *Porter*, 3 Penr. & W. 132; *Neel* v. *McElhenny*, 69 Pa. 300.

The possession of succeeding occupiers in privity is sufficient.

Overfield v. *Christie*, 7 Serg. & R. 177; *Schrack* v. *Zubler*, 34 Pa. 38; *Doswell* v. *De La Lanzo*, 20 How. 32 (61 U.S. bk. 15, L. ed. 824); *Brandt* v. *Ogden*, 1 Johns. 159; *Doe* v. *Campbell*, 10 Johns. 477.

Certainty, publicity and notoriety are the essential elements of adverse possession.

Tyler, Ejectment, 890 and cases cited; *Ewing* v. *Burnet*, 11 Pet. 41, 52 (and see note Bk. 9, L. ed. 624, 629); *Ellicott* v. *Pearl*, 10 Pet. 412 (35 U. S. bk. 9, L. ed. 475); *Johnston* v. *Irwin*, 3 Serg. & R. 291.

Payment of taxes is evidence of a claim, and of the extent of such claim.

Sorber v. *Willing*, 10 Watts, 142; *Naglee* v. *Albright*, 4 Whart. 291; *Hockenbury* v. *Snyder*, 2 Watts & S. 240; *Boyer* v. *Benlow*, 10 Serg. & R. 303.

To give color of title does not require the aid of a written conveyance, or other evidence in writing; but it is only necessary that the entry be made under a *bona fide*, and not a pretended claim of title, existing in another.

La Frombois v. *Jackson*, 8 Cow. 589; *M'Call* v. *Neely*, 3 Watts, 72; *Green* v. *Kellum*, 23 Pa. 254–258; Tyler, Ejectment, 863–865.

The law designs that the owner shall have ample knowledge on the subject, and a full opportunity to assert his claim; but if he sleeps upon his right for the period prescribed by the Statute of Limitations, he is presumed to have acquiesced in the claim of another.

Thompson School Dist. v. *Lynch*, 33 Conn. 330; *Pray* v. *Pierce*, 7 Mass. 383; Tyler, Ejectment, 909.

The possession need only be according to the nature of the thing.

Robison v *Swett*, 3 Greenl. (Me.) 316.

Messrs. **Cyrus G. Derr** and **George F. Baer**, for defendants in error:

The authorities are clear that it is absolutely essential, before undertaking by parol to prove the contents of a lost deed, that the loss should be unequivocally established.

Parks v. *Dunkle*, 3 Watts & S. 291; *Parke* v. *Bird*, 3 Pa. 360; *Graff* v. *Pittsburgh etc. R. R. Co.* 31 Pa. 489.

Proof of the genuineness and of the actual execution and delivery of a lost instrument must precede parol evidence of its contents.

Whart. Ev. § 141; *M'Reynolds* v. *M'Cord*, 6 Watts, 288; *M'Credy* v. *Schuylkill Nav. Co.* 3 Whart. 424; *Slone* v. *Thomas*, 12 Pa. 209; *Porter* v. *Wilson*, 13 Pa. 641. See *Leazure* v. *Hillegas*, 7 Serg. & R. 323; *Pipher* v. *Lodge*, 16 Serg. & R. 214; *Parks* v. *Dunkle*, 3 Watts & S. 291; *Jack* v. *Woods*, 29 Pa. 375; *Emig* v. *Diehl*, 76 Pa. 359.

Per Curiam:

The plaintiffs below proved a good paper title to the land in question. We have carefully examined and considered all the assignments of error. The evidence was properly rejected, and the points were correctly answered.

Judgment affirmed.

William B. BRICKELL *et al.*, *Piffs. in Err.*,
v.
C. R. EARLEY.

1. A constructive or a **resulting trust** can arise only when title has been obtained by fraud or purchased with the money of another.
2. No part of a **parol trust** can be left to inference, the proof to establish it must in all particulars be clear and specific.
3. A, B and C, by conveyances which excepted certain lots, became the **tenants in common of a large tract of land** which, for the purpose of clearing up the title, A afterwards, by agreement with B and C, permitted to be sold for taxes, and bought in in his own name for the benefit of all. Still later both this tract and the excepted lots were again sold for taxes, and were bought by D. The excepted lots were not redeemed, and D conveyed them to A. B and C thereon brought **ejectment** against A **for an undivided two thirds** of the lots. *Held*, **that in the absence of fraud** or the use of their money in purchasing the lots by A, **they could not recover.** *Held also*, that **evidence** on the part of B & C was **inadmissible** to prove: 1, that A had employed, to survey the tract owned in common, a surveyor who had included the lots within the tract; or 2, that A represented to them that there were a number of tracts the title to which was in doubt which he could perfect by purchasing at tax sale, to be followed by A's letters showing he was pursuing a policy as to obtaining tracts at such sales which he had told them could be accomplished when they made the purchase; or 3, that A had written to them a letter by which as they alleged he had said D would assign the tax deeds at any time the purchase money was paid; or 4, that before and after his purchase A declared that the sale was for the joint benefit of the parties to perfect their joint title.

(Argued Feb. 17, Decided March 14, 1887.)

JULY Term, 1886, No. 105, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Elk County, to review a judgment of compulsory nonsuit in an action of ejectment. *Affirmed.*

This was an action by W. B. Brickell and P. Y. Hite, against C. R. Earley, for an undivided two thirds of forty-one lots of land in the Townships of Benzinger and Fox and the County of Elk.

At the trial the following facts appeared:

By deed dated October 13, 1859, Jesse Landis conveyed to H. G. O. Ramberger, Edwin Jefferies and Richard J. Byrnes, a large number of tracts of land, situate in Elk County. The several tracts were described by metes and bounds, and included within the boundaries and number of acres given a large number of farm lots which had before that time been surveyed and offered for sale; a considerable number, among which were some of the lots in controversy in this suit, had been sold.

For the years 1858 and 1859, these lands, which were all unseated, were assessed with the usual taxes, and on the 11th of June, 1860, were sold to one Sarah A. Byrnes for taxes and costs. None of the farm lots were then assessed separately, but a few of the purchasers paid taxes or redeemed from the sale.

Ramberger, Jefferies and Byrnes continued to make sales and conveyances of the farm lots until April 1, 1861, when they sold the remaining lands to one William C. Black. In this conveyance the lands were again fully described, and included within the bounds all the farm lots which had been so conveyed; and the grantors excepted, by the names of purchasers and the numbers of the lots, with the number of acres, the lands sold by them.

Among the lots so excepted were Nos. 3, 5, 6, 7, 15, 16, 17, 18, 20, 34 and 37, in the precipe.

On the same first of April, 1861, Black bought from Mrs. Byrnes and her husband, Timothy Byrnes, all the rights that Mrs. Byrnes had acquired by the treasurer's sale. This purchase was evidenced, not by assignments of the treasurer's deed, but by a conveyance, complete in itself, and which is of record, and was given in evidence at the trial.

Black sold and conveyed some more lots, among others Nos. 35, 38, 39, 40 and 41, in precipe, and on the 12th of August, 1862, conveyed to S. B. Coughlin. This deed does not describe the lands in full, but refers to deed from Ramberger *et al.*, and recites that deed and its exceptions, and after thus describing the land, excepts about 1,170 acres sold by grantor. The taxes of 1860 and 1861, on all the lands, were paid in full by Coughlin, as were the taxes of 1862 and 1863.

For 1860 and 1861, lots were assessed to William Shanahan and M. Shanahan (29 and 30, Chestnut Road, Nos. 17 and 18, in precipe), and were bid in at treasurer's sale by Coughlin and the taxes paid by him for 1862 and 1863.

Coughlin also made sales or conveyances, and among others Nos. 1, 2, 4, 8, 9, 10, 11, 12, 13, 14, 21, 23, 24, 25, 26, 27, 30, 31, 33, 19, 22; all but the two latter being to John Jamieson, by deed dated January 15, 1864. Jamieson never paid a cent of taxes and never had the lands assessed to himself. On the 16th of January, 1864, Coughlin, by a deed which from its contents appears to have been indorsed upon the deed from Black to him, conveyed to Josiah Caldwell, with a further exception of 1,907 acres conveyed by Coughlin to sundry persons.

On or about the 11th of June, 1866, the lands were again sold for taxes, and those tracts in Benzinger Township were bid in by Albert Willis, and those in Fox Township by L. H. Eicholtz. Afterwards, and near about the 5th day of June, 1868, the treasurer's deeds were assigned to Mr. C. W. Huntington.

In 1873, the plaintiffs, with one J. D. Baldwin and the defendant, agreed to buy the body of lands, and on or about the 15th of August, 1873, the defendant, Earley, received from Huntington a deed for the lands he held under the treasurer's sales of 1866. This deed was dated February 27, 1873, and was recorded August 20, 1873. Afterwards, the defendant received a deed from Josiah Caldwell "for all the lands described in a mortgage from C. W. Huntington to Benzinger & Eschbach, 25,000 acres, more or less," and also a confirmatory deed from Geo. P. Sanger and Thomas J. Lee, surviving trustees under a conveyance from Caldwell.

By various subsequent conveyances between Earley, Jacob H. Walter, Brickell, Hite and Baldwin, the title was supposed and intended to have vested one third each in Brickell, Hite and Earley. There was some question among the parties as to the titles; and it was agreed to let the lands again go to sale, and be bid in by Earley for all parties in interest. The farm lots which were the subjects of this suit were in many cases separately assessed.

In pursuance of this agreement, the land having been sold in 1872, Earley took assignments of the treasurer's deeds from the various purchasers. In 1874 the lands were again allowed to go to sale for the taxes of 1872 and 1873, and were bid in by Earley under said agreement, together with a number of the lots which were separately assessed.

In 1878 all the lands in controversy, as well as the lands of which plaintiffs and defendant were tenants in common, were sold for taxes; all were bought by John G. Hall. The lands in controversy were not redeemed, and on December 20, 1880, after the titles had become absolute, Hall conveyed them by assignment to Earley.

The plaintiffs made the following offers of testimony:

"We propose to prove by the witness on the stand, Mr. Willard, that he was employed as a surveyor by Dr. Earley, with general authority to make an examination of the lines and the records, and prepare a statement for Earley, Brickell and Hite: that pursuant to that employment he did make and prepare a statement which he now has, and that he furnished a copy of that statement to Dr. Earley, and that the lands in controversy were within the bounds of the survey made by him at that time or within the bounds of a paper description which he had before him, and that all was done at the request of Dr. Earley for Earley, Brickell and Hite." Overruled. *First assignment of error.*

"Plaintiffs counsel offered to prove by the witness on the stand (Brickell) that Dr. Earley, the defendant, represented to them at the time of the purchase, and subsequently, that there were a number of those tracts or parts of tracts the title to which was in doubt, and to which he could perfect the title by purchasing the same at treasurer's sale; and that an agreement was entered into between them that he should do so; and that that agreement was part of the orignal transaction; and that it was on the faith of those representations and believing that they would thus acquire a larger tract than expressed in the deed that they went into the purchase with Dr. Earley; to be followed by letters from Earley showing that he was pursuing a line of policy in regard to obtaining the tracts at treasurer's sales which he had stated to them could be accomplished at the time they made the purchase." Overruled, except as to the letters. *Second assignment of error.*

Among the letters then read in evidence was the following, known as Exhibit 11.

Ridgway, Elk Co., Pa., June 26, 1878.

W. B. Brickell, Esq.,

My Dear Sir: Yours at hand. Mr. Hall will assign deeds at any time if money is paid at once; but if he pays out or has to raise the money, we must pay the 25 per cent. I have not seen Mr. Wilson since your letter came to hand. We cannot use the timber this winter, and we cannot sell the bark this year. As to 6 per cent for roads, etc., that should be in case of whole warrants. I see this warrant was put in net, and there was a piece sold, and I think there is no doubt that it has been reclaimed by tax titles; but we may have a suit about it and therefore if I take property without warrantee, I would not like to pay for that amount. You have the description then and if you are satisfied with the proposal you can send back if not all right; I am not particular, I have Wheeler & Woodward estimating pine on 4,877 and 4,889. Mr. Hyde offers to pay it. Have not been able to get 4,116 estimated yet. Can we do any better as to Fox?

Yours Truly,

C. R. Earley.

The plaintiffs then made the following offers of evidence:

"Plaintiffs' counsel now propose to prove by Mr. Brickell that the letter of June 26, 1878, being 'Exhibit No. 11,' in evidence, which recites the fact that Mr. Hall will assign deeds at any time if money is paid, etc., relates to the lands in controversy so far as the same were purchased by Mr. Hall, and for the purpose of showing a recognition on the part of C. R. Earley of the plaintiffs' right to participate in the benefits of that tax sale, and for the further purpose of showing in connection with other evidence and letters that the sale and purchase was in fact in the interest of all the tenants in common." Overruled. *Third assignment of error.*

"Plaintiffs' counsel offered to prove now by parol testimony that both before and since this tax sale took place, at which Mr. Hall became purchaser, Dr. Earley declared to the parties in interest, the plaintiffs, the purpose for which the sale was conducted, and that the purpose was the joint benefit of all, and to perfect the title in the interest of all." Overruled. *Fourth assignment of error.*

The court entered judgment of compulsory nonsuit, and subsequently refused to take it off. This also was assigned as error.

Messrs. **Geo. A. Rathbun** and **J. McF. Carpenter,** for plaintiffs in error:

If Earley purchased the lands originally for the joint benefit of all, he could not set up an adverse title to any of the lands as against the person in whose interest he bought. He was the recognized agent of all the purchasers. The measure of his duty was fidelity. How far he came up to this measure is shown by his present attitude toward the plaintiffs.

Having conveyed or purported to convey the lands in controversy to plaintiffs, he cannot now be permitted to set up title subsequently acquired, to defeat the title of his vendee.

If authority be deemed necessary in support of so plain a proposition, we cite: *Banks* v. *Ammon*, 27 Pa. 172; *Washabaugh* v. *Entriken*, 34 Pa. 78; and *Clark* v. *Martin*, 49 Pa. 289.

The court below seemed to lose sight of the fact that plaintiffs were not setting up a claim of title hostile to defendant, but were simply demanding the right to share with him, as tenants in common.

If one has died in possession, and his possession has descended to his heirs, whether his title was perfect or not is not a subject of inquiry in an action by one of the heirs against another heir who claims to have purchased a perfect title from a third party.

Keller v. *Auble*, 58 Pa. 412.

As vendor of the title Earley was bound to defend it, and could not acquire any title outstanding when he conveyed, as against his vendees. Both as grantor and tenant in common he was bound to protect the plaintiffs.

Weaver v. *Wible*, 25 Pa. 272; *Van Horne* v. *Fonda*, 5 Johns. Ch. 389; *Lloyd* v. *Lynch*, 28 Pa. 419; *Davis* v. *King*, 87 Pa. 261.

The plaintiffs made out or offered by competent evidence to make out a *prima facie* case.

We offered to show that, when the original purchase was made, Dr. Earley represented that as to certain portions of the land there was some cloud on the title; and that as an inducement to the purchase by plaintiffs he (Earley) undertook and agreed to have the doubtful titles perfected; and that relying on this agreement plaintiffs purchased. This offer was refused, except so far as shown by letters; and as to these letters, the court refused to allow any explanation, restricting us to what was expressed therein. Surely it needs no citation of authority to show that parol evidence is admissible to show facts, which induced the parties to enter into the agreement.

Parol evidence is admissible to explain and define the subject matter of written agreements.

Gould v. *Lee*, 55 Pa. 109.

Messrs. **John G. Hall** and **C. H. M'Cauley,** for defendant in error:

By the plaintiffs' own showing the parties never were tenants in common. In the deeds on which the tenancy in common was founded these lands were excepted out. They did not, by such deeds, get any title to these lands, perfect or imperfect; they were not conveyed to them because they had been previously conveyed to other parties. There was, therefore, no relation between these parties that forbade Earley from purchasing these tracks for his own benefit.

But even if there had been a cotenancy between the parties, that was dissolved as to these lands when the tax titles became absolute in John G. Hall. After that Earley could buy for himself.

Reinboth v. *Zerbe Run Improvement Co.* 29 Pa. 139.

Mr. Justice **Gordon** delivered the opinion of the court:

Admittedly the plaintiffs have no title to the lands in dispute, unless they succeed in establishing a resulting trust arising from the fraud of Dr. Earley, the defendant. While the plaintiffs and defendant were tenants in common as to several tracts of land, yet as to the lots in dispute they were not such, for these lots were expressly excepted out of the conveyances to them; so that nothing can be predicated of that relation in favor of the contention of the plaintiffs. As to these lots, either of the parties was at liberty to act for himself; he might buy one or all of them at treasurer's sale, or otherwise, as he saw fit, without consulting his fellows, since his act in this particular could not affect their rights.

How then does Dr. Earley become the trustee for Brickell, and Hite? How does this alleged resulting trust arise? In order to sustain a proposition of this kind, the plaintiffs are bound to show that Earley obtained his title in fraud of their right, or that their money was used in its acquisition. *Blyholder* v. *Gilson*, 18 Pa. 134; *Cross' App.* 97 Pa. 471.

But there is not even an offer to prove that so much as a dollar of the plaintiff's money went into the purchase of the lands in controversy. Then again; when we turn to the charge of fraud, it is unsupported by a shadow of proof. On this head it is complained that the court overruled an offer to prove that Earley had employed Willard to make an examination of the lines and records of the company lands; that he did make such an examination and that "The lands in controversy were within the bounds of the survey made by him at that time, or within the bounds of a paper description which he has before him, and that all was done at the request of Dr. Earley, for Earley, Brickell and Hite." But we are as obtuse as the court below in perceiving how this, if proven, would have manifested the fact that the defendant acquired title to these lands as a cotenant or trustee. A fatal defect in the offer is that it does not propose to show anything as to the manner of the acquisition; and failing this it fails altogether. *Cross' App. supra.*

The next assignment is to the refusal of the court to permit the plaintiffs to prove "by the witness on the stand (Brickell) that Dr. Earley, the defendant, represented to them, at the time of the purchase and subsequently, that there was a number of those tracts, or parts of tracts, the title to which was in doubt, and which he could perfect by purchasing at treasurer's sale; and that an agreement was entered into between them that he should do so; and that that agreement was part of the original transaction; and that it was on the faith of those representations, and believing that they would thus acquire a larger tract than expressed in the deed, that they went into the purchase with Dr. Earley; to be followed by letters from Earley, showing that he was pursuing a line of policy, in regard to obtaining the tracts at treasurer's sale, which he had stated to them could be accomplished at the time they made the purchase."

It is enough to say with reference to this offer, that it is too indefinite, in not specifying what those tracts or parts of tracts were. No part of a parol trust can be left to inference; the proof to establish it must in all particulars be clear and specific. Moreover, there is nothing in the offer to show that the parties ever did come to any definite agreement concerning the matter. The offers in the third and fourth assignments are as ineffective as are the others.

Admitting that Earley's letter (Exhibit 11) referred to these lands when it stated the fact, "Mr. Hall will assign deeds at any time if the money is paid," yet, as there is no offer to show that they did pay the money to Mr. Hall, or that he did assign, the proposition comes to nothing. So, there was no significance in the fact that both before and after the sale to Hall, the defendant declared that the sale was for the joint benefit of the parties and to perfect their title. Earley could not thus compromise Hall; and when the treasurer's title was complete in Hall, he could sell to whom he pleased, and Earley, even though he had been a tenant in common with the plaintiffs in these very lands, could take from him a perfect title, excluding his cotenants. *Lewis* v. *Robinson*, 10 Watts, 354; *Kirkpatrick* v. *Mathiot*, 4 Watts & S. 201.

Nor can Earley's case be weakened by the showing that the plaintiffs had notice of Hall's purchase. Parol trusts are not favorites, and unless the proof of them is clear and specific they will not be entertained. In the case in hand, assuming, as we must, the correctness of the plaintiffs' offers and proofs, and there is nothing in them that is distinct and definite. No specific tracts are defined, but "there were a number of those tracts, or parts of tracts, the title to which was in doubt;" and for that reason they were allowed to go to sale, and were to be bought in by Dr. Earley.

Indefinite as this statement is, yet it is very clear that no reference could have been had to the lots in controversy; for as they had no pretense of title, of that fact there could been no doubt. So, with reference to Earley's letter of June 20, 1878, it is not only not certain that the land in controversy is referred to, but the contrary. Mr. Hall had purchased, not only these Earley lots, but also the lands belonging to the company; and it is evident that reference is made to the latter when it is said: "Mr. Hall will assign at any time if money is paid at once; but if he pays out, or has to raise the money, we must pay the 25 per cent." This language refers to a redemption, and not to a purchase of property not theretofore belonging to the company.

But it is useless to dwell upon this fruitless matter, for there is nothing in the case which tends to raise a resulting trust.

The judgment is affirmed.

CITIZENS & MINERS SAVINGS BANK & TRUST CO. To Use, etc., of W. D. Kennedy and F. B. Silkman, Assignees in Trust for Creditors of said Bank, *Plff. in Err.*,

v.

James W. GILLESPIE.

1. Where the whole amount of the unpaid subscriptions to the stock of an insolvent corporation is required to pay the creditors, an **assessment is not prerequisite to an action by the assignee of the corporation against a stockholder.**
2. But **where the whole amount is not necessary to pay creditors,** no action can be maintained until the extent of the stockholders' liability has been ascertained.
3. **In assumpsit to recover the amount due by a subscriber** who alleges as a defense that the whole amount of unpaid subscriptions is not needed to pay creditors, it is nevertheless **error to permit the defendant to prove** the financial **responsibility of another stockholder** without first proving the amount of the latter's subscription.
4. A **transferee of stock** who at the time of the transfer signs the subscription book **assumes** the **liabilities** of an original subscriber to the stock.*
5. **Where an offer of evidence contains several subjects** the court is not bound to treat it piecemeal, admitting part and rejecting the rest. The court may in its discretion do so, but its refusal is not ground for reversal.

(Argued Feb. 22, Decided March 21, 1887.)

JANUARY Term, 1887, No. 30, E. D., before Gordon, Paxson, Trunkey, Sterrett and Clark, *JJ.*

Error to the Common Pleas of Lackawanna County, to review a judgment on a verdict for the defendant in an action of assumpsit to recover an unpaid balance to a subscription to capital stock. *Reversed.*

The facts as they appeared at the trial before ARCHBALD, *A. L. J.*, are stated in his charge to the jury.

The defendant offered, *inter alia*, to show by a witness on the stand and by other witnesses that John B. Gillespie subscribed for 100 shares of the capital stock of the Bank in question; that he paid the first call of 10 per cent on said subscription for stock, also the second call for 40 per cent, and that afterwards, after the organization of the Bank and while the Bank was doing business, he transferred thirty of said shares to the defendant, and that the stock now standing upon the books of the Bank in the name of the defendant is the stock which was subscribed for by John B. Gillespie and transferred by him to the defendant.

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*See McKim v. Glenn (Md.), 5 Cent. Rep. 776.

Counsel for the plaintiff objected to the offer as irrelevant and incompetent; that it was no answer to the subscription of the defendant to the capital stock of the Bank already given in evidence, and that it was immaterial whether a certificate for such subscription had actually been issued to him, that by the subscription he became liable to pay the amount thereof to the Bank, and that any unpaid amount he was liable to pay to the assignees.

Counsel for defendant proposed to follow this offer by evidence that the defendant never had any other stock in the Bank, or that any other stock was ever alloted to him by said Bank, except that which was transferred to him by John B. Gillespie.

Objection overruled. Exception. *Seventh of assignment of error.*

The court under objection and exception permitted the defendant's counsel to ask plaintiff's witness, on cross examination, the following questions:

Q. Mr. Kennedy, who do you consider good, of the original subscriptions; do you know Henry O. Silkman?

A. Yes, sir.

Q. Do you consider him good?

A. I consider him good for the amount of this subscription here.

Q. I am asking now about the original subscription, the charter organization of this Bank? Do you consider H. O. Silkman good?

A. I cannot tell you whether he is good or not.

Q. What is your judgment?

A. My estimate was made from the other, not from that.

Q. How much do you think you could collect from him providing he subscribed?

A. For all I know he could pay that.

By the Court: How much is that?

A. Twenty thousand dollars.

Q. Don't you consider H. O. Silkman is good for $20,000?

A. He may be.

Q. You don't know anything to the contrary, but he would be able to pay, that he is a man of property?

A. I don't know that he has got real estate.

Q. Do you know anything about him?

A. I consider him good for this amount here, $2,500.

Q. How much would you consider H. O. Silkman worth?

A. I don't know.

Q. What is he considered to be worth up in that community where he lives?

A. I don't know that I ever heard.

Q. Now if he subscribed for $20,000, as that purports to show, he is good for half of it, isn't he?

No answer.

Q. Whether you consider him good for $10,000.

A. No, I don't know as I do.

Q. Well, how much do you think could be collected out of him?

A. He wouldn't want to pay it, even if he had to pay it.

Q. I want to know whether you think you could not collect $10,000 if you had a judgment against Mr. Silkman, don't you think you could collect it of him?

A. For aught I know we could; I don't know anything about it.

Q. What is your judgment about it?

A. If it was an ordinary case, I should say we could, but I wouldn't unless.

Q. You think being a subscription to bank stock, you could not do it?

A. Having lost half he didn't want to lose any more.

These questions and answers formed the subject of the *ninth assignment of error.*

Counsel for plaintiff also offered in evidence a citation issued out of this court in No. 779, May Term, 1879, to W. D. Kennedy and F. B. Silkman, setting forth among other things that they had neglected to collect the unpaid subscription to the capital stock of the Bank,—asking for their removal on that ground.

By the Court: By whom was that?

Counsel for plaintiff. This was a petition by T. Von Storch, J. Von Storch, G. Von Storch, and William Von Storch.

Petition for citation filed January 14, 1882, upon which citation was issued the 27th of January, 1882. Answer of W. D. Kennedy and F. B. Silkman filed February 6, 1882, setting forth among other things that the question whether or not there should be an assessment for the unpaid subscription to the capital stock of said Bank has been submitted to this court and still remains undecided; that they at all times heretofore have been and now are desirous to follow the directions of the court in this matter, etc.

Then in connection with that the order of *Judge* Handley, August 7, 1882: "On consideration of the petition of the assignees of said Bank, said assignees are authorized and directed to collect the unpaid subscription to the capital stock of said Bank, and they are authorized to receive in payment of the unpaid subscription any just and legal claims against the Bank." (Signed) John Handley, *President Judge.*

Entitled in this case, filed February 7, 1883.

To be followed by proof that a petition was duly presented to the court previous to the time of this citation (and that the same cannot be found) by the assignees, for leave to collect, setting forth that the assets were not sufficient in their hands to pay the liabilities; that it was necessary to collect the unpaid subscriptions in order to pay depositors and creditors, and asking the direction of the court, and that in pursuance of the petition (which has been lost from the files and cannot now be found) Judge Handley made that order upon that petition, and that this order was made previous to the commencement of this suit.

Objected to as irrelevant and immaterial, and because the record was between other parties and is not binding upon this defendant. So far as the record is a record of any proceeding, it is *inter alios acta.*

Objection sustained. Exception. *Twelfth assignment of error.*

The court charged the jury as follows:

This is an action brought to recover the unpaid balance of an alleged subscription to the capital stock of the Citizens & Miners' Savings Bank & Trust Company of Providence. It is brought in the name of the Bank to the use of Messrs. Kennedy and Silkman, the present assignees, to whom all the property and assets of the Bank have been transferred for the benefit of the creditors of the Bank.

The action proceeds upon two grounds: 1, that the defendant, Gillespie, is not only a stockholder of the Bank, but that he has subscribed to the capital of the Bank, upon which a balance remains unpaid; and 2, that that balance is necessary in order to enable the assignees to meet the liabilities of the Bank which are still due.

It appears from the evidence that this Bank was organized in April, 1873, under an Act of the General Assembly of this State, passed a year before that. The Bank began business in July, 1873, and continued in business until April, 1879, when, being unable to meet its obligations, an assignment was made to Dr. Roberts and Mr. Kennedy; and Dr. Roberts having subsequently resigned, Mr. Silkman was duly appointed in his stead. These assignees gave bonds, qualified and entered upon their duties. In August, 1882, they made a demand upon the several stockholders of the Bank, and among others upon this defendant, for the balance, which they claimed to be then due, upon unpaid subscriptions to the capital stock. No more than 50 per cent of this stock was paid in by the stockholders prior to the failure of the Bank.

[The main questions at issue, to wit: whether the defendant was a stockholder, who had subscribed for capital stock of the Bank, and whether this balance of unpaid stock is fully necessary to meet the liabilities of the Bank, are both denied by the defendant. These raise the issues then, upon which you are to pass; and according as you determine these, so your verdict will be for the plaintiff or the defendant, as I shall explain to you.]

[The first question then for you to determine is whether the defendant is a subscriber, or was a subscriber at the time of the failure of this Bank, to the capital stock of the Bank; now this is not simply whether he held stock in the Bank, because of that there is no dispute; at the time of the failure of the Bank, he held thirty shares, and still holds them, upon which one half, 50 per cent had been paid; but the question is whether he subscribed for this stock.]

[The minutes of the organization of this Bank in 1873 have been put in evidence before you. By the recitals contained in them, it appears that the corporators, or a majority of them, having met, subscriptions were made to the capital stock of the Bank, to the extent of $125,000. While this may not be sufficient evidence to hold the parties who are recited in these minutes to a subscription, if they were contesting their position as original subscribers, still, under the evidence as it has been presented to you, I must hold, and so instruct you, that the original subscribers to the stock of the Bank were the parties who are named in these minutes.]

This, then, excludes the defendant from being held as an original subscriber. His name is not recited there; and he does not appear therefore to have been one of the parties who subscribed to the original stock of the Bank.

The method in which he actually acquired his stock is disclosed to you by the evidence; and there appears to be no particular dispute in regard to this.

One of the parties who subscribed to this $125,000 of original stock, was the brother of the defendant, Mr. John B. Gillespie. He subscribed for 100 shares, or at par value of $100, $10,000 of this $125,000, and subsequently he transferred of this 100 shares, thirty shares to the defendant. This transfer was made about the second of December, 1878, as I remember the evidence; and at that time Mr. John B. Gillespie marked upon the certificate which had been made out to him for his original subscription, an assignment of thirty shares covered by that original subscription to the defendant, and upon the certificate back, which has been presented to you here, a regular transfer of thirty shares of that 100 was made to the defendant, and a stock certificate issued to him for it.

[Now, then, if the case stopped there, the defendant would be virtually a transferee of stock, as it is called, that is, a person to whom, either immediately or through other intervening parties, stock has been transferred from a person who originally subscribed; and a simple transferee is not liable to the corporation for any balance that might be unpaid upon it as a subscription.]

But at the time of receiving this certificate for thirty shares of stock the defendant was called upon to sign a book, which has been put in evidence here; and in compliance with that requirement of the Bank he did sign that book. He signed his name under the following head: "We, the undersigned, do hereby subscribe for the amount set opposite our respective names of the capital stock of the Citizens & Miners' Savings Bank & Trust Company, incorporated by an Act of the Legislature of the State of Pennsylvania, approved April 18, 1872, and we do hereby agree to pay the amounts subscribed at such times, and in such manner, as the board of directors of said Corporation may from time to time order and direct." "Providence, Pa., Saturday, April 12, 1873."

Then follows a long list of names with the amounts set opposite them, in a column arranged for that purpose, and among others, the name of the defendant, James W. Gillespie, with the figures 3,000 opposite his name.

It is alleged on the part of the defendant that this book was signed by all parties to whom stock was transferred; and he says that this was done simply for the purpose of having a complete record and list of the stock as it was transferred, and of the stockholders to whom it was transferred.

But in terms as it stands before us that is not the purport of this writing, and there is no sufficient evidence in the case, in my opinion, to change this from its natural effect, or to give it any other effect than such as would be drawn from it as it stands.

The question then is, What is the purport of this writing subscribed by the defendant?

[Now, as I have already said to you, a person is not liable for unpaid subscriptions to the capital stock of a bank, unless he originally participated in the organization of the bank, and was one who originally subscribed to the capital of the bank, and that the person to whom the stock was simply transferred was not, as a transferee, liable to the bank.]

That is, however, subject to this qualification: that if a party to whom stock has been transferred, upon the requirement of the bank, agrees to pay the unpaid balance upon the stock which is transferred to him, then a contract relation is established between himself and the bank, which can be enforced. And that is the effect, under the evidence, of this writing, to which the defendant subscribed his name at the time of the transfer.

The evidence is that it was required of him that he should sign this book as a condition of the stock being transferred to him; and while it reads as an original subscription might, it still is not necessarily confined to that; we are not warranted in discarding it, because it is in part of that form; in substance it assumes to pay, as part of the capital stock of the Bank, the amounts set opposite the parties' respective names who signed it. And that, taken in connection with the fact that the defendant was required to do this, as a condition of the transfer to him of his stock, and the issuing of a certificate to him, established a contract or agreement on his part to hold himself liable to the Bank to the extent of $3,000.

I might say further, gentlemen, that it was right and proper for the officers of the Bank to call upon the defendant to do this, in making this transfer. While it is true, if he had refused to do that, the Bank could not have compelled him, because everyone may dispose of his stock in a corporation to another; and a party to whom it is transferred has a right, unless there be by-laws to the contrary which bind him, to have it transferred upon the books of the Bank, and certificates for it issued to him, upon a mere transfer.

[But the defendant did not stand upon that right. He accepted the requirement of the Bank, and as the Bank or Corporation could only enforce unpaid subscriptions to stock against parties who had agreed to pay, and so if they had not compelled parties to sign this book, or to sign something like it, would have been remitted to the original stockholders] upon a failure such as this, it was proper for the Bank, when parties came in with a transfer of stock, to compel them to sign such an agreement as this, so that they, in every case, might be held for the balance that was unpaid.

That, as I have instructed you, was the effect under the evidence of the defendant signing this agreement, and if you believe this evidence, a contract relation is thus established between the Bank and the defendant, to pay the balance of 50 per cent which is shown to be due upon his shares.

This leads us, then, to the second question: Is it necessary, in order to enable the assignees to meet the liabilities of this Bank, that they should collect the whole of the unpaid stock subscriptions?

The right of these assignees to call upon the stockholders for the balance unpaid upon any subscription of stock, is not absolute, but qualified. They have only the right to call for so much as may be necessary to meet the liabilities of the Bank. They cannot call for the whole of a stock subscription, merely to go through the form of getting assets into their hands, and then subsequently hand back a part. Their duty is confined to collecting from the subscribers to stock so much as may be necessary to meet the existing liabilities.

This question is properly to be determined in proceedings specially brought against the stockholders before a proper court, in which, upon all the facts in regard to the assets of the Bank, the solvency of the several subscribers and the liabilities, a proper assessment upon such stockholder may be made according to the exigencies of the case; but if it clearly appears from the evidence that all the subscriptions from solvent stockholders will be necessary to meet the liabilities of the Bank, it is not necessary to go through the preceding form of an assessment by proceedings in court, under such circumstances as I have mentioned to you.

Now then, Mr. Kennedy, upon this point, says that in his opinion, it is necessary; not only that (because if that were the only fact in the case, I should not feel as though it were proper to submit the question to you upon his mere say so), but he particularizes and shows to you how it is necessary to collect, and why it is necessary to collect from the defendant, as well as from all other solvent stockholders, this 50 per cent of the stock unpaid.

The original liabilities of the Bank, as it appears from his evidence, amounted to some $70,000. Upon this, interest has accumulated more or less since 1879, when the Bank failed. The appraisers who were appointed by the court to go through the assets of the Bank and make an appraisement fixed the amount of available assets at about $86,000. Of this the assignees have collected, as I remember the evidence, something over $60,000, and with a little over $5,000 cash in hand remaining with them, they have paid off some $50,000 to $55,000 of the liabilities. This, taking into consideration the cash which they have, would reduce the balance unpaid of liabilities down to from $10,000 to $15,000, with interest to be added to that. The exact amount of this interest is not shown to you. It could hardly amount to seven years' interest upon $70,000, because, as we have seen, from $50,000 to $55,000 of this original $70,000 has been paid off. Mr. Kennedy estimates, however, that it would require to pay off these existing liabilities, from $30,000 to $35,000.

If we take that, then, from the evidence, as a proper statement of the indebtedness; on the other hand, to meet these liabilities is the $5,000 of cash on hand, the balance of the appraised assets $16,000, and the subscriptions. If these figures are correct, in any event, the stockholders have got to respond to some extent upon their unpaid subscriptions.

Of the unpaid subscriptions, Mr. Kennedy estimates, and gives you particulars in this respect, that only about $18,000 or $19,000 can be collected. If that be so, with the $5,000 in hand, there would only be from $23,000 to $24,000 to meet liabilities which Mr. Kennedy estimates at from $30,000 to $35,000. If this be the evidence which you accept as true, then there is sufficient evidence to submit to you, that, beyond any question, the whole of all the subscriptions of solvent stockholders will be required to meet the liabilities of this Bank.

It is true, on the other hand, that we are not given particulars in regard to the $16,000 which the appraisers considered sufficient to be brought in and scheduled as available assets. Nor are the original subscriptions to this $125,000 taken into account in making that estimate. Mr. Kennedy's estimate is based entirely upon such stockholders as he finds in this book, and upon the amounts which they have there subscribed for.

[It is right and proper to take into consideration these parties who appear as original subscribers to this $125,000; and if you find from that, and if you are not satisfied in regard to this $16,000 which the appraisers have considered available assets, taking those two circumstances into consideration, that the whole of the stock subscriptions of each solvent stockholder, and among others this defendant, is required to meet the liabilities, then the plaintiff is not entitled to recover in this case.

As I have said to you before, the question on this issue is not whether there may not be a necessity for calling in some part of the subscriptions; in any view of the case, as I take the evidence, a necessity is shown for calling in some part; but neither you nor I, in this proceeding and under such facts as have been developed, would be able to make an assessment, and say how much is needed less than the whole amount.

If you find, under the evidence, that the whole amount is not necessary, then the plaintiff cannot recover for any amount, because we have no standard to fix how much; but if you are satisfied from the evidence that the whole amount will be necessary, then the plaintiff is entitled to recover upon that issue.]

There are, then, as I have explained to you, or endeavored to, two questions: 1, whether this defendant has made himself liable, as a subscriber, by signing this agreement; and under the evidence, if you believe it, I instruct you that he has; 2, whether the whole of this stock which is unpaid is necessary to meet the liabilities of the Bank. If you find that it is, then the plaintiff is entitled to recover. If you find that it is not, then the plaintiff is not entitled to recover.

I will now read to you certain points which the counsel on either side have submitted to me, with my answers in regard to them. I will first read the plaintiff's points:

1. "That James W. Gillespie, by signing the subscription in evidence, became a subscriber to the capital stock of the Bank, and as such is liable to pay any amount unpaid upon the same, necessary to pay the debts of said Bank, even if the jury should find from the evidence, that the certificate of stock in evidence was not issued upon such subscription."

2. "That as it appears by the evidence of the defendant himself that he was required to sign the subscription to the original stock, upon the issuing to him of the certificate in question, and that he did so voluntarily, he thereby became a subscriber to the stock of the Bank, and liable to pay the amount unpaid thereon."

I have endeavored to instruct you substantially as set forth in these two points. There are minor points of inaccuracy that do not enable me unqualifiedly to affirm them; but with such qualifications as I have endeavored to give you in my general charge, and to which I now refer you, I affirm these points.

The defendant's points are as follows: * * *

3. "That the assignee of stock of the Bank in question is not personally liable for assessments made upon him subsequent to his purchase of the stock from an original subscriber."

This point is affirmed with this qualification: that if it does not appear that he has not assumed to pay the same, of which, however, there is evidence in this case; that is, the simple assignee of stock (a transferee as I have called him), without more, without having undertaken any obligation to pay, would not be liable, but if (of which there is evidence in this case) such transferee as the defendant is has himself assumed to pay the balance due upon stock, then of course the plaintiff, upon such a showing as we have here, would be entitled to recover. * * *

Now, in making up your verdict, you will find either for the defendant or for the plaintiff for the full amount of the unpaid balance due upon this stock, with interest from the time of the demand made upon the defendant by the assignees. You cannot find for a less amount; nor can you stop between those two points. Your verdict, under such instructions as I have endeavored to give you, must be either absolutely for the defendant, or it must be for the assignees for the full amount.

I do not need to remind you that in the consideration of this case you are to dispel anything of prejudice from your minds; that you are not entitled to consider anything except the evidence in the case.

Whichever way you look in regard to this evidence, of course hardship is seen; it is hard for this defendant to be required to pay further upon the stock, which is now of no value, and which payment would be an absolute loss to him. Still if the evidence, according as I have instructed you, shows that under the law he ought to respond, that he is obliged by law to respond, that there is a legal liability upon his part, then it is your duty to say so by your verdict.

Of course the determination of these questions, if the assets of the Bank are not going to be sufficient to meet the liabilities, are important for the plaintiffs. They are important to the creditors and the depositors of this Bank whom they represent; and if your verdict should be for the defendant, of course followed by other similar verdicts, it might result in loss to the depositors.

These plaintiffs, as assignees, have very little interest other than simply to represent those for whose interest and in whose trust this property and the assets of this failed Bank, have been assigned to them. You are, therefore, to deal with the case simply as it is represented to you upon the evidence, and not upon what you may think might be right under other circumstances, but simply under the law, as I have endeavored to instruct you, and under the evidence as it has been presented to you here.

Verdict and judgment for the defendant.

The assignments of error not already mentioned specified the portions of the charge inclosed in brackets, and the answers to the points quoted.

Messrs. **Jessup & Hand,** for plaintiff in error:

Can a corporation assign an unpaid subscription to its capital stock, so that its assignee can collect the same?

Corporations, unless expressly restrained by the Act which establishes them or some other Act, have and always have had an unlimited power over their respective properties, and may alienate and dispose of the same as fully as any individual may do in respect to his own property.

Dana v. *Bank of U. S.* 5 Watts & S. 223; 1 Kyd, Corp. 108.

The directors of a bank have power to assign all its property to trustees to pay its debts.

Catlin v. *Eagle Bank,* 6 Conn. 233; *Union Bank of Tennessee* v. *Ellicott,* 6 Gill & J. 363.

The general assignment made by the Corporation for the benefit of creditors passed all its rights substantially to the assignees.

Yeager v. *Trust Co.* 14 W. N. C. 296.

Unpaid stock is as much a part of the assets of the company as the cash which has been paid in upon it.

Sanger v. *Upton,* 91 U. S. 60 (Bk. 23, L. ed. 222).

This being the case there seems to be no reason why the claim for unpaid stock, which is a simple chose in action, cannot be collected as any other asset.

The unpaid subscriptions to its stock are a part of its assets, which can be made available in equity, by the creditors; and therefore a general assignment for their benefit passes them to the assignee.

West Chester etc. R. R. Co. v. *Thomas,* 2 Phila. 344.

It is, however, but the assignment of a chose in action; and the legal title being still in the corporation, the assignee can proceed only in its name, and must be able to show that the provisions of the charter have been pursued so as to give the company the right; in other words, that a call for the unpaid capital has been duly made, and by the proper authority.

Germantown Pass. R. Co. v. *Filter,* 60 Pa. 131.

The discretion of the directors as to calls is modal merely, relating to the time and manner of making payments. When the debts of the company require the calls to be made, it becomes the duty of the managers to make them, as much so as to collect other debts due the company.

Germantown Pass. R. Co. v. *Filter,* 60 Pa. 132.

A common-law action may be maintained for such a debt.

Yeager v. *Trust Co.* 14 W. N. C. 296; *Sanger* v. *Upton,* 91 U. S. (Bk. 23, L. ed. 220); *Upton* v. *Tribilcock,* 91 U. S. (Bk. 23, L. ed. 203); *Webster* v. *Upton,* 91 U. S. 65 (Bk. 23, L. ed. 384); *Messersmith* v. *Sharon Sav. Bank,* 96 Pa. 440; *Hall* v. *U. S. Ins. Co.* 5 Gill, 484.

The court below held that the assignees, holding the legal title to this debt, and having power to make the calls which they did, could not collect anything unless there was first an adjudication by a competent tribunal that the whole of the unpaid stock of all the subscribers was required to pay off the liabilities.

This ruling was founded, as we think erroneously, upon *Lane's Appeal,* 105 Pa. 49.

In that case the corporation and the assignee refused to call for and collect the unpaid stock; and so the creditor was compelled to file his bill.

In *Bell's Appeal,* 6 Cent. Rep. 161, which was a bill by a creditor to enforce unpaid subscription to the stock, this court says:

"This is a proceeding to enforce the equitable obligation of stockholders in an insolvent corporation to pay the unpaid portions of the capital stock due by them, in order that the debts, all the debts, of the corporation may be paid to the extent of such unpaid capital. It is not a statutory obligation at all, but an obligation in equity, arising out of the consideration that the capital stock of a corporation is a trust fund for the payment of its debts. Only so much of the unpaid capital as is necessary for the payment of the debts can be called in, and this can only be done when all the other assets are exhausted. It is manifest, therefore, that in a case of this kind there must be an account taken of the amount of debts, assets and unpaid capital, and a decree for an assessment of the amount due by each stockholder."

In *Cornell's Appeal,* 5 Cent. Rep. 181, it is held that under the Act of 1836, P. L. 799, making stockholders liable individually for the amount of unpaid stock held by them, it was not necessary for the creditor to bring in other stockholders, or to take an account of the other indebtedness of the company.

These cases simply show the law to be that where the individual has exhausted his remedy at law, he can go into equity, and compel defaulting stockholders to pay over the balance of their unpaid stock.

Is a transferee or holder of stock liable to pay calls for any amount unpaid while he so holds the same?

It has been supposed by the profession in this State that a mere transferee or holder of stock was not liable to pay the amount due upon stock held by him, but *Bell's Appeal, supra,* holds to the contrary and adopts the doctrines stated in Angell & Ames on Corporations, § 534.

The transferee of stock in an incorporated company is liable for calls made after he has been accepted by the company as a stockholder and his name has been registered on the stock books as a corporator; and being thus liable, there is an implied promise that he will pay calls made while he continues the owner.

Webster v. *Upton,* 91 U. S. 65 (Bk. 23, L. ed. 384).

Bell's Appeal overrules *Messersmith* v. *Sharon Sav. Bank,* 96 Pa. 440, as to the nonliability of a simple transferee.

May the court of common pleas exercise its chancery powers in directing an assignee for creditors, to call in unpaid installments, without notice to each stockholder before making such order?

The courts of common pleas have general chancery powers, in reference to trusts; and while they cannot take possession of the assigned estate and appoint a receiver, unless for cause upon the removal of the assignee, as was done in *Lane's Appeal, supra,* still they have chancery powers over the assignees, so far as relates to filing and settling their accounts, and the removal of them for neglect of duty or misfeasance in office.

In this case the court of common pleas had jurisdiction of the assignees, so far as their official conduct was concerned. They applied to the court for direction; the court gave it and they followed it.

In *Sanger* v. *Upton*, *supra*, which was an action of assumpsit, the district court made an order directing the assignees to notify stockholders to pay, and in default of payment to collect.

The plaintiff in error, Sanger, claimed that she was not bound by the order because she was not before the court and had no opportunity of resisting it. But it was held that the bankruptcy court, having jurisdiction of the subject matter, could make the order, and it could not be attacked in this collateral proceeding; that if she wished the order modified or revoked, she should apply to the court by separate and direct proceedings for that purpose. The same rule was applied to an order of the comptroller of the currency under the National Bank Act.

Kennedy v. *Gibson*, 8 Wall. 505 (75 U. S. bk. 19, L. ed. 478); *Cadle* v. *Baker*, 20 Wall. 650 (87 U. S. bk. 22, L. ed. 498).

Messrs. **Fred. W. Gunster** and **Chas. H. Welles,** for defendant in error:

The doctrine that the capital stock of a corporation is a trust fund for the security and benefit of creditors is an invention of the courts of equity; and those courts were the first to aid creditors in calling in unpaid installments of stock to satisfy their demands.

Thomp. Liability of Stockholders, §§ 10, 16.

The transferee of stock of the Bank in question without more is not liable for unpaid subscriptions.

Act of Incorporation, P. L. 1873, p. 1100; *Pittsburg & Baltimore Coal etc. Co.* v. *Otterson*, 4 W. N. C. 545; *Delaware etc. Canal Co.* v. *Sansom*, 1 Binn. 70; *Palmer* v. *Ridge Mining Co.* 34 Pa. 288; *Franks Oil Co.* v. *McCleary*, 63 Pa. 317; *Messersmith* v. *Sharon Sav. Bank*, 96 Pa. 440.

Bell's Appeal, 6 Cent. Rep. 160, only decides that in equity, on a creditor's bill, the holder of stock is liable for so much of the unpaid subscription as is necessary to pay the debts of the corporation.

If the instrument, which James W. Gillespie signed at the time the stock was transferred to him, be construed (as was done by the court below) into an agreement to pay the amount still remaining unpaid on his stock, it was certainly an agreement only to pay "at such times and in such manner as the board of directors of said corporation may from time to time order and direct."

Before the plaintiffs can recover, they must show a call by the board of directors, or what is equivalent, by a court of competent jurisdiction in a proper proceeding.

Lane's Appeal, 105 Pa. 49; *Chandler* v. *Siddle*, 10 Nat. Bank. Reg. 236; *Scovill* v. *Thayer*, 105 U. S. 143 (Bk. 26, L. ed. 968).

If the assignment carried with it the alleged subscription or promise to pay, it was, however, but the assignment of a chose in action; and the legal title being still in the corporation, the assignee can proceed only in its name, and must be able to show that the provisions of the charter have been pursued so as to give the company the right; in other words, that a call for the unpaid capital has been duly made, and by the proper authority.

Germantown Pass. R. R. Co. v. *Fitler*, 60 Pa. 124; Pierce, Railroads, 74, 75; Morawetz, Priv. Corp. 281.

The verdict of the jury establishes the fact that the whole amount of the unpaid stock, held by owners who are good, is not necessary to pay off in full the liabilities of the Bank.

In equity the stockholder is under obligation to pay only so much as is necessary.

The amount, if any, of the defendant's equitable obligation (as owner of stock) to creditors cannot be ascertained in this action, because: 1, there has been no designation of creditors, no adjudication upon the claims of creditors, no ascertainment of any actual specific debts; 2, there has been no disposition of the assets; 3, there has been no ascertainment of what stock still remains unpaid.

The assignment in this case is evidently by virtue of the power conferred by section 29 of the Act of April 16, 1850, and as such is subject to the provisions of section 27 of the said Act.

Act April 16, 1850, P. L. 490, §§ 27–29; 1 Purd. Dig. 177, pl. 112.

There is no evidence in this case that these plain requirements have been complied with. As a matter of fact they have not been.

If it be held that the assignees have power to make calls or levy assessments, then we contend that they must defer any call or assessment upon stockholders until such time as they have complied with the provisions of the Act in regard to the disposing of the property and collecting liabilities, in order that it may be seen whether any, and if any what, assessment is necessary.

Thompson, Liability of Stockholders, § 417.

Where the trustees have attempted to make an assessment upon stockholders, without first having disposed or attempted to dispose of the property of the company, or to collect its debts, this is an objection which goes to the jurisdiction of the trustees to make the call at all. *Id.*

Where a creditor or creditors desire to avail themselves of the equitable liability of stockholders they should file a bill in equity, praying for an assessment on which an action can be brought, or for a decree directly against each stockholder.

Lane's App. 105 Pa. 49; *Bell's App.* 6 Cent. Rep. 161.

Mr. Justice **Paxson** delivered the opinion of the court:

While the assignments of error in this case are numerous the questions involved are but few, and those easily disposed of. And we may remark at the outset that we need not discuss the question whether the defendant, as the transferee of stock, was liable for the unpaid subscription for the reason that in point of fact he assumed the liability of an original shareholder by his subscription or agreement of April 12, 1873. This established a direct contractual relation between the defendant and the company upon which he is liable to a suit as if he had been an original subscriber. This is the fair legal construction of that paper.

This suit was brought by the assignees of the Bank to collect the whole of the unpaid subscription. There was no proof of an assessment. The plaintiff offered to prove an assessment or order of Judge Handley, made at Chambers, during vacation, authorizing the assignees to collect the whole of the unpaid subscriptions. See twelfth assignment.

We have no doubt of the power of a judge at chambers to make such an order. It is an exercise of chancery power, and the chancery side of the court is always open. While this order, standing alone, would be competent evidence it was not error to reject it as a whole. It was accompanied by an offer to prove a petition and citation which were not pertinent to the issue trying. It is always well to remember that in making offers of evidence the court has a right to regard the offer as a whole. The judge is not bound, where it contains several subjects, to treat it piecemeal, and admit one part and reject the residue. He may do so, but we will not reverse for his refusal. This is settled by numerous decisions, which we need not specify.

There being no assessment in evidence, the learned judge left it to the jury to find whether the whole of the unpaid subscription was required to pay the debts of the company. We see no error in this. If all the unpaid subscriptions were required to pay the creditors, no assessment was necessary under the authority of *Yeager* v. *Scranton Trust Co.* 14 W. N. C. 296.

It is well to observe that the *syllabus* of that case as reported is not correct. It is much broader than the point decided, which was that where it is shown that the whole subscription is required to pay the creditors an assessment is not essential. It was said in the opinion of this court that:

"The uncontradicted evidence shows that it was necessary to collect the whole of this stock subscription in order to pay the sums due to the depositors of this insolvent corporation."

There is not even an apparent conflict between the case referred to and the later cases of *Lane's Appeal*, 105 Pa. 49, and *Bell's Appeal*, 6 Cent. Rep. 160, 44 Legal Int. 27.

These were creditors' bills, filed against insolvent corporations, to compel the payment by the stockholders of their unpaid subscriptions; and it was held that in such cases there must be an account taken of the amount of debts, assets, and unpaid capital, and a decree for an assessment of the amount due by each stockholder. The reason of this is plain: upon the insolvency of a corporation a stockholder is liable for only so much of his unpaid subscription as may be required to pay the creditors; hence, he may not be called upon in an arbitrary way to pay any sum that an assignee or creditor may demand. It is, therefore, requisite to ascertain in an orderly manner the extent of a stockholder's liability, before proceedings are commenced to enforce it. But the necessity for this does not exist where the whole amount is required to pay the debts; hence, in such cases, as was said in *Yeager* v. *Scranton Bank*, *supra*, an assessment is not essential. The assignee may sue at once for all, for all is required.

In the case before us the jury found that the whole of the unpaid stock was not required to satisfy the debts of the Bank. As this finding may have been due in part to the testimony referred to in the ninth assignment of error, it is proper that I should refer to it. The court below, against the objection of plaintiff's counsel, permitted the defendant's counsel to interrogate Mr. Kennedy, the witness on the stand, as to the financial responsibility of one Henry O. Silkman, the allegation being that Silkman was a stockholder to the amount of $20,000, and that if his subscription was good, the whole amount of the unpaid stock would not be needed. There was no evidence that Silkman was a stockholder to the extent of over $5,000; hence, it was clear error to admit evidence as to his ability to pay up on $20,000. It is true the witness was not very clear upon the subject of Silkman's responsibility, but it is not easy to measure the effect of such evidence as this upon the jury; and because we cannot do so, and because its admission was error, we must reverse this judgment.

Judgment reversed and a venire facias de novo *awarded.*

Henry POTTEIGER, *Plff. in Err.*,
v.
Lavina POTTEIGER *et al.*, Exrs. of Adam Potteiger, Deceased.

As a **defense to a past due promissory note** signed by the defendant and payable to the plaintiffs' testator, the defendant alleged **that** the **note was given for** the **accommodation** of the testator, and in support of the allegation proved that the date of the note was written with ink different from that used in the rest of the note, and that when the note was protested he had sent notice to the testator complaining that the testator did not attend to his business, to which the testator replied that it was the defendant who did not attend to his business—*held*, that this **evidence was properly submitted to** the **jury,** and that a **comment upon** its **inadequacy** was not error.

(Argued Jan. 21, Decided March 14, 1887.)

JANUARY Term, 1887, No. 178, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, and Green, *JJ.*

Error to the Common Pleas of Berks County, to review a judgment on a verdict for the plaintiffs in an action of assumpsit. *Affirmed.*

The facts as they appeared at the trial before ERMENTROUT, *J.*, were stated in his charge to the jury, which was as follows:

"The executors of Adam Potteiger bring suit upon this promissory note, which is dated March 3, 1881, payable ninety days after date, in the sum of $1,000. When this note fell due on the 4th of June, 1881, neither Adam Potteiger nor Henry Potteiger appearing to make payment of the note, the note was duly protested. Subsequently to that time it appears that Adam Potteiger paid the note, and his estate claims that Henry Potteiger owes the amount of this note, with interest, from the time the note became due.

"There is no dispute about the signatures of the note. The note is admitted to be a genuine note; and so far as the face of the note is concerned, the law would import that Henry Potteiger was indebted to Adam Potteiger upon this note in the sum of $1,000, with interest, as claimed by the plaintiffs, for when a man's name appears upon a note as a maker, the party whose name appears as the first indorser, or the man to whose order the note is payable has a right to bring suit against the maker and recover the amount of the note. I say, upon its face, it would import that contract.

"The defendant, however, alleges that instead of Henry Potteiger owing this money, Henry Potteiger simply loaned his name as an accommodation; and instead of this being Henry Potteiger's debt it is in fact Adam Potteiger's. When a note of this character is laid down before you, and admitted to be genuine, you start out with the presumption that it is exactly what the note calls for, and that upon its face it implies an indebtedness upon the part of Henry Potteiger to Adam Potteiger. It then remains for the defendant to show to you that he is not liable upon this note; for unless he shows that to you, there must be a recovery in this case.

"Now, what is the testimony? There are no witnesses called as to the giving or the making of these notes. They first put in evidence the note for which this last note was given in renewal. When that note is examined you will see that it is a note signed by Henry Potteiger, payable to the order of Adam Potteiger; and the law would imply that when that note fell due Henry Potteiger owed the amount set forth in that note to Adam Potteiger.

["They next allude to the date of these notes. It is not pretended that either of them was forged paper. They do not dispute the correctness of the dates of these notes, but they offered that in evidence as a fact from which you, gentlemen, are to infer that it was Adam Potteiger's debt and not Henry Potteiger's, because there is a difference, an alleged difference, in the ink; and the theory is that Adam Potteiger obtained these notes in the first place, and then took them to the bank or to some other place; and they ask you from that circumstance to infer that it was Adam Potteiger's debt and not Henry Potteiger's, and that this note was given for an accommodation.]

["What is the next evidence? They say that Adam Potteiger, the son, was sent by Henry Potteiger to his father to convey to him the protest of this last note, and to say that the father did not attend to his business; and they ask you to infer from the fact of the son having told the father that conversation that he had held with Henry Potteiger, that that was an acknowledgment on the part of Adam that it was his debt.

Probably if the simple fact as stated had been reported to Adam Potteiger, and he had said nothing, it might possibly then be used as a circumstance to show that it was his debt. But the testimony is that he denied it. The moment the matter was called to his attention, he said, it was Henry that did not attend to his business; so that that testimony, if believed, instead of being an admission on the part of Adam Potteiger, might be construed into a denial of the allegation of the defendant here, that this was accommodation paper.]

["Now that is the only testimony in this case that they offer for your consideration to show you that this paper is accommodation paper—from what it reads upon its face. Is that testimony sufficient to satisfy twelve reasonable men that a promissory note in writing should be set aside? Is there anything in the testimony produced by the defendant that can in any way lead you to believe that this note was anything else than what it reads upon its face? If such testimony can convince you or satisfy you of that fact, then your verdict will be for the defendant.] But if such testimony fails to convince you or to satisfy you, rather, not convince you, that this is not Henry Potteiger's note, that it was for the accommodation of Adam Potteiger, then your verdict will be for the defendant. But if it does not give satisfactory proof, then your verdict must be in favor of the plaintiffs. And you will bear in mind always that when men give notes and place their names to them, the law implies that the maker of the note is responsible for its payment. You will start out, as I have said, with a presumption of this kind; and if you find for the plaintiffs, you will find for the sum of $1,000, with interest from the 4th of June, 1881, and the costs of protests."

Verdict and judgment were for the plaintiffs.

The assignments of error specified the portions of the charge inclosed in brackets.

Messrs. **Jeff. Snyder** and **Geo. F. Baer**, for plaintiff in error.

Messrs. **H. P. Keiser**, **J. H. Jacobs**, and **Chas. C. Kehr**, for defendants in error:

Where the plaintiff in an action on a promissory note is notified that proof of consideration will be required on the trial, and there is conflicting evidence on the question of consideration, the jury are to determine from all the evidence in the cause whether a consideration has been satisfactorily proved.

Wire Book Sewing Machine Co. v. *Crowell*, 6 Cent. Rep. 186.

The burden of proving want of consideration rests on the defendant.

Swain v. *Ettling*, 32 Pa. 486; Chitty, Bills, 69.

In every case of a promissory note the *prima facies* is in this respect in favor of the payee. It imports a valuable consideration. And that consideration must be impeached by the defendant with sufficient evidence before the plaintiff is required to make further proof.

Hartman v. *Shaffer*, 71 Pa. 315; *Knight* v. *Pugh*, 4 Watts & S. 447; *Conmey* v. *MacFarlane*, 97 Pa. 364.

Per Curiam:

All the alleged errors are to the charge of the court. It is claimed that the language covered by the third specification is incorrect. It follows, however, a pretty full statement of the evidence, so that it is substantially correct. We see nothing in the general language of the charge to make it misleading. There is nothing therein which gives a just cause for reversing the judgment.

Judgment affirmed.

Abraham PENNYPACKER *et al.*, *Piffs. in Err.*,
v.
Richard PENNYPACKER *et al.*

1. The presence of a brother and a nephew of the testator, at the making of his **will** in which they are legatees, does not, without more, raise a presumption of **undue influence.**
2. The question of **testamentary capacity** is for the jury.
3. The **burden of proving mental unsoundness** is always upon those who allege it.
4. If, however, general or habitual unsoundness of mind be shown previous to the will, the **burden of proving** a lucid interval or **restoration to sanity,** at the time, is in turn thrown upon those who allege it.
5. **If, at** the time of **making** the **will,** the **testator was sound in mind** and knew the business in which he was engaged, it is **immaterial that he was mentally unsound before or after.**

(Argued March 3, Decided March 14, 1887.)

JULY Term, 1886, No. 85, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Berks County, to review a judgment on a verdict for the plaintiffs (proponents) in an issue *devisavit vel non. Affirmed.*

The facts as they appeared at the trial before ERMENTROUT, *J.*, were stated in his charge to the jury, which was as follows:

Some time in 1885 John Pennypacker, a bachelor of some sixty-four years of age, died; and at his death a certain instrument of writing, under date of November 7, 1879, was presented as his last will and testament. Richard Pennypacker, a brother of the decedent, and his children are here as plaintiffs, asserting that this paper is the will of the decedent. Abraham, James and Charles Pennypacker, also brothers of the decedent, and Mary Huyett, a sister, are the defendants, asserting that it is not the will of the decedent, and that at the time of the execution of the paper the decedent had not sufficient mental capacity to make a will.

In passing upon this question you will carefully examine the evidence, laying aside all prejudice and disregarding all appeals to your sympathies. You are to judge in this case by the evidence that has been submitted to you, and not on mere passion, prejudice and sympathy. And in order to enable you intelligently to consider the facts that are in evidence, the court will instruct you in such legal principles as may be applicable to the case. The counsel have presented certain points to the court, upon which they ask us to charge. These points embody certain legal propositions which, we are asked to say to you, form the law in this case. We will first take up the points presented on behalf of the defendants.

The defendants respectfully ask the court to charge the jury as follows, and to cause the requests and answers to be filed as a part of the record of the cause. * * *

"6. By the evidence in the case it clearly appears that the relations existing at the date of the will between Richard Pennypacker and John Pennypacker were confidential, and as Richard Pennypacker is named in the will as a beneficiary taking an estate for life under the will, and was present actively taking part in the formal execution of the will, the will is void and must be set aside upon the presumption of undue influence, unless the plaintiffs have satisfied the jury by clear evidence that the will was the free, voluntary and uncontrolled act of John Pennypacker, and was not obtained by undue influence; and if the jury believe that John Pennypacker was of weak mind at and before the execution of the will, the plaintiffs must also prove to the satisfaction of the jury that at the time the will was made John Pennypacker was of sound and disposing mind."

We decline so to charge. The issue of undue influence is withdrawn from the consideration of the jury.

"7. If the jury believe from the evidence in this case that at one time in his life, before the execution of the paper offered in evidence as the will of John Pennypacker, he was for a period of one or two years of unsound mind, and was ever thereafter an imbecile, and after the execution of the alleged will, he became a wild and raving lunatic; and if the jury further believe from the evidence in the case, that Richard Pennypacker transacted all of John's business and had charge of his estate and business affairs at the time of the execution of the alleged will and John was at that time an imbecile; and if the jury further believe from the evidence in the case that Richard Pennypacker and Adam Pennypacker, his son, beneficiaries in said alleged will, were present at the execution of the will, and that Richard Pennypacker obtained the lawyer to write the will and the witnesses to attest its execution and was present in the room actively promoting its formal execution, by directing one of the subscribing witnesses, Charles Rans, to sign his name to the will as a witness and to do his best, the law presumes the will to be null and void for undue influence, and in order to overcome the presumption, the plaintiffs in this case must have satisfied the jury by clear evidence of two facts: 1, that at the time John Pennypacksr signed the will, he had enough memory, reason and judgment to have an intelligent understanding of the property he possessed, and of its nature, extent and value, and that he had an intelligent apprehension of the nature of the will he was making; and 2, that the making and execution of the will was the free and voluntary act of John Pennypacker's mind, and not the result of the undue influence or unlawful importunity of Richard Pennypacker."

This point is refused.

"8. Where a jury sees that at and near the time when the will sought to be set aside was executed, the alleged testator was, in other important transactions, so under the influence of the person benefited by the will that, as to them, he was not a free agent, and was acting under undue control, the circumstances may be such as to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised."

We answer this point as follows: while that may be true in law, the present is not a case for its application. The undue influence must be an influence exercised in relation to the will itself and not an influence in relation to other matters or transactions. Undue influence, to affect a will, must be such as subjugates the mind of the testator to the will of a person operating upon it. And in order to establish this, proof must be made of some fraud practiced, some threats or misrepresentations made, some undue flattery, or physical or moral coercion employed so as to destroy the free agency of the testator; and these influences must be proved to have operated at the very time of the making of the will. There being, in the judgment of the court, no such circumstances shown in this case, the point is refused.

"9. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in mind may be such as to excite terror and make him execute as his will an instrument (which if he had been free from such influence) he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency."

We answer this point as follows: as a proposition of law, this is true, but the facts referred to are not the facts of the present case. There is no evidence in this case to show violence used or threatened; nor is there shown any conduct on the part of Richard Pennypacker, or any of the plaintiffs, exciting any terror, real or imaginary, in the mind of the decedent.

"10. If the jury should find that John Pennypacker's mind, from many years of mental infirmity and from long habits of dependence upon his brother Richard for direction and guidance, was not self directing, and was easily led into the channel of his brother Richard's suggestions; and if Richard was present at the time the will was signed, procured counsel to draw the will, and directed Charles Rans to sign as a witness and do his best; and if Richard, at and about or near the time when the will was made, by the stamp of his firm mind on the weak and plastic mind of John (if the jury so find the facts), impressed there his wishes and views in regard to the disposition to be made by the will, and thus constrained the mind of John, and so produced and procured such a will, as his brother would not otherwise have made, the will is not the free expression of John Pennypacker's intentions, and must be set aside."

This point we also refuse.

"11. The relation existing between Richard and John Pennypacker, when the will offered in evidence was made, having been of a confidential and fiduciary character, and Richard having procured the attorney to write the will, and having been present and taken part in the formal execution of the will by directing one of the subscribing witnesses to sign his name to the will, and Richard having been one of the persons named in the will as devisees, and taking a life estate thereunder, the law presumes that the will was obtained by Richard by undue influence, and the plaintiffs having offered no competent proof to rebut that presumption, the will must be set aside, and the verdict should be for the defendants."

We decline so to charge.

Plaintiffs' counsel have also handed to the court propositions of law which they ask us to affirm, and charge the jury in accordance therewith. * * *

"2. There is no evidence in this case tending to disprove the positive testimony of Messrs. Wanner and Zieber and of the subscribing witnesses, that at the time he made his will he did have mind and memory sufficient to understand and intelligently direct the disposition he desired to be made of his property; and if, therefore, his testimony is believed, the verdict must be for the plaintiffs."

We answer this point as follows: The jury are the judges of the evidence, its nature and character. If, upon full consideration of all the evidence in this case, the jury believe the testimony of Messrs. Wanner and Zieber and the subscribing witnesses, that at the time he made his will he did have mind and memory, sufficient to understand and intelligently direct the disposition he desired to be made of his property, the verdict must be for the plaintiffs.

* * *

"4. That the fact that his brother Richard went for Mr. Wanner, called the subscribing witnesses, and some of the witnesses testify that he and his son were present in the room when the will was signed, does not create a suspicion even as to the rectitude of the transaction. The law does not regard the presence of a brother and of a nephew at the time of the making of the will as improper, suspicious or objectionable, although they are legatees."

This point we affirm, on the authority of *Caldwell* v. *Anderson*, 104 Pa. 199.

"5. There is no evidence of undue influence in this case sufficient in law to justify its submission to the jury."

This point we affirm.

"6. That if the testimony of the numerous witnesses called by the plaintiffs, together with the testimony of the persons present at the execution of the will, is believed, that John Pennypacker was possessed of mind, memory and understanding to know what he was about; that prior to the fall of 1881 his only peculiarity was slowness of speech and a retiring disposition, but all his acts and conversations were sensible; that he never was known to have any delusions, or to talk irrationally, or to do any act showing a want of sound mind, then he had capacity to make a will. The testimony that Richard did the buying and selling and attended to the general business of the farm becomes immaterial, and the verdict must be for the plaintiffs."

This point we affirm if the jury so find; but, in judging of the mental capacity of the decedent, the jury will consider all the evidence both of the plaintiffs and defendants.

"7. That the evidence of want of testamentary capacity and undue influence in this case is not sufficient to justify the jury in finding a verdict for the defendants."

We refuse this point.

As you will have observed, the question of undue influence is withdrawn from the jury. That leaves for your consideration but one point in this case, namely: did the decedent, John Pennypacker, have sufficient testamentary capacity to make his will at the time of its execution on the 7th of November, 1879? This is the only question that you have now to consider. And I may say here that in consideration of that question there are a few principles of law that are well settled, and they will, in addition to what the court has already said, be carefully considered by the jury in passing upon this case. These legal principles are as follows:

As sanity, that is, soundness of mind, is the normal condition of men, the burden of proving mental unsoundness is always upon those who allege it.

Testamentary capacity, that is, the capacity to make a will, is presumed of everyone of full age, and the affirmative is with him who undertakes to call it in question, and this affirmative he must establish, not in a doubtful, but in a positive manner; and if, in weighing the evidence, the question is doubtful or balanced, a jury ought to incline in favor of disposing ability.

If, however, general or habitual unsoundness of mind be once shown to exist previous to the will, the burden of proving a lucid interval or restoration at the time of making it is thrown upon those who allege the fact.

I will also in addition read to you what is said upon the question of mental capacity in a late case decided by our supreme court, the case of *Wilson* v. *Mitchell*, 101 Pa. 503: "A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the recipients of his bounty. It is not necessary that he collect all these in one review. If he understands in detail all he is about, and chooses, with understanding and reason, between one disposition and another, it is sufficient for the making of a will. If, from any cause, he is enfeebled in mind, so as to be incapable of knowing the property he possesses, of appreciating the effect of any disposition made by him of it, and of understanding to whom he intends to bequeath it, he is without the requisite testamentary capacity. He must have memory. A man in whom this faculty is totally extinguished cannot be said to possess understanding to any degree whatever or for any purpose. But his memory may be very defective; it may be greatly impaired, weakened by age or disease. He may not be able at all times to recollect the names, the persons or the families of those with whom he had been intimately acquainted, may at times ask idle questions and repeat those which had before been asked and answered; and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor of intellect to make and digest all the parts of a contract, and yet he may be competent to direct the distribution of his property by will.

"The question is not so much, What was the degree of memory possessed by the testator? as this, Had he a disposing memory? Was he capable of recalling the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligent form, Were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time when he executed the will? Neither age, nor sickness, nor extreme distress or debility of body will affect the capacity to make a will if sufficient intelligence remains. The failure of memory is not sufficient to create incapacity, unless it be total or extend to his immediate family or property. The want of recollection of names is one of the earliest symptoms of decay of memory, but this failure may exist to a very great degree and yet the solid power of the understanding remain."

You will, therefore, observe that what the law defines as the mental capacity necessary to make a will is this: Were the mind and memory of the man who makes the will sufficiently sound to enable him to know and to understand the business in which he was engaged at the time of the execution of the will? Did he know what he was doing? Did he have a proper idea of the manner and form in which he was disposing of his property and the parties to whom he was making that disposition? That is all the mental capacity that the law calls for in cases of this kind. It is a rule based upon sound principle, for all men are not created alike. One man may possess a very high degree of intelligence, another man may not. One man may be highly educated, another may have no education. One man may be able to read and write and to talk learnedly and intelligently, and another may not. But because a man cannot read or write, or has not received a high degree of education, he is not thereby prevented from making a will. Otherwise, people who walk in humble life and have not received much education or school learning, might be judged incapable of transferring property which they have earned by their daily toil. All that the law requires is, Did the man at the time of making the will understand the business in which he was engaged, and the disposition he was about to make of his property. If he did, his testamentary capacity is established. And if, under all the facts in this case, you believe John Pennypacker possessed that degree of mental capacity, you are bound to render a verdict in favor of the plaintiffs in support of the will.

Now, what is the evidence in this case? I do not propose to refer to the whole of this evidence, because that will be impossible. I would have to read over the notes of testimony to do that; you will recollect the details, for I can only refer to it in a general way, and I do so simply to explain to you the law which you are to apply to the facts in the case.

On the 7th of November, 1879, this paper was drawn up and signed by John Pennypacker. Under the Act of Assembly, every man of the age of twenty-one years has a right to make a will; and if he is a man of proper mental capacity, and attaches his name to a paper setting forth the disposition of his property, that is all that is necessary to be done by way of executing a will. It is not necessary to have subscribing witnesses to make a will good. The signature of a man to a paper of that kind can be proven; and, therefore, although there may be no subscribing witnesses upon a will, yet the moment that the paper is brought into court and witnesses are called who are acquainted with the signature, and they prove that this is the testator's signature, the law presumes that paper to be his will; and unless it is shown that there was a want of mental capacity to make that will, it will stand.

In the case before us, however, a paper is brought into this court, and its formal execution is proved by two subscribing witnesses. Now that does not make it a will so that no one can contest it; otherwise, there would be no issue framed for your consideration. But after this will is brought in and formally proved, the allegation is that the decedent had not mental capacity to make a will; and it is for this reason that this evidence has been produced for your consideration, and from which you are to determine the question of mental capacity of John Pennypacker.

There are various branches of testimony in this case. The one branch of testimony extends to a time before the signing of this paper; another relates to the time of the signing of the paper, and still another to a time subsequent to its execution.

You will, however, always bear in mind that whether evidence is given as of the time before or after, that evidence becomes important only as it tends to throw light upon the condition of the man at the actual time of the execution of the will. Although in this case the decedent may have been of unsound mind before the making of the will on November 7, 1879, and although he may have been of unsound mind after the making of this paper, yet, if from all the evidence in the cause it is shown to you that at the time he did sign it he had sufficient mental capacity to know what he was doing, to know what he was about, to know the disposition he was making of his property, in other words, that he had sufficient mental capacity to make a will on that day, your verdict must be for the plaintiffs.

I have said that I do not intend to refer in detail to the evidence. Excluding James and Abraham Pennypacker, there were ten or more witnesses called on behalf of the defendants for the purpose of proving want of mental capacity. In addition to these twelve there were three physicians called, to testify as to their opinion upon what was stated to them to have been proven in the case. On the part of the defendants there were fifteen witnesses or more as to the mental condition of decedent, the witnesses stating facts within their knowledge, and three of them as to opinions from these facts. I mean, now, as to the fact of mental capacity or want thereof. On the other side, I think, some twenty-six witnesses have been called for the purpose of proving that he was of sound mind, and that he had proper mental capacity.

When the physicians were on the stand there were certain questions asked of them by both sides. The object of putting the questions to the doctors was to obtain from them an opinion regarding the mental soundness or capacity of the testator. In the questions that were asked of them, the physicians were bound to assume that everything stated in those questions on either side had been proven. I will read to you these questions which were asked of the physicians, because in their questions the defendants claim that they have embodied the facts which they have shown; while the plaintiffs also claim that in the question they put to the physicians they have embodied the facts shown by them in the case.

The question asked by the defendants is as follows:

"If a person were so dull of understanding at eighteen years of age that with the usual educational advantages of the community, he would be in the infant class in school with children ten years his junior in age; if he was very slow of speech and could not hold a conversation; would speak five or six words and then break off in an incoherent way; could not carry on a conversation; never had any idea of looking after his business; and being the owner of one half of a valuable farm and the stock thereon, and interested in the product thereof, would not do any work or anything unless directed by some one else, and who had a habit of standing at a place and looking on the ground for hours at a time, and this habit continued during all his life; and who, on or about thirty years ago, had delusions, said he was going to die, and be buried on a certain day, and chopped wood for his funeral, and when asked what he was chopping wood for, said: 'I will die; on Sunday the funeral will be, and they must have some wood to cook;' if he had the habit of saying there was something behind the house, if he had been there, of course it would be all right, but so it was away; it was not there any more; and if you would ask him what it was, he would not know, and would talk much about mad dogs, in a wild, incoherent way; would pass persons whom he knew, and when addressed by them, would not answer; would stand in the middle of a public road when a vehicle was approaching, and, although in the road way of the vehicle, would dumbly stand and compel the vehicle to drive around him; would go out on the public road without his hat, in the month of July or August, in a very hot sun, motioning and gesticulating strangely and looking wildly, and grinning, and when addressed by a person in the carriage whom he knew, were not to answer, but were to seize the shaft of the carriage and were to exclaim, 'If I only would not have done what I did,' and in answer to a question as to what he had done, were to reply, 'Yah! Yah! Yah!' would find pictures the only objects of interest in a book, and would show no interest in a book or newspaper, excepting in the pictures contained in the book or newspaper; would sit for hours writing his name on a slate, and nothing but his name; would sit on the earth and play with stones and dirt; would not buy his own clothes, but have them bought by some one else; would do no business, although owning a considerable interest in a farm and farm stock; what would be your opinion as to the sanity or insanity of that man, from the time described in this question, when he had delusions thirty years ago, up to 1880, five years before his death, assuming that the facts set forth in this question are true?"

And the answer which was made to this question was that he was insane or an imbecile. The jury will recollect the form of the answer.

After this question had been put to the doctors, and answered, Mr. Baer, on behalf of the plaintiffs, put this question:

"Suppose this man was able to read and write, and when he was about twenty-nine or thirty years old, he and his brother would take a farm and live on it, his brother managing the farm, he working and assisting; that his conversation was sensible; that he knew everybody in the neighborhood; that he made no mistakes of persons or things; that the only habitual peculiarity was a stoppage of speech and want of fluency; that what he did was entirely rational; that in 1856 he was sick for a year and a half, and during the time of the sickness he was under the care of Dr. Martin, and that the only facts testified to as to delusions were that during that period of sickness, covering a year or a year and a half, he had told this story about the chopping wood and dying, and this story of the mad dog; that when he recovered he continued to live with his brother, working on the farm, talking to people he knew; that in 1879 Mr. Wanner and Mr. Zieber went out, and with him in a room by themselves he told them that he wanted to give his property to his brother for life, and to his brother's children after his brother's death; that Mr. Wanner and Zieber wrote that out; that he signed the will with his own hand, of which this is the will (indicating); that he could write with his right hand and left hand; that he went out to gatherings in the neighborhood; and that no delusions nor insanity which took the form of delusions developed itself until two years after the making of the will; and that his brother testified that three years after the making of the will, when the insanity had commenced, the testator, in answer to his brother's question, told him that Mr. Wanner and Mr. Zieber had written a will for him, thereby showing his recollection of a fact that took place three years before; would you say that such a man had not mind enough to make such a plain and easy disposition of his property as is contained in this will?"

And to this question the answer substantially was that they would think that such a man had mind enough to make so plain and easy a disposition of his property, and that he had mental capacity enough to make a will of this character.

Now, you will observe that when these questions were asked of the doctors they were not required to have a personal knowledge of the facts contained in the questions, but they were bound to assume the truth of everything that is stated in the questions. It is for the jury to say whether or not the facts contained in these questions are true; and if the facts contained in the questions are true, then the answers of these experts would be opinions for the guidance of the jury.

But you will observe that these experts answered both these questions "Yes;" so that, assuming the facts set forth in these questions by the one side, the decedent could make a will, and assuming the facts set forth by the other side to be true, he could not make a will. It is for the jury to say what are the facts in this case. The facts set forth in either of these questions are all facts of this case; and the jury, in examining all the evidence, will consider what both sides allege, and they for themselves will find what are the facts of the case. The opinions which witnesses in the case gave were also in part for the guidance of the jury; but the value of an opinion which a witness may give in a case of this kind depends altogether on the facts which the witness may have testified to. And, therefore, when you come to consider the evidence of a witness, the first question that you will ask is, What did the witness testify to? If he gave an opinion upon the mental capacity of John Pennypacker, upon what facts did he base that opinion? Were they sufficient in your judgment to warrant the opinion he did express? If they were, that opinion is entitled to some weight, but if the opinion was not based upon proper facts, the opinion is not entitled to weight, although you are bound to consider the facts shown.

In other words, when the issue is one of mental capacity, you are not blindly to follow the theories of one side or the other. You are to use your judgment, your intelligence, your reason, in sifting the truth from all the evidence in the case. You are to take each and every fact, for the mental capacity of a citizen is to be judged by his actions, his speech, his conduct, his behavior, and his appearance. You are to give every fact in this case due and proper consideration. You are to endeavor to harmonize everything the witnesses may have said; if you cannot, then you are to reject those facts which you cannot harmonize with each other; so that, you observe, this question of capacity comes right back to the jury, under the principles of the law which the court has laid down to you; and the question which you are to answer is, Was John Pennypacker, at the time of the making of the will, a man of proper testamentary capacity? Was he fit to make a will? Had he a proper idea of the business in which he was engaged? Did he know what he was about? What disposition he was making of his property and to whom it was made? And in judging of that, the most important testimony is his actions, his declarations, his habits, his appearance, his conduct.

What took place before that day and what took place after that day are only important as they bear upon the question of his testamentary capacity at the time of the execution of the will; because that is the period of time that your verdict must determine the man to have been of sound mind and disposing memory.

I have already referred to the number of witnesses in this cause, and to the fact that, in judging the value of their opinions, you are to consider the testimony upon which such opinion may be based. As to the credibility of witnesses, you have heard them testify; they have stated their occupations, where they lived, how long they have known the decedent, their powers of judging, the conversations they may or may not have had with him, and they have told you different things as to the conduct, behavior, acts and declarations of the testator which, in their mind, may have induced them on the one hand to believe that he wanted mental capacity, and on the other that he had mental capacity. It is for you to determine their credibility. You saw them on the stand; you saw their appearance, their character, the extent of their information, and the manner in which they testified, and as you find so will your verdict be, either for the plaintiff or defendant. If you find that he possessed proper mental capacity on the 7th of November, 1879, your verdict will be for the plaintiffs; if otherwise, for defendants.

[I desire to call your attention also to what took place on the 7th of November, 1879:

From the testimony it appears that Messrs. Wanner and Zieber went out to the house of John Pennypacker on that day. It is said by those two witnesses that at the time of the making of the disposition of this property there was no one present but John Pennypacker; that upon being asked by Mr. Wanner what was wanted, he replied that he wished to make a will, and that thereupon, and in answer to questions of Mr. Wanner, he stated how he desired the will to be made, and dictated substantially what is set forth in this present paper as to the disposition of his property; that Mr. Zieber wrote down these facts; that having written them the will was read to John Pennypacker, and explained to him by Mr. Wanner, and that thereupon he replied that that was the way he wanted it; that thereupon witnesses were called in and the will was signed by the witnesses.

There is some conflict of testimony as to whether the will was signed before the witnesses came in or after; but at all events it appears from the evidence that the will was signed by the witnesses in the presence of John Pennypacker; that he attached his signature to the will. Mr. Wanner, Mr. Zieber, James Fry, and Charles Rans, are the attorney, the scrivener and the two subscribing witnesses. They all say that at the time of the making of that paper John Pennypacker was of proper mental capacity; that he knew what he was about, and that in their judgments, he was fit at the time that paper was drawn up to make a will.

No other witnesses are called in this case to show anything that was said or done there upon that occasion, except these four people, and these four people agree in the one fact, that he possessed sufficient mental capacity. Has their testimony been shaken by the testimony submitted here before or after, or is their testimony entitled to its full weight? If you believe their testimony, that John Pennypacker was fit to make a will, it is immaterial whether John Pennypacker was sound or unsound before or after, or before or after that day. If he was sound in mind and knew the business in which he was engaged, and what he was doing, then this will must stand, and the verdict must be for the plaintiffs.

If, however, after a consideration of all the evidence in this case, you should come to the conclusion that upon that occasion John Pennypacker did not possess such mental capacity, your verdict must be for the defendants. If he was of sound mind, memory and understanding upon that day, it is immaterial to whom he gave this property; for when a man is of sound mind and memory the law permits him to will his property to whomsoever he pleases in his own family or elsewhere; it is his own property and no one else's.]

I think now I have gone over all the principles in this case. You will take the legal principles which I have laid down to you, and in the light of these principles you will look at the facts in this case, after a careful consideration of all evidence, you will say how your verdict shall be—whether for the plaintiffs or for the defendants.

Verdict and judgment were for the plaintiffs.

The assignments of error specified the answers to the points quoted, and the portion of the charge inclosed in brackets.

Messrs. **Benjamin F. Dettra, J. Howard Jacobs** and **H. Willis Bland,** for plaintiffs in error:

Richard owed the highest good faith to John. John was his feeble minded brother, to whom he stood in the relation of a natural guardian. Besides, he was his cotenant, and for thirty years had taken the fruits of the farm, which they owned in common, to himself without account.

In defining fiduciary relations, Rapalje & Laurence, in their Law Dictionary, title, *Fiduciary*, say:

"Such is the relation between trustee and *cestui que trust*, attorney and client, principal and agent, and generally, wherever from the position of two persons, one of them repoees confidence in the other."

"Tenants in common by descent are placed in confidential relations to each other by operation of law, as to the joint property; and the same duties are imposed as if a joint trust were created by contract between them, or the act of a third party. Being associated in interest as tenants in common, an implied obligation exists to sustain the common interest. This reciprocal obligation will be enforced in equity as a trust. These relations and confidence bind all to put forth their best exertions, and to embrace every opportunity to protect and secure the common interest, and forbid the assumption of a hostile attitude by either."

Freeman, Cotenancy, § 151; *Tisdale* v. *Tisdale*, 2 Sneed, 599; *Van Horne* v. *Fonda*, 5 Johns. Ch. 388; *Lee* v. *Fox*, 6 Dana, 171; *Lafferty* v. *Turley*, 3 Sneed, 182; *Saunders* v. *Woolman*, 7 Lea, 302; *Williams* v. *Gideon*, 7 Heisk. 620.

While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them, by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption.

2 Pom. Eq. Jur. § 956.

The jurisdiction exercised by courts of equity over the dealings of persons standing in certain fiduciary relations, has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well known decisions; but the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise.

Tate v. *Williamson*, L. R. 1 Eq. 528, 536.

The relation and the duties involved in it need not be legal; it may be moral, social, domestic or merely personal.

2 Pom. Eq. Jur. § 956.

That a strict legal relation need not exist is shown by the following cases:

Revett v. *Harvey*, 1 Sim. & Stu. 502; *Allfrey* v. *Allfrey*, 1 Macn. & G. 87, 98; *Espey* v. *Lake*, 10 Hare, 260, 262; *Beasley* v. *Magrath*, 2 Sch. & Lef. 31.

The same general principle extends, with more or less force, to dealings between a physician and patient, a spiritual adviser and penitent, vendor and vendee of land, husbands and wives, and persons occupying their position, partners, and indeed all persons who occupy a position of trust and confidence, of influence and dependence, in fact, although not perhaps in law.

Pom. Eq. Jur. § 963; *Rhodes* v. *Bate*, L. R. 1 Ch. App. Cas. 252, 257.

No part of the jurisdiction of the court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other; and this part of the jurisdiction of the court cannot be too freely applied, either as to the persons between whom or the circumstances in which it is applied.

Billage v. *Southee*, 9 Hare, 534, 540.

This court has adopted and enforced the most advanced equity doctrines upon this subject.

Miskey's App. 107 Pa. 611.

Whenever from such relation considerable authority or influence necessarily exists on the one side, and a corresponding reliance and confidence is placed on the other, a party will not be suffered to abuse this authority or influence by extracting any advantage to himself.

Darlington's App. 86 Pa. 518.

Influence is a thing which is assumed as between father and child; not that the influence is assumed to be unduly exercised, but that the influence is assumed; and it is then thrown upon the father, if he takes any benefit, to prove what is called the righteousness of the transaction.

Turner v. *Collins*, L. R. 7 Ch. App. Cas. 329.

The question is, not whether he knew what he was doing, had done, or proposed to do, but how the intention was produced; whether all that care and providence was placed round him as against those who advised him which from their situation and relation with respect to him they were bound to exert on his behalf.

Huguenin v. *Baseley*, 14 Ves. 273.

Wherever one person obtains by voluntary donation a large pecuniary benefit from another the burden of proving that the transaction is righteous falls on the person taking the benefit.

Hoghton v. *Hoghton*, 15 Beav. 278.

Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had competent and independent advice in conferring them.

Rhodes v. *Bate*, L.R. 1 Ch. App. Cas, 252; *Savery* v. *King*, 5 H. L. Cas. 627; *Comstock* v. *Comstock*, 57 Barb. 453; *Boyd* v. *De La Montagnie*, 73 N.Y. 498; *Boyd* v. *Boyd*, 66 Pa. 283; *Cuthbertson's App.* 97 Pa. 163.

It is sufficient to invalidate any instrument by a person of weak intellect, to show that the person in whose favor it is framed held a situation of confidence with respect to the maker of such instrument.

Jones App. 11 W. N. C. 261.

In *Darlington's Appeal*, 86 Pa. 518, the instance was one of husband and wife, and *Miskey's Appeal*, 107 Pa. 611, one of father and son; and the general doctrine is applied to transactions between other near relations: as gifts from a sister to a brother.

Thornton v. *Ogden*, 32 N. J. Eq. 723; *Hewitt* v. *Crane*, 2 Halst. (N. J.) Eq. 159, 631; *Sears* v. *Shafer*, 6 N. Y. 268.

In these cases consanguinity has not been allowed to prevent the presumption, but the beneficiaries have all been required by the law to show affirmatively that the benefit to them was not a result of the abnormal influence inseparable from the confidential relation.

Where the alleged testator is shown by evidence to be weak in mind, whether arising from age, bodily infirmity, great sorrow or other cause tending to produce such weakness, though not sufficient to create testamentary incapacity, and the person whose advice has been sought and taken receives a large benefit under the instrument propounded as a will, it must be shown affirmatively that the alleged testator had a full understanding of the nature of the disposition contained in it.

Cuthbertson's App. and *Boyd* v. *Boyd*, *supra*; *Frew* v. *Clarke*, 80 Pa. 180.

The rule is applicable not only to one who manually prepares the will, but to one who is instrumental to its preparation and assists in its execution.

Rea's Estate, 11 W. N. C. 80; *Wilson's App.* 99 Pa. 545.

In *Wistar's Appeal*, 54 Pa. 63, *Judge* Allison, in an opinion affirmed by the supreme court, speaking of dealings between persons who sustain the fiduciary relation, says:

"Where a claim is sought to be established by one holding a fiduciary relation to another, against the person or estate which he is required to protect, the burden of establishing the claim, both as to its fairness and consideration, rests upon him who asserts the demand. The principle on which courts act in regard to such claims, stands independent of the ingredients of deceit, imposition or unconscionable advantage, upon a motive of general public policy, and is designed to protect parties against overconfidence in those who have the care and management of their person, property or estate."

Where there is no evidence of infirmity of mind at the execution of a will, and the subscribing witnesses are uncontradicted, infirmity may be inferred from anterior and subsequent facts.

Irish v. *Smith*, 8 Serg. & R. 581.

Subscribing witnesses are not always the best to prove the sanity of the testator.

McTaggart v. *Thompson*, 14 Pa. 155; *Irish* v. *Smith*, 8 Serg. & R. 581; *Rambler* v. *Tryon*, 7 Serg. & R. 90.

Where the testimony is voluminous and the jury would naturally rely upon, and be largely influenced by the rehearsal of it by the court, it is important that the *résumé* should be as full on one side as the other, so that the jury may not be misled.

Gehman v. *Erdman*, 105 Pa. 371.

A tendency to mislead in the general tenor of the charge, although no particular portion of it be erroneous, is ground of reversal.

Wash. Mut. Fire Ins. Co. v. *Rosenberger*, 8 W. N. C. 16; 33 Legal Int. 338.

Actual violence need not be established.

Boyse v. *Rossborough*, 6 H. L. Cas. 47; *Davis* v. *Calvert*, 5 Gill & J. 302-3; 1 Jarm. Wills, p. 133, *note* Randolph & Talcott's ed. 1880; *Thompson* v. *Kyner*, 65 Pa. 376.

Messrs. **Howard P. Wanner, Jeff. Snyder** and **Geo. F. Baer,** for defendants in error:

The language of the court in answering the contestants' eighth point is a correct statement of the law as the supreme court has time and again declared it.

Tawney v. *Long*, 76 Pa. 115; *Stokes* v. *Miller*, 10 W. N. C. 241.

Where the testator is shown to be of weak mind, without regard to the cause or causes from which that weakness has arisen, although it be not sufficient in itself to wholly destroy testamentary capcity, and the person by whom, or under whose advice, the will has been written, being a stranger to the testator's blood, receives a legacy or bequest, large as compared with the testator's estate, the burden of proof shifts from the contestants to the proponent of the will.

Caldwell v. *Anderson*, 104 Pa. 199.

Per Curiam:

All questions relating to the mental incapacity of the testator were correctly submitted to the jury. As the evidence failed to show any undue influence on his mind at the time he executed the will the issue of undue influence was properly withdrawn from the jury.

We discover no error in the answers to the points nor in the general charge.

Judgment affirmed.

Daniel K. B. KAUFFMAN, *Plff. in Err.*,
v.
COMMONWEALTH of Pennsylvania.

1. To maintain an **action on an administration bond** it is not necessary to push the administrator to insolvency.
2. A **judgment** at law or a decree of the orphans' court **ascertaining** the **amount of** the personal **responsibility of** the **administrator** to the particular creditor suing is a sufficient **prerequisite.**
3. **Notice by** a **surety in** an **administration bond,** before adjudication, to persons who by the adjudication are found to be creditors of the estate, that the administratrix is wasting the estate and that all claims against the estate must be pushed at once or he will not be responsible for losses, is **ineffectual to relieve him from liability** to such creditors.
4. An **administration bond is not within** the provisions of the **Act of May 14, 1874.**

(Argued March 2, Decided March 14, 1887.)

JANUARY Term, 1887, No. 151, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Berks County, to review a judgment on a verdict for the plaintiff in an action of debt. *Affirmed.*

This was an action by the Commonwealth, at the instance of William L. Rhoads and Adam Rhoads, against Daniel K. B. Kauffman, on a joint and several administration bond of Sallie E. Guldin, administratrix of Simon P. Guldin, deceased, in which the defendant was a surety.

The facts as they appeared at the trial were stated in the charge of the court and in the opinion filed upon discharging a rule for a new trial.

The defendant made at the trial the following offers of evidence:

"Defendant proposes to show by the witness on the stand that the signature to a notice dated April 12, 1878, is his signature; that he served said notice, or a copy of the same, upon each of the plaintiffs in this suit about the time of the date of said notice. The notice is as follows:

"'Reading, Pa., April 12, 1878.

"'Dear Sir: I am one of the bail of Sallie E. Guldin, on her administration bond. She is exceedingly slow in pushing matters to a settlement, and I am of opinion that the estate is being wasted. You will please take notice that all claims against said estate must be pushed at once, or I shall not regard myself responsible for losses that may accrue. I want you to push your claim in ten days.

"'Yours Truly,
"'Daniel K. B. Kauffman.'

"To be followed by evidence of proceedings in the Orphans' Court of Berks County, to compel Sallie E. Schaeffer, administratrix of Simon P. Guldin, deceased, to furnish counter security; and also to be followed by evidence of the solvency of Sallie Schaeffer at the time of the service of the notice, and for at least three years thereafter; thus for the further purpose of showing that had the plaintiffs pursued their remedies, their claims could have been collected by the plaintiffs without injury to the defendant in this action."

Rejected. *First assignment of error.*

"The defendant renews his offer of proof of notice and service of notice as aforesaid; to be followed by evidence of proceedings in the Orphans' Court of Berks County to compel Sallie E. Schaeffer, administratrix of Simon P. Guldin, deceased, to furnish counter security; with the order of the court refusing said application, thus decreeing in fact that said administratrix at the time was neither wasting nor mismanaging said estate, nor insolvent; to be followed by showing by the records of the orphans' court that at the time of the service of the said notice she was the owner of three tracts of lands, one situate in Oley Township of the value of $20,195; another in Earl Township of the value of $330; another in Earl Township of the value of $217; this to be followed by proof that after the service of said notice Jacob Senger did proceed upon his decree, and on or about the 29th day of March, 1880, he did receive from said administratrix amounts of the *fa. fas.*; this to be followed by a judgment and execution in the Court of Common Pleas of Berks County, by which it appears that on May 12, 1881, the sheriff sold goods of said Sallie E. Schaeffer upon said execution, to the value of $1,115.70; and to be followed by showing that the first application for a *fi fa.* of these plaintiffs was made on or about the 12th day of February, 1881, almost three years after said notice was served, and upwards of fourteen months after the final confirmation of the auditor's report and decrees by the court."

Rejected. *Second assignment of error.*

The charge of the court was as follows:

"In this case your duty is very plain. Nearly all the offers of testimony made by the defendant have been ruled out by the court. The only question remaining is the liability of the defendant upon the bond. It appears that on the 26th of April, 1878, Sallie E. Guldin was appointed administratrix of the estate of Simon P. Guldin, and she gave a bond to the Commonwealth of Pennsylvania in the sum of $5,000, conditioned for the faithful performance of her duties as administratrix. It is not necessary to read the bond, for it has already been read to you. She gave as her bail John F. Guldin and Daniel K. B. Kauffman.

"This bond is a joint and several bond. It also appears from the testimony produced before you that there was an account filed in the orphan's court by this administratrix, and auditor's report had; and that the orphans' court adjudicated and settled that Adam Rhoads was entitled to the sum of $610.83, a claim which he had against the estate of Simon P. Guldin; and that also William L. Rhoads was entitled to the sum of $311.68 for a claim which he had against the estate. This action of the orphans' court is final on the question of the amount; and since these decrees were entered against Sallie E. Guldin, the administratrix, for these amounts, and the administratrix did not pay them, the creditors had a right to proceed upon the official bond given, and recover against the bail.

"As this bond is joint and several, suit is brought against one of the sureties, which plaintiffs had a right to do; and this action is against Daniel K. B. Kauffman. Calculations have been made of the exact amounts due in these cases; and it is ascertained that the correct amount due this day coming to Adam Rhoads is $531.81, and the amount coming to William L. Rhoads is $323.03.

"It is necessary in cases of this kind to render a verdict in this form, first, in favor of the Commonwealth, for the sum of $5,000, the penalty in the bond, and then to render a verdict in favor of the plaintiff, Adam Rhoads, in the sum of $531.81, the amount of damages assessed and costs accrued; and in favor of William L. Rhoads for the sum of $323.03, the amount of damages assessed and costs accrued; so that if you believe this evidence that has been laid before you, and there is nothing to contradict it, it is all record testimony, your verdict will be as indicated by the court. It will not be necessary for you to leave the box. So far as the legal questions and the rulings of the court are concerned, these will be for the court to review hereafter, and your duty will have been done by rendering the verdict."

Verdict and judgment accordingly for the plaintiff.

The defendant obtained a rule to show cause why a new trial should not be granted.

Upon discharging it, ERMENTROUT, *J.*, filed the following opinion:

"To maintain suit upon the administration bond it is not necessary to first push the administrator to insolvency. A judgment at law or a decree of the orphans' court ascertaining the amount of the personal responsibility of the administrator to the particular creditor suing, is all that is necessary as a prerequisite to such suit. *Commonwealth* v. *Stub*, 11 Pa. 150.

"In the present case the auditor's report upon the administration account was confirmed December 5, 1879, although filed May 19, 1876. On February 14, 1881, the orphans' court decreed to Adam Rhoads $610.83 and William L. Rhoads $311.68. The court, subsequently reviewing the account and report, directed *fi. fas.* to issue. This was done and returns of *nulla bona* were made. The plaintiffs were therefore in proper position to sue.

"The defense is that on April 12, 1878, Kauffman served upon plaintiffs notice in writing to push their claims or he would consider himself discharged. The answer is that they were in the orphans' court doing precisely what was asked of them, and even if they had not done so, the Act of May 14, 1874, upon which reliance is placed, does not apply. The administration bond is not within its provisions. It is not an instrument in writing for the forbearance or payment of money at any future time, nor was the amount therein to be collected. The liability of a surety in such a bond is contingent, requiring certain proceedings to be had before any liability results. When the notice was given no suit could lie upon it. The court, on October 21, 1878, decreed that the administratrix was not wasting or mismanaging.

"The only step to protect the bail was the entering up by the plaintiffs of the decrees against the real estate of the administratrix; and this the bail complained of as being done without his knowledge or consent. The bail does not seem to have taken steps to protect himself. As to the alleged agreement of forbearance to bring suit against the principal, there is no evidence of such fact. It is not shown to us how any Statute of Limitations can apply to this suit."

Messrs. **Henry O. Schrader** and **Hiram Y. Kaufman**, for plaintiff in error:

Prior to 1874 a request on the part of the surety to the creditor to proceed and collect from the principal was sufficient, provided the request was positive and accompanied with a declaration that unless complied with the surety would consider himself discharged.

By the Act of May 14, 1874, "The surety or sureties in any instrument in writing for the forbearance or payment of money at any future time shall not be discharged from their liability upon the same by reason of notice from the surety or sureties to the creditor or creditors to collect the amount thereof from the principal in said instruments, unless such notice shall be in writing, and signed by the party giving the same."

We see no good reason why the Act of May 14, 1874, should not apply to an administration bond. It applies to all instruments in writing for the forbearance or payment of money.

"If a creditor, after being requested to bring suit against the principal debtor, refuse or neglect to do so, the surety is discharged, provided the request be positive and accompanied with a declaration that, unless complied with, the surety will consider himself discharged."

Greenawalt v. *Kreider*, 3 Pa. 264. See also *Wilson* v. *Glover*, 3 Pa. 404.

In order to discharge a surety notice to sue the principal must be clearly proved, and shown to the identical claim.

Wolleshlare v. *Searles*, 45 Pa. 45; *Donough* v. *Boyer*, 31 Legal Int. 286.

The notice must be in writing, and in the most explicit terms that he will otherwise hold himself discharged.

Fidler v. *Hershey*, 90 Pa. 363; *Commonwealth* v. *Wilson*, 7 W. N. C. 62.

The notice must be given by one duly authorized, at a time when the creditor has it in his power to proceed.

Conrad v. *Foy*, 68 Pa. 381.

Where the circumstances show that the creditors could not by legal proceedings have made the debt out of the principal the surety will not be discharged.

Weiler v. *Hoch*, 25 Pa. 525.

The offers were made to bring the plaintiff in error within these rules.

To hold a surety, after notice from him to proceed, etc., against the principal, it is necessary for the creditor to show that he used due diligence in proceeding against said principal. What is due diligence in pursuing the principal, in pursuance of a notice from the surety, may be gathered from *Simpson* v. *Bovard*, 74 Pa. 362.

Where a creditor has the means of satisfaction, either actually or potentially, in his hands or within his control, and does not choose to retain it, the surety is discharged.

Coatesville v. *Hope*, 1 Chester Co. R. 57.

If these plaintiffs had exercised only ordinary diligence they could have collected their claims from the administratrix. They could only have lost their claims by the grossest negligence. The notice from defendant should have put them on their guard. After such notice to them, if any loss results, it is because they utterly disregarded that ordinary caution which every person ought to possess.

(No counsel appeared for defendant in error).

Per Curiam:

There was no error in rejecting the evidence offered by the defendant below. It was wholly insufficient to prevent a recovery on the facts proved.

Judgment affirmed.

Solomon CLOSE *et al.*, *Plffs. in Err.*,
v.
Noel H. BENJAMIN.

1. A **voluntary conveyance to a child by a father who is indebted** at the time **is not ipso facto fraudulent and void,** under the Statute of 13 Eliz. chap. 5. If the grantor had other property at the time or was otherwise of sufficient ability to pay all his debts, it is for the jury to say whether there was any design to defraud creditors, and if there was not, the conveyance is valid.*

2. **One who was sick** in bed and expected to die, was advised by counsel to convey his property by deed instead of devising it by will. Accordingly he **conveyed** his **real estate to his son and died.** He had at the time more than enough money in bank to pay his debts. After his death a **creditor** (who had obtained, after the conveyance, judgment for a pre-existing debt) **sold** the **land in execution as** the **property of the father,** bought it in and brought ejectment for it against the son. *Held*, that the **question whether** the **conveyance was intended to defraud creditors** or not was properly submitted to the jury.

(Argued Feb. 28, Decided March 14, 1887.)

JANUARY Term, 1886, No. 179, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Berks County, to review a judgment on a verdict for the defendant in an action of ejectment. *Affirmed.*

The facts as they appeared at the trial before SASSAMAN, *P. J.*, were stated in his charge to the jury, which was as follows:

"You have been sworn to try an issue joined between Solomon Close and George W. Kershner as plaintiffs, and Noel H. Benjamin, defendant. It is an action of ejectment, and is brought for the recovery of the possession of a small parcel of ground situate on the northwest corner of Thirteenth and Cotton Streets, in this City of Reading. It is said to contain seventy-six feet front on Cotton Street, and on its western line to extend back 150 feet, and on the eastern line towards the north to extend back, I think, 170 or 180 feet. It is the parcel of land described in the plaintiffs' writ.

"It appears that on the third day of April, 1875, one J. O. Thomas and wife conveyed two lots, as they are called, thirty-eight feet front on Cotton Street, to H. D. Benjamin; and that on the first day of April, 1875, A. W. Viven conveyed two lots of like front on Cotton Street to H. D. Benjamin; and thus on the third of April, 1875, H. D. Benjamin became the owner of this entire lot. H. D. Benjamin appears at the time to have been in litigation with one Zell, who survived one Eshelman, and who had a claim against him which was then being litigated. That litigation continued and by the records given in evidence it appears that in 1876 there was a verdict rendered in favor of the defendant, H. D. Benjamin.

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*See Low v. Wartman (N. J.), 5 Cent. Rep. 641.

"Some time thereafter, in December of that year or the next year, H. D. Benjamin received an injury, and after he had received that injury he seemed to have been physically incapable of being communicated with, to any large extent, and the case went to the supreme court where it was languishing until 1879, when it was decided in favor of Zell. The judgment which had been rendered on the verdict in favor of H. D. Benjamin became thereby reversed in the supreme court. It then came back again into this court in 1879 and was prosecuted to a verdict again, which resulted in favor of Mr. Zell. When this last verdict was obtained, there was a motion made for a new trial, and the case hung in this court on that motion from 1879 until the 31st of January, 1881. On that day, if I understand the evidence rightly, there was an attachment execution issued and served on Garret B. Stevens; a *fi. fa.* was issued at the same time. The property in question was levied upon and was condemned. It was afterwards sold on a *vend. ex.* which was issued subsequently to the *fi. fa.*, and the property was sold to H. W. Bland for $5, which was appropriated to the payment of costs. In pursuance of that sale on the 23d of April, 1881, Sheriff Gerhard, of this county, made a deed in favor of H. W. Bland, and Mr. Bland on the third day of August, 1881, deeded two of those lots.

"It seems that this property was regarded as four lots, each having a front apparently of nineteen feet; and two of those lots were deeded by Mr. Bland, the purchaser, to Thomas Zell. Mr. Bland was acting as the attorney in the former suit for Mr. Zell, and also in this execution; and Mr. Bland, as attorney, bought for his client, and afterwards conveyed it to him in one deed, dated August 3, 1881, and other deeds dated October 24, 1882, so that the property vested in Thomas Zell, in 1882, in October. Before that time, on the 7th day of September, 1881, Thomas Zell and wife conveyed the lots first conveyed to him by Mr. Bland, to one Hinchman; and he, on the 18th day of December, 1883, reconveyed these lots. It seems that Thomas Zell then became the owner of these two lots, and on the following day he and his wife conveyed them to Solomon Close and George W. Kershner, the plaintiffs in this case.

"The case standing in this form, without anything else being shown, the title of this property would vest in the plaintiffs; and upon the plaintiffs' *prima facie* case there would be no question but that the jury would have to render a verdict in favor of plaintiffs. A plaintiff in ejectment must always recover on his own title.

"When the case rested there and the plaintiffs were upon their *prima facie* case entitled to your verdict, the defendant said that so far as the plaintiffs' showing was concerned, their case could not be sustained in law. The defendant shows that there was a conveyance made by H. D. Benjamin while he was in possession of these lots on the 4th day of September, 1877, to one Noel H. Benjamin, the defendant herein.

"H. D. Benjamin was the defendant in the Zell suit; but in the suit here Noel H. Benjamin is the party against whom the ejectment is brought, who is admitted to be in possession of these lots. [H. D. Benjamin and wife made a deed to Noel H. Benjamin, on the 4th of September, 1877, which was a long time before there was a judgment entered in the case of *Zell* against *Benjamin*,—that first suit spoken of here as having terminated in 1879. The effect of the judgment of the supreme court in 1879 was the award of a *venire facias de novo*, which resulted in a new trial. This case, therefore, remained undetermined in 1879; and this deed of H. D. Benjamin to Noel H. Benjamin was made two years prior to 1879, and having been given about two years prior thereto, the defendant having a prior deed from H. D. Benjamin to the deed of the plaintiffs, instead of the plaintiffs being entitled to a verdict at that point the defendant, upon his own showing, would be entitled to a verdict at the hands of the jury.]

"The plaintiffs say that there is such a deed, but answer that the deed is void in law; and for that purpose they opened their rebutting case by calling Mr. Yarrington, who went along to the execution of the Noel H. Benjamin deed and witnessed it. There was no consideration passed for the deed in the presence of Mr. Yarrington, nor was the deed delivered in his presence. So far as his evidence is concerned he knew very little about the deed transaction.

"Mr. Snyder is called next. He testified that he was a notary public at that time, and that he took the acknowledgment of the deed of H. D. Benjamin to Noel H. Benjamin; that he saw no money pass, and no deed delivered there, and that Noel H. Benjamin was not present. There was therefore nothing elicited on the part of the witnesses, Yarrington and Snyder. But to further maintain their contention they called Noel H. Benjamin, who said he was a son of H. D. Benjamin, had met with a severe accident and was very sick therefrom, and that after having received that injury he could not be out of bed for a long time; that he made a deed to him, while he was bedfast, on the 4th of September, 1877; that he gave no money for it; in fact was a voluntary conveyance.

"By a voluntary conveyance is meant where one man makes a deed to another without giving anything for it. Where a man has debts at the time of making such a deed, he comes under the law which was enacted in England under the reign of Queen Elizabeth in the thirteenth year of her reign. It reads as follows, the law having been extended to this country: 'Be it declared, ordained and enacted, by authority of this present Parliament, that all and every feoffment, gift, grant, alienation, bargain and conveyance of land, tenements, hereditaments, goods and chattels or any of them by writing or otherwise, and every bond, suit judgment and execution at any time had or made sithence the beginning of the Queen's Majesty's reign that now is or at any time hereafter to be had or made to or for any intent or purpose before declared and expressed shall be from henceforth admitted and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns and every of them whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs by such guileful, covinous or fraudulent devices and practices, as is aforesaid are, shall, or might be in any way disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrated and of none effect. Any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.'

"The sum and substance of this Act is that where there is a fraudulent conveyance, or where there is a conveyance with intent to defraud, hinder or delay creditors from collecting their debts, all such conveyances of land are void; and it has been held in England as well as in the State of Pennsylvania, more strenuously in New York, and I believe in several of the other States where it is considered that the Statute of Elizabeth is in force, that where there is a deed of this kind it is absolutely void, as against creditors it is also held to be absolutely void.

"Where the deed is made with the intent to defraud, hinder and delay or defeat creditors it has been held to be void. This matter has been before our higher courts very frequently. Where a man has outstanding debts, makes a conveyance of his property so that his creditors may be hindered, delayed or defeated in the collection of their claims, the conveyance is absolutely void as to those creditors. If a man is indebted to another, and at the time makes a deed to another without consideration or without a valuable consideration, and the main intent and purpose is to defeat his creditors, such deed is void, although the land may have a record title in the name of another.

"If an execution is issued against a property to sell the right, title or interest of the man who was the owner, and he conveyed it thus to get it out of the reach of his creditors, such a sale brings a good title to the man buying and the man in whose favor the deed was made.

["Where there is a voluntary conveyance without consideration, the law presumes, in the absence of other proof, that there was a present intent to defeat creditors; but such a presumption is an inference from the facts supposed to exist, and is only what in the law is called *presumptio juris*, which may be rebutted by other and competent evidence.

"It is not of that class of presumptions which in the laws are called *presumptio juris et de jure*, which are said to be unrebuttable and unassailable in the law.]

"For instance: where one man is indebted to another, either of record or under seal, and twenty years have run without there being a renewal of the debt or a new promise, the law presumes that debt to have been paid, because it is reasonable to suppose that a man would not allow a debt to hang that long without having had satisfaction. Under the Statute of Limitations the presumption is that there was payment made; and this limitation of the law is made to help sustain the presumption.

["These presumptions in the law are intended for various uses: to prevent improper litigations, improper disputes, or prevent frauds that might be perpetrated if there was no such statutes. We say to you that while this is only one of that class of presumptions, the law presumes that it was with the intent to defeat creditors, and it is permissible for the courts to admit evidence to show that it was not the intent.]

"When the plaintiffs rested their case they were entitled to a verdict at your hands. The defendant, however, offered in evidence a deed which is absolute upon its face and is recorded, and which changes the case. [At the point where the defendant rested the defendant would have been entitled to your verdict for the land described in the writ; but the plaintiffs rebutted that evidence by calling the witnesses, Yarrington, Snyder and Noel H. Benjamin, who says it was a voluntary conveyance to him without a consideration. So far as Noel knew, his father had no other property to pay any debts; that is, there was no other visible property or real estate left to pay any debts with. At that time, there being no real estate and no visible property for the payment of debts, the claim, as contended for by the plaintiffs, was in full force and effect. Of course it was in litigation. The one part claimed a considerable amount of money which was eventually recovered, and the other party said it was not owing at all; but as the final result turned out, there was a judgment for $2,350, so that the final event of the suit would show there was an actual existing debt. Where such is the case the testimony of Noel H. Benjamin becomes important. The law raises the presumption, because there was an outstanding debt at the time H. D. Benjamin conveyed this property without any payment of money, that it was a fraudulent conveyance, because if it existed, they, the plaintiffs' grantors, or those before them, would have been hindered or delayed in the collection of their debt, and because they would have been hindred or delayed in the collection of their debt, the law would presume that it was fraudulent and would make the deed void.

"This being however a *presumptio juris* it may be rebutted; and in order to continue the contention of the parties the defendant turns around and rebuts the rebutting case of the other party again.]

"Before proceeding further with the case as it stood after these parties were examined with their record evidence, showing the disposal of the one property to Mr. Stevens, I want to say to you that the plaintiff would again be entitled to your verdict for the lands described in the writ.

"There is where the hitch in the case comes; up to this time the one or the other party would be entitled to a verdict.

"First the plaintiffs and then the defendant is entitled to a verdict; and then there is another showing which entitles the plaintiffs to a verdict.

["The defendant comes in again and asks leave to rebut, which is done by the evidence of H. D. Benjamin, from whom it was learned as well as in part from the cross examination of Noel H. Benjamin and Mr. Stevens, that at the time the conveyance was made to Noel H. Benjamin, H. D. Benjamin was sick in bed and expected to die, having received a very painful and serious injury; and being in expectation of dying, Geo. F. Baer, a member of this Bar, was called in to consult as to the making of a will and disposing of this property in contemplation of death, and while he was called, in speaking about a will, the question arose as to the expense of a will being made here. Mr. Benjamin, as soon as he could move with his family, intending to go to the State of New York, and upon the advice of Mr. Baer, instead of making a will, conveying this property; there was a conveyance made transferring the property to these two children, the one on Cotton Street to the son Noel, and the other on Fifth Street, to his daughter Ella, which was soon after, in 1878, conveyed to G. B. Stevens, who in part of the consideration gave a mortgage for $4,500.

"It is in evidence that before the failure of the Bushong Bank, and at the time of these conveyances, H. D. Benjamin had other personal properties; that he had $10,000 in the Bushong Bank and that he had other money outstanding. No one that I have heard has contended, or would be able to contend successfully in the law, that if this property was conveyed for the purpose of hindering, defeating, defrauding or delaying the collection of the Zell claim against H. D. Benjamin, or any other, that these two deeds would not be fraudulent. In contemplation of law, if it was for the purpose, they would have been fraudulent.

"If there was an entire absence of purpose to defraud, and done under the advice of counsel, the party having enough and ample property, as Benjamin testified, and that property was not removed and it was forthcoming at the time when the judgment was really recovered and finally settled, I cannot say to you as a matter of law, that such a transaction would be fraudulent. While a man must be honest and just before he is generous, a man is the absolute controller of his own property, and he can make just such disposition of it as he sees proper, either by will or conveyance instead of a will, so long as he pays his debts; and a man must always pay his debts before he gives his property away. If in this case you are satisfied under this final rebutting evidence of the defendant that H. D. Benjamin had other means and other property, and had made provisions for the payment of this debt, whether the money was in the hands of the Bushong Bank, and if that failed and the other money remained which he kept under his control or he kept the control of his property as long as he would live, and if you believe it was really so and there was an entire absence of purpose and interest in the transaction to hinder, delay and defraud the creditor he had, no creditor can come in and say that the purpose was to defeat and defraud].

"It is a question for you. [If it was not for this rebutting evidence the court would have been obliged to say to you that the verdict would have to be in favor of the plaintiffs. If you believe this rebutting evidence to be true: that there was money enough in the hands of Benjamin, and that he was ready and willing to pay at that time, without wishing to hinder, delay and defraud, your verdict will be in favor of the defendant. If you believe that under the rebutting evidence there was an entire absence of purpose which in effect would hinder or delay the creditors, then it would not be proper to take away this property from Noel H. Benjamin and give it away to others.]

"If you believe the other way, that the case stands as it was presented by the plaintiffs in their rebutting evidence, then the plaintiffs are entitled to your verdict for the property described in the writ. If you believe that there was a provision made here, and the provision was sufficient at the time the conveyance was made, and there was ample money in the hands of this man outside of the conveyance of the properties, and there remained enough until this judgment became finally conclusive to pay it, your verdict would be in favor of the defendant.

"If you believe there was an absolute fraud in the conveyances, your verdict will be in favor of the plaintiffs for the property described in the writ."

The court then read and answered the plaintiffs' points as follows :

1. If the jury believe that at the time the lots in suit here were sold by the sheriff on the judgment of Thomas Zell against Hiram D. Benjamin, he, Hiram D. Benjamin, had removed to the State of New York and had no real estate or other property in the State of Pennsylvania in his name, which could be taken in execution to pay Zell's judgment, and if the jury find that Noel H. Benjamin paid nothing to his father, Hiram D. Benjamin, for the lots in suit here, the sheriff's sale passed a perfect title and the verdict must be for the plaintiffs, Solomon Close and George W. Kershner.

Ans. We cannot say so as the case will be submitted to the jury.

2. There is no evidence in this case that Hiram D. Benjamin had any property in his own name at the time of the sheriff's sale which could have been levied upon to pay Thomas Zell's judgment; and it being the uncontradicted evidence in the case that his conveyance of the lots in suit here to his son, Noel H. Benjamin, the defendant, was voluntary and without valuable consideration, the conveyance from Hiram D. Benjamin to the defendant was fraudulent in law and void, and the verdict must be for the plaintiffs, Solomon Close and George W. Kershner.

Ans. I cannot say so; the case will be given to you for determination.

3. Under all the evidence in this case the verdict should be for the plaintiffs, Solomon Close and George W. Kershner.

Ans. Refused.

Verdict and judgment were for the defendant.

The assignments of error specified the admission in evidence of the deed of September 4, 1877, from Hiram D. Benjamin and wife to the defendant; the attachment execution; and testimony as to the disposition of purchase money by Stevens; and also specified the portions of the charge inclosed in brackets and the answers of the court to the plaintiffs' points.

The assignments of error also complained that the charge did not fairly submit the facts to the jury.

Messrs. **D. E. Schroeder, B. F. Dettra,** and **H. Willis Bland,** for plaintiffs in error:

The plaintiffs are purchasers for value. The transfer to Noel H. Benjamin was as to Mr. Zell's judgment, in effect, a legal fraud.

On September 4, 1877, the date of the voluntary conveyance to the defendant, Thomas Zell was a creditor of Hiram D. Benjamin, defendant's voluntary grantor.

On January 31, 1881, a judgment was obtained against Benjamin, by Thomas Zell.

The real estate described in plaintiffs' writ was sold under said judgment as the estate of Hiram D. Benjamin to said Zell, and the plaintiffs have the title of the sheriff's vendee.

The defendant offered in evidence a deed dated September 4, 1877 (admitted by his counsel in his opening to be voluntary), from Hiram D. Benjamin, for the land described in the writ, for the purpose of showing that the title in said premises was in him.

As the indebtedness existed at the time of the voluntary conveyance, and as the defendant did not offer to show by other proof that Hiram D. Benjamin had other property at the time to pay said indebtedness, with the view of disproving the corrupt intent of delaying, hindering and defrauding Zell, a creditor, the court should have rejected the offer, upon the ground that the fraudulent intent resulted as a conclusion of law.

Shontz v. *Brown*, 27 Pa. 128.

Both of the writs were execution process; and the general rule is that you may have as many forms of execution as the law will afford, and may pursue them all at the same time until satisfaction be obtained on one of them.

Pontius v. *Nesbit*, 40 Pa. 311.

A levy on and sale of real estate on a *fi. fa.*, does not avoid an execution attachment issued with the *fi. fa.*

Herriot v. *Wagner*, 9 Pittsb. Legal Jour. 109.

Aside from this, after acknowledgment of sheriff's deed in open court, the title of the sheriff's vendee cannot be affected by mere irregularities, however gross.

McFee v. *Harris*, and *Spragg* v. *Shriver*, 25 Pa. 102, 282; *Crowell* v. *Meconkey*, 5 Pa. 168; *Mitchell* v. *Freedley*, 10 Pa. 208.

In a question of fraud the validity of the conveyance from father to the son depends, not upon supplementary acts but upon the character of the contract when it was made.

United States v. *Mertz*, 2 Watts, 406; *Kepner* v. *Burkhart*, 5 Pa. 479–480.

Under section 2 of the Act of April 15, 1869, P. L. 60, when either party to the record is called as if under cross examination, they are subject to the same rules for examination as any other witness.

Where a witness is called by his adversary, as on cross examination, under the Act of April 15, 1869, § 2, leading questions may be put to him; and there may be drawn from him any facts or admissions which weaken his case and strengthen his adversary's.

The party so called is to be considered as if orriginally offered and examined on his own behalf.

Brubaker v. *Taylor*, 76 Pa. 83.

Cross examination should be confined to matters in regard to which the witness has been examined in chief, and to such questions as may show the bias and interest of the witness.

Hopkinson v. *Leeds*, 78 Pa. 400; *Hughes* v. *Westmoreland Coal Co.* 104 Pa. 207; *Fulton* v. *Bank of Pittsburg*, 92 Pa. 112; *Floyd* v. *Bovard*, 6 Watts & S. 75.

Evidence having reference to a transaction long after the conveyance, and not of the character of the contract at the time of the conveyance, and consisting only of declarations of a party charged with the fraudulent conveyance, is not admissible.

U. S. v. *Mertz*, 2 Watts, 407–409.

The declarations offered in evidence must be concomitant with the principal act, as the mere result and consequences of the coexisting motives, in order to form a proper criterion for directing the judgment which is to be formed upon the whole conduct.

1 Greenl. Ev. § 110.

Statements of a party in his own favor, out of court, are hearsay.

Id. § 99, note, 14th ed.

Every person is conclusively presumed to contemplate "the ordinary and natural consequences of his own acts."

3 *Id.* § 14.

In a question of fraud, the validity of a conveyance from a father to a son, depends, not on supplementary acts, but on the character of the contract when it was made.

U. S. v. *Mertz*, 2 Watts, 406.

The Statute of 13 Elizabeth makes "utterly void, frustrate, and of none effect," all conveyances and other recited instruments and acts, as against that person or persons, his or their heirs, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, etc., by such guileful, covinous, or fraudulent devices and practices,' as is aforesaid, are, shall or might be in any way disturbed, hindered, delayed or defrauded.

Robert's Dig. 296.

Fraud in law consists in acts, which, though not fraudulently intended, yet, as their tendency is to defraud creditors, if they vest the property of the debtor in the grantee, they are void for legal fraud, which is deemed tantamount to actual fraud, full evidence of fraud, and fraudulent in themselves, the policy of the law making the acts illegal.

Hanson v. *Eustace*, 2 How. 688, 689 (See note, bk. 11, L. ed. 430); *McKibbin* v. *Martin*, 64 Pa. 256.

Actual fraud is always a question for the jury; legal fraud, where the facts are undisputed or are ascertained, is for the court.

Dornick v. *Reichenback*, 10 Serg. & R. 90; *Avery* v. *Street*, 6 Watts, 247.

A conveyance by a father to his sons, in trust for the payment of all the judgments on record against the grantor, and for his maintenance and that of the family, is void as to creditors.

Johnston v. *Harvy*, 2 Penr. & W. 82. See also *McAllister* v. *Marshall*, 6 Binn. 338, in which a tacit agreement to vest a part of the property in trustees, for the benefit of the family, avoided the conveyance as to creditors who had not assented to the agreement.

In such a case the fraud is matter of law and should be so declared by the court.

Geiger v. *Welsh*, 1 Rawle, 349; *Hack* v. *Stewart*, 8 Pa. 213.

A conveyance by one indebted, in trust to sell, the grantor reserving a power of appointment of the proceeds, is fraudulent as to a prior creditor recovering judgment after the grantor had appointed the proceeds to creditors.

Mitchell v. *Stiles*, 13 Pa. 307; *Whallon* v. *Scott*, 10 Watts, 237; *Sheerer* v. *Lautzerheizer*, 6 Watts, 549; *Hack* v. *Stewart*, 8 Pa. 217.

A conveyance by one indebted, in consideration of a debt due, and the residue of the consideration secured by judgment bonds, payable within six years, which were intended to be applied to pay creditors, is fraudulent within the Statute of 13 Elizabeth.

Kepner v. *Burkhart*, 5 Pa. 478.

Bargains which are not ordinary sales to pay debts, but which are unusual and tie up a property out of the reach of creditors, preventing the collection of their debts in the ordinary course of law, are held to be against the statute.

Hennon v. *McClane*, 88 Pa. 222.

A sale of all a man's property to his sons on bonds, not due for a long time, is invalid, on the ground of hindering and delaying. In such a case, the law determines the intent to be fraudulent on the face of the transaction, which, on its front, shows that it must necessarily prejudice the right of creditors; for otherwise it would be in the power of the debtor to impose his own terms of payment, regardless of their rights.

Kepner v. *Burkhart*, 5 Pa. 478; *Johnston* v. *Harvy*, 2 Penr. & W. 82; *Adlum* v. *Yard*, 1 Rawle, 163; *Sanders* v. *Wagonseller*, 19 Pa. 248.

The interest of a debtor in property fraudulently conveyed by him is, as regards benefit to himself, absolutely nothing; but as regards benefit to those attempted to be defrauded, is something tangible and substantial. For the benefit of these, the ownership remains in him, as a trustee *ex maleficio*.

Englebert v. *Blanjot*, 2 Whart. 244; *Moncure* v. *Hanson*, 15 Pa. 391; *Heath* v. *Page*, 63 Pa. 122-3.

A voluntary conveyance is absolutely void as to existing creditors; whether it is void as to subsequent creditors depends upon intent and solvency.

Preston v. *Jones*, 30 Pa. 66; *Spirett* v. *Willows*, 11 Jur. N. S. 70.

In a deed from a father to his son, if voluntary, the fraudulent intent results as a conclusion of law; if not voluntary, the fraudulent intent is to be established, if at all, as a matter of fact.

Shontz v. *Brown*, 27 Pa. 128.

If the party be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstance will permit those debts to be affected by the settlement, or repel the legal presumption of fraud.

The presumption of law, in this case, does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party. There is no such line of distinction set up or traced, in any of the cases.

Reade v. *Livingston*, 3 Johns. Ch. 500.

The creditors in whose favor a fraudulent deed will be declared void must be those who would be defrauded if validity was given to the conveyance; but it does not follow that one whose claim originated before, but was established after the conveyance, may not have been injured by it.

Miner v. *Warner*, 2 Grant, Cas. 449; *Mitchell* v. *Stiles*, 13 Pa. 307.

To submit a fact, destitute of evidence, as one that may, nevertheless, be found, is an encouragement to err, which cannot be too closely observed or unsparingly corrected.

Stouffer v. *Latshaw*, 2 Watts, 165; *Egbert* v. *Payne*, 99 Pa. 244; *Sartwell* v. *Wilcox*, 20 Pa. 117; *Newbaker* v. *Alricks*, 5 Watts, 183; *Whitehall* v. *Wilson*, 3 Penr. & W. 405.

Where the language of a charge as to the true character of the testimony tends to mislead the jury, it is error and a ground for reversal.

Fawcett v. *Fawcett*, 95 Pa. 376.

It is the duty of the court, where it assumes to state the facts, to present them as fully on one side as on the other, so that the jury may not be misled.

Burke v. *Maxwell*, 81 Pa. 153; *Gehman* v. *Erdman*, 105 Pa. 371.

A misdirection is ground of reversal, although no special instructions were asked.

Garrett v. *Gonter*, 42 Pa. 143; *Washington etc. Ins. Co.* v. *Rosenberger*, 3 W. N. C. 16.

It is error to confine the attention of the jury to one view of the case, where there is more than one, which they should consider.

Garrett v. *Gonter*, 42 Pa. 143.

The mere omission to charge upon a particular point for which there was no request is not assignable for error; yet if the language of the court, taken in connection with the circumstances of the case, may have misled them, it is ground for reversal.

Bisbing v. *Third Nat. Bank*, 93 Pa. 82; *Pennsylvania R. R. Co.* v. *Berry*, 68 Pa. 272; *Stall* v. *Meek*, 70 Pa. 181; *Washington Ins. Co.* v. *Rosenberger*, 3 W. N. C. 16.

Messrs. **Jeff. Snyder** and **Geo. F. Baer**, for defendant in error:

The voluntary conveyance to the defendant, from his father, who was indebted at the time, was not fraudulent and void *per se*. There being evidence that the grantor had other property more than sufficient to satisfy the debt and out of which the debt was in fact fully satisfied, it was proper to submit the evidence to the jury to find what the facts were, and to determine whether the conveyance was made with any design to hinder, delay or defraud the creditor.

The doctrine of *Spirett* v. *Willows*, 11 Jur. N. S. 70, and *Reade* v. *Livingston*, 3 Johns. Ch. 500; *Jackson* v. *Seward*, 5 Cow. 67, 8 Cow. 406.

A deed from a parent to a child, for the consideration of love and affection, is not absolutely void as against creditors. The want of a valuable consideration is a badge of fraud; but that it is only presumptive and not conclusive evidence of it, and may be met and repelled by other evidence.

Hinde v. *Longworth*, 11 Wheat. 199 (24 U. S. bk. 6, L. ed. 454).

A voluntary conveyance, made by a person not indebted at the time, in favor of his wife or children, cannot be impeached by subsequent creditors, upon the mere ground of its being voluntary. It must be shown to have been fraudulent, or made with a view to future debts. And, on the other hand, the mere fact of indebtment at the time does not, *per se*, constitute a substantive ground, to avoid a voluntary conveyance for fraud, even in regard to prior creditors. The question whether it is fraudulent or not is to be ascertained, not from the mere fact of indebtment at the time alone, but from all the circumstances of the case. And if the circumstances do not establish fraud, then the voluntary conveyance is deemed to be above all exception.

1 Story, Eq. Jur. § 362.

If a parent makes an advancement to his child, and honestly and fairly retains in his hands sufficient property to pay all his existing debts, the child will not be bound to refund, even though the parent does not pay his debts existing at the time of the advancement.

Van Wyck v. *Seward*, 6 Paige, 62.

There is, as applicable to voluntary conveyances made on a meritorious consideration, as of blood and affection, no absolute presumption of fraud which entirely disregards the intent and purpose of the conveyance, if the grantor happened to be indebted at the time it was made, but that such a conveyance under such circumstances affords only *prima facie* or presumptive evidence of fraud, which may be rebutted and controlled.

Lerow v. *Wilmarth*, 9 Allen (Mass.), 386.

A voluntary conveyance, in consideration of blood and affection, by a person not indebted or not in embarrassed circumstances, but leaving ample means in his hands open to attachment, to pay all his debts, is good against creditors, if made *bona fide*. Whether it was *bona fide* in such case or not is a question of fact for the jury, upon consideration of all the circumstances attending it.

Pomeroy v. *Bailey*, 43 N. H. 118.

In Connecticut and Vermont the same rule prevails.

Salmon v. *Bennett*, 1 Conn. 525; *Brackett* v. *Wait*, 6 Vt. 411.

But the question has been definitely settled in Pennsylvania.

A voluntary conveyance to a child, by a father who is indebted at the time, is not *ipso facto* fraudulent and void under the Statute of 13 Elizabeth; if the grantor had other property at the time, or was otherwise of sufficient ability to pay all his debts, it will be referred to a jury, to determine whether there was any design to defraud creditors; if there was not, the conveyance is valid.

Chambers v. *Spencer*, 5 Watts, 404; *Posten* v. *Posten*, 4 Whart. 42; *Sanders* v. *Wagonseller*, 19 Pa. 252.

Per Curiam:

We have considered the twenty specifications of error, and cannot sustain any of them. There is no error in the answers to the points submitted, nor in the rulings relating to the admission of evidence. The charge was not misleading and the case was correctly submitted to the jury.

Judgment affirmed.

Manoah S. LONG, *Plff. in Err.*,
v.
William TREXLER.

1. A **judgment** in trespass on the case recovered by a lower **against an upper riparian owner, for diminishing** the **natural flow of** the **stream** and polluting it by ore washing and mine drainage, although entered on a verdict which did not specify the causes for which damages were assessed, **is, in a subsequent action** for a continuance of the same acts, **conclusive** evidence **that** the **defendant has no right to divert** the water of **the stream.**

2. The **pollution of** the **stream by mine drainage** is **damnum absque injuria,** but, although considered in the former action, bore on the measure of damages only, and did **not affect** the **validity of** the **judgment for** the **purpose of estoppel.**

(Argued March 3, Decided March 14, 1887.)

JANUARY Term, 1887, No. 301, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Berks County, to review a judgment on a verdict for the plaintiff in an action of trespass on the case. *Affirmed.*

The facts, as they appeared at the trial before ERMENTROUT, *J.*, are stated in his charge to the jury:

The plaintiff offered in evidence, *inter alia*, the record of a former suit, No. 19, October Term, 1877. The offer was made in the following terms: "The declaration sets out that heretofore, to wit: on the 10th of September, 1877, to October Term, 1877, No. 19, a certain suit or action was instituted in the Court of Common Pleas of Berks County, in which William Trexler, the present plaintiff, was plaintiff, and Manoah S. Long, the present defendant, was defendant; in which suit a declaration was filed setting forth in substance, as follows:

"The cause of action—which is substantially the same subject matter as is embraced in the present suit; the declaration goes on and sets out in substance that the plaintiff was possessed of certain premises in the County of Berks, including a messuage and tract of land, and a tannery and a dam; that a stream of water had for many years flowed through the premises and into the dam, and that the water was originally pure and unadulterated and abundant in quantity and that it came to the premises in that condition; that the said defendant diverted large quanties of water from the stream and thereby lessened the amount of the water, and that he also fouled the water by means of mining operations; that in consequence of the fouling of the water it as it flowed through the plaintiff's premises became likewise foul and corrupt and diminished in quantity, and that he sustained damage on account of these acts of the defendant. That is set out as being the statement of what was tried in the former suit.

"We propose further, then, to show that there was a declaration filed embracing substantially what I have stated, that the defendant filed a plea to issue; that the case was tried in 1880, and that there was a verdict for the plaintiff for a small sum of damages; that upon the verdict judgment was entered, and that no appeal was ever taken, at least that is the inference from the record; that we offer in evidence now as the basis of the proceeding in this case, and to show the liability of the defendant for a continuation of the same acts as were established in the former suit; the plaintiff averring that the present action is brought for a continuation of the nuisance or wrongful acts which the defendant then did, and for which a verdict was found against him."

The defendant objected: "1, the cause of action set out in the declaration in the suit now offered in evidence is not the same as the cause of action set out in the declaration in the suit now trying; 2, the plaintiff does not declare in the same right in the present suit as the declaration in the suit of No. 19, October Term, 1877; 3, the offer is generally irrelevant, incompetent and inadmissible."

Objection overruled; exception.

The court charged as follows:

"Some time in September, 1877, the present plaintiff instituted an action on the case against the present defendant. The action began on the 10th of September, 1877; and in the pleadings in the case the injury alleged to have been inflicted is stated as beginning the 15th of October, 1871, and continuing from that time until the bringing of the action; or, in other words, for a period of about six years.

"The cause of action, as disclosed by the narr., is, first, a diversion of the stream and the use of it, whereby the water is materially diminished in quantity, to the injury of the plaintiff's property; second, that by using the water for the purpose of washing ore, the defendant polluted and fouled the stream running through the land of the plaintiff; and in addition to these two causes of action, the narr. states that there was added to the stream other water pumped from the ore workings and mines on defendant's land, thereby also polluting the stream, to the injury of the plaintiff's property.

"Upon a trial of that cause, on the 23d of September, 1880, the jury found a general verdict of guilty, and for the injury, in the narr. set forth as continuing for this space of six years, the jury assessed the damages at $231. It does not appear anywhere what damages were assessed for each particular branch of the alleged injury.

"It is now alleged that the defendant continued all these special injuries, and this present suit is brought to recover for a period beginning the 29th of December, 1878, to December 29, 1884, another period of six years. Some counts of the plaintiff's declaration in this case allege it as an old nuisance continued; and there are other counts which allege it as simply a nuisance, without referring to the former action.

"Counsel for both plaintiff and defendant have presented points to the court in which they claim that the law governing this case is set forth; and they ask the court to instruct the jury as requested in these different points. I will answer the points before proceeding with the general charge.

"The plaintiff's counsel respectfully request the court to instruct the jury, as follows:

"'1. The plaintiff having given in evidence the verdict and judgment in a former action, between the same parties, for the same subject matter, viz.: for the diversion and corruption by the defendant, in mining and cleansing iron ore, of the water of a certain stream flowing through plaintiff's premises, in which said action the verdict and judgment were in favor of the plaintiff, and the present action being for a continuance of the same wrongful acts, the record of said former action is conclusive of the plaintiff's right to recover in the present suit, upon showing to the satisfaction of the jury that the defendant continued to divert and corrupt the water of said stream in the same way as he had previously done. The question of his legal liability for such acts cannot be retried.'

"This point is affirmed, if the jury so find the facts; but is not to apply to any water pumped from the mines in its natural character with impurities arising from natural, not artificial, causes.

"'2. Under such circumstances the only question to be considered by the jury is as to whether the defendant has continued the diversion and corruption of the water of the stream since the former action in 1877; and if the evidence satisfies the jury that such is the fact, it will be their duty to find a verdict for the plaintiff for such damages as he is legally entitled to recover from the defendant for his proportionate share of the injury.'

"This point is affirmed, if the jury find such circumstances to exist, with the qualification as to the water pumped from the mines in its natural condition, as stated in the answer to the first point.

"'3. If, after the plaintiff's right to recover has been established by a verdict and judgment in his favor, the defendant continued the wrongful acts complained of in the first suit, it is the duty of the court to instruct the jury to give such damages as will deter him from continuing the same, though such sum be in excess of the actual damages suffered.'

"'4. The defendant having admitted himself that since the former action he has continued to divert large quantities of the water of the stream flowing through the plaintiff's premises for washing ore, of which it was shown that but a small amount returned to the stream, it is no answer to say that he pumped an equal or greater quantity into the stream from the water accumulated in the mine.'

"The principle contended for we affirm, if the jury so find the facts.

"'5. Even should the court be of opinion that in a case where the mining of ore could not be carried on without discharging the water collected from the percolations of the mines into the stream, such discharge would be *damnum absque injuria*, there is no sufficient evidence of such existing necessity in the present case.'

"We decline to charge as requested in this point.

"The defendant's points are as follows:

"The court is requested to charge the jury:

"'1. That the defendant's use of the water from the stream for carrying on his mining operations, was a reasonable and rightful use of the stream; and there being no evidence of negligence in conducting these operations, but the testimony being that the use of the water for washing ore was the ordinary and reasonable use of the country, in conducting mining operations, the inconvenience and injury to the plaintiff is *damnum absque injuria.*'

"This point we decline to affirm.

"'2. If the jury believe that the inconveniences to the plaintiff are slight, and that he has sustained no material and appreciable injury from the use made by the defendant of the water taken from the stream in washing his iron ore, then the verdict must be for the defendant.

"This point we affirm.

"'3. If the jury believe that owing to the distance and the intervening dams between plaintiff's property and defendant's the discoloration and sediment in the water from defendant's use of it at the ore washing would disappear, were it not for the operations using the same water between defendant's and plaintiff's property, then the defendant is not liable for the injury complained of, and the verdict must be for the defendant.'

"This we affirm.

"'4. If the jury believe that the discoloration and sediment in the water when it reaches plaintiff's property was due to the water pumped from the defendant's and other mines, and that it was necessary to pump this water from his mine, in order that he might operate it, then the defendant is not liable for the injury complained of, and the plaintiff cannot recover.'

"This point we affirm, on the theory, however, that it applies only to such water as the mine naturally discharges, or to the natural percolations of mine water into the mines, and with the impurities arising from natural not artificial causes; and upon the further theory that in this case the jury should find no other cause of injury.

"'5. That as the defendant received the water on his land affected by similar ore washers above on the stream, if liable at all it would only be for increasing the impurities in the water by operations on his own lands; and if the jury find that the defendant received the water pure and clear, and that but for the action of other operations lower down the stream, the stream would be freed from impurities before it reached plaintiff's land, the plaintiff cannot recover.'

"Affirmed.

"'6. Should the jury believe that the plaintiff has sustained appreciable injury, the defendant would be liable only to the extent that his mining operations contributed thereto: and if that alone did not cause appreciable and material injury to the plaintiff, but only slight inconvenience, the verdict must be for the defendant.'

"Affirmed.

"[In addition to the legal instructions contained in these points, we further say to you that the owner of lands through which a stream of water passes, while he has the right to use the water for any legal purpose, must return it to the channel uncorrupted and without essential diminution in quantity, for the benefit of the owner of the land along its banks below him. If he employs it for ordinary domestic purposes, and the stream is so small that all is consumed, although its loss would be an injury to the land below, yet it is an injury for which the law gives no damages; but where he employs it for manufacturing or other purposes, having no necessary relation to the use of the land, he is liable to an action by the owner of the lower land. For such purposes he can neither corrupt the water nor sensibly diminish its volume at the expense of his neighbor, although he may think it necessary for manufacturing, or washing ore.]

"When a jury approaches a case of this character, they will be careful to keep in view the magnitude of the interests that are involved. The section where these operations are carried on is a mining country. There are, within a half a mile, along this stream alone, as disclosed in this testimony, some seven operations, in which a vast amount of iron ore is handled, a great number of men employed, and the iron ore industry is a vast and important one.

"The proprietors of large and useful interests, such as mining of coal or iron ore, should not be hampered or hindered for trifling or trivial causes. For slight inconveniences or occasional annoyances, they ought not to be held responsible. But when material and appreciable injuries, such as damages to land, actual diminution, appreciable diminution of streams are shown, when such injuries have been sustained, a recovery of damages against them ought to be allowed, just as against any other person,—because a rule of law should be for all men; and all interests, mining and agricultural, should be treated impartially.

"In estimating the damages, if the jury find that any damages were sustained, there is a general rule laid down; that is, that the measure of damages is compensation for the injury that may have been sustained by the acts complained of. If the injury result from grossly negligent or malicious acts, or is caused by the persistent action of a man whose rights to do such acts have been legally determined against him, larger damages may be given by way of punishment; and the amount of such damages, which in law are called punitive damages, or exemplary damages, rests in the sound discretion of the jury, uninfluenced by prejudice or passion.

"We further say to you that the defendant, being the owner of the land, had a right to mine his iron ore, or permit his lessees to do so: and if this right was exercised in the ordinary and usual mode of mining and with due care, so far as the water pumped up from the mine is concerned, there is no liability for permitting the natural flow of mine water, either to run away from the land or to be pumped up from the mine into the creek, which, from the testimony, seems to be the natural drainage of that section.

"In all mines there are percolations, or drippings, or runnings from the water which accumulates; and this water must be discharged, or mining would cease. A man is permitted to get rid of this natural flow of water, and the defendant had a right to lift this water to the surface by artificial means, such as pumping, and let it into the creek. He may not foul it by any act of his own. He may not use it as a sewer for the mere purpose of throwing dirt, or in such a way as to throw the soil upon the land of his neighbor. He may not do that either by his own act or by the act of his servants. But if the impurities in the water which he thus conveys from the mine arise from natural, and not artificial causes, without any fouling on his part, or any act done whereby to alter the nature and condition of this water, that is, the natural impurities that water may receive in percolating through the mines, he may pump that out, although it may, by its natural impurities, defoul the creek. And, therefore, so far as this case is concerned, when you come to consider any injury which you find attributable to that source, you would exclude that special injury from your consideration.

"Taking the evidence submitted on the part of the plaintiff, if believed, and it is for the jury to pass upon the evidence, its effect would be that the streams below were muddy; that the impurities in the creek affected his leather in the tannery; the deposits settled in his dam at his grist mill; that the water for domestic purposes at the dam at his house was polluted in the same way. There were a good many witnesses called, and it is unnecessary to give their testimony in detail, because the jury will well recollect that, inasmuch as this case has not taken so many days.

"If, under a consideration of the plaintiff's testimony, you find that this defendant, taking into consideration the testimony on both sides, is guilty of inflicting such injuries, for which the law allows damages, as we have before stated, you would apply the rules we have indicated in ascertaining the damages. You will ascertain what damages were sustained by the alleged diverting of the stream, the appreciable diminution in the quantity and the pollution of the water. You will inquire how the acts complained of may have affected the use and enjoyment of the plaintiff and his property; and in the case of any permanent injury, you will inquire how the acts complained of affect the property in its value. So far as the mere diversion of a stream is concerned, that diversion may be simply temporary in its character, for when the stream is no longer diverted, the injury ceases; and then you would inquire what damage was done by its diversion and the diminution in quantity.

"When you come to examine into the question of any deposits that may have been made of mud, soil or otherwise, if there were any such deposits made, you will inquire whether they have affected the value of the property permanently, and ascertain to what extent. You will also, at the same time, ascertain what would be the cost of the removal of such deposits; and whichever way shows the lesser damages, you are to accept as the true measure. In other words, if the difference in value, caused by the permanent injury, is, we will say, in illustration, $100, and the cost of removal is $50, you would take the $50; if the cost of removal were $150, and it should be testified that the depreciation in the value of the property were but $100, you would take the $100.

"You will bear in mind that the plaintiff is the owner of farms there, a tannery, a grist and sawmill; the dams are there all erected; there is a valuable water power there. So far as the properties which the plaintiff has leased are concerned, you will not allow anything for diminishing the annual profits to the tenant. Such profits and damages belong to the tenant, and not to the owner. The tenant may sue for those; but the owner simply sues for the damages which he suffers in his reversionary interest.

"If, under all this evidence, you find that there was an injury committed, and you proceeded in the way indicated to ascertain the amount of the damages, you will further bear in mind that the estimates of damages alleged to have been committed contained all the damages that are alleged to have been actually suffered during these six years.

"When Colonel Trexler was upon the stand he said that he did not claim that these acts were due to the defendant alone. There are, according to the testimony, some seven operators upon that stream; and all of them seem to be carrying on mining operations in pretty much the same way. Some of the witnesses say that it is necessary to go away above the operations of the defendant, past the others, to get clear water; and that when the water reaches Long's, it is muddy both above and below; and some of the witnesses say that the stream is oftener clear than muddy, and others say oftener muddy than clear.

"Therefore, it is that you must, in the best way you can, apportion what you may find to be the proper amount of damages caused by the act of the defendant; for he is not liable for what the others have done, but only for his proportionate share. It is, of course, difficult to get at that. You can hardly do it exactly, but you will approximate to it as near as you can; and you must use your good judgment and sound discretion in getting at the true measure.

"Now, the defendant alleges, on the other hand, that he has not inflicted the injuries complained of; and for the purpose of establishing his theory of the case, he calls witnesses who give to you an account of how the mining operations are there carried on. They have described to you the course of the mine from the pit to the washery, and the washery and the mud dam. They have told you that unless there is a heavy rain in that neighborhood, the water in the pit is generally clear; that the water in this stream—there is no contention about that—is taken up, used in the washery in washing the ore; and they allege that the sand and dirt are separated, the sand first by means of the washery and screens connected with it; and from that the muddy water flows into the mud dam where it is allowed to settle; and that the water in its clear state is then taken from the mud dam and put into the creek; and that there is no pollution of water arising from that source; and they further testify to you that this creek is the natural drainage of that country, that on either side of the creek the land slopes, and that whatever washings there may be after rains pass into this creek; and the defendant alleges that the water is fouled in that way.

"There is testimony to the effect that during these six years a mud dam below the defendant broke, and that by that means great quantities of mud were washed into the stream; that there was a freshet in 1883 of so serious a character that it took the defendant some three weeks to pump out the water from his mine—some three weeks to clear the mining operations of the water; and he alleges that so far as he is concerned, he has not done any injury to the plaintiff. He brings to you the deposits of mud or soil, or whatever it may have been testified to be, which he says he found in these various dams; and he says that an analysis of these different muds or deposits shows that they do not come from his property; and that they are not of the same nature as the soil of his property.

"Now, all these things are brought to your attention for the purpose of showing that while true it may be that deposits were thrown into the different dams of the plaintiff, he, the defendant, was not the cause of it, and that therefore he is not responsible for that; and if you should find that he is responsible for some of the deposits, you will ascertain that quantity—naturally, the water in a creek of that kind will carry down sand, leaves, dirt and other stuff; dams will gradually fill up; freshets may do that; and my object in directing your attention to these facts is simply to show to you that you must apportion the damages; and you can only hold the defendant responsible simply for what he may have done, and not for what may have been done by others, or by the act of nature, or great freshets, or heavy rains that may have washed soil into that creek.

"If the testimony satisfies you that there was no diversion of water by the defendant, no deposit of mud, no injury to the lower owner caused by his act, then he would be entitled to a verdict. But if you find that he has done an injury to the lower owner that he has diverted the stream and failed to return it in proper quantity and pure in quality as he ought to have done, and that injury has resulted to the plaintiff, then you must return a verdict for the plaintiff, and assess the damages as indicated in the charge."

Verdict and judgment were for the plaintiff for $225.66.

The assignments of error specified the admission of the record of the former suit, the answers of the court to the points submitted, and the portion of the charge inclosed in brackets.

Messrs. **Ermentrout & Ruhl,** for plaintiff in error:

The declaration and evidence admitted by the court at the latter trial show conclusively that the merits of the controversies at the several trials were quite different.

In the former suit the *gravamen* of the complaint was that "the defendant had diverted the water of the stream, and had used it for washing iron ore upon his premises, whereby it was made muddy, impure, corrupt and poisonous, and that he did return the same into the stream," etc.; and also that "he did, then and there, empty and discharge other water pumped or drawn from the ore workings and mines, and likewise rendered muddy, impure corrupt and poisonous, etc., whereby all the water of the stream became muddy, corrupt, poisonous," etc.

"The declaration in the present suit contains an averment of the former suit, and the verdict and judgment thereon; and further avers that since the 10th day of September, 1877 (the date of the bringing of the former suit) the defendant continued the tortious acts complained of in the former suit. The plaintiff does not, however, aver that he was in possession of the tannery premises at the time of bringing this suit, but avers that since 1883 he did not have the possession of it, and declares for damages sustained in his reversionary interest since that time. The declaration in the present suit contains no averment that the defendant in the same way, and to the same extent, continued all the tortious acts complained of in the former one."

The admissibility of the record, in the first instance, was a question for the court to pass upon; and the plaintiff not having averred that the injuries complained of were continued to the same extent, it should have been rejected.

In *Casebeer* v. *Mowry*, 55 Pa. 423, which was a second action on the case for flooding plaintiff's land, by means of a dam which the defendant had erected in a stream, the court said that the effect of the first action was to establish the right, and adds: "Of course, this is only so if the dam was of the same height when the second suit was brought. That it was so we may infer from the fact that nothing was alleged to the contrary."

In the former action the plaintiff claimed damages sustained in his business of tanning, which he averred he had been and was then exercising and carrying on; while in this action he declares for injuries sustained in his reversionary interest. He, therefore, is now suing in a different right.

Damages for injuries to property vary also, according to the nature of the claimant's right. The owner of the freehold may undoubtedly recover for an injury which permanently affects or depreciates his property; while a tenant, or one having only a possessory right, may recover for an injury to his use or enjoyment of it.

Seely v. *Alden*, 61 Pa. 305; *Ripka* v. *Sergeant*, 7 Watts & S. 9; *Williams* v. *Esling*, 4 Pa. 486.

Where the verdict and judgment in a former trial between the same parties are used in pleading as a technical estoppel, or relied upon by way of evidence as conclusive *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered to have settled that matter as to all future actions between the parties; and further, in cases in which the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be conclusive.

Washington etc. Packet Co. v. *Sickles*, 5 Wall. 592 (72 U. S. bk. 18. L. ed. 553); *Coleman's App.* 62 Pa. 272.

Assuming, however, for the sake of the argument, that the court ruled correctly in admitting the offer, we submit that there is serious error in the answers to the several points of the plaintiff below as to the effect of the evidence, especially in view of the evidence admitted relating to the water pumped from the defendant's mines, and the instructions to the jury as to the right of the plaintiff to recover for injuries resulting therefrom. In both actions the plaintiff's chief complaint was the alleged injury resulting to him by reason of the water raised or pumped from defendant's mines. The learned judge, however, held that all injuries resulting from such acts were within the ruling of this court in *Pa. Coal Co.* v. *Sanderson*, 4 Cent. Rep. 475, 113 Pa. 126, and therefore *damnum absque injuria.*

At the former trial the defendant was held liable for such injuries. How can it then be said that the cause of action is the same in this as in the former action? The use made of the water by Long is inseparable to and necessary for the use of his land; it has a necessary relation to his use of this land,. and therefore is within the rulings of this court upon that question.

Pa. R. R. Co. v. *Miller*, 3 Cent. Rep. 126.

In the case of *Kauffman* v. *Griesemer*, 26 Pa. 407, it was held that the owner of the superior heritage may improve his lands by agricultural or mining operations, although thereby the quantity of water discharged upon the inferior owner is changed. This is said to occur when necessary for carrying on agricultural and mining operations. By a parity of reasoning the same rule should include a necessary alteration in the quality of the water.

The reasonableness of the detention of water by the riparian owner above to the injury of the riparian owner below depending, as it must, on the nature and size of the stream as well as the business to which it is subservient, and on the ever varying circumstances of each particular case, must be determined by the jury and not by the court.

Hetrich v. *Deachler*, 6 Pa. 32; *Hartzall* v. *Sill*, 12 Pa. 248; Cooley, Torts, 588.

The damages resulting to another from the natural and lawful use of his land by the owner thereof are, in the absence of malice, *damnum absque injuria.* When the maxim *Sic utere tuo ut alienum non lædes* is applied to landed property the plaintiff must show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land.

West Cumberland Iron & Steel Co. v. *Kenyon*, L. R. 11 Ch. Div. 783.

The reasonableness of the use of a stream by the upper riparian owner is a question of fact, to determine which testimony showing the uniform usage of the country is admissible.

Snow v. *Parsons*, 28 Vt. 459.

The court will refuse to enjoin the burning of bricks because it is essential to brick making, which the court regarded as a useful and necessary business and necessarily exercised near towns.

Huckenstine's App. 70 Pa. 102.

The water used in the mining operations below was returned to the stream in so clear and pure a condition as the nature of the operations upon the land would permit. The depreciation in quantity was equal only to the extent of the evaporations while it was permitted to remain in the mud or slush dam for the purpose of clarification. No substances foreign and not indigenous to the defendant's land was introduced into the water to foul it, as was proven in *Wheatley* v. *Chrisman*, 24 Pa. 298, and *McCallum* v. *Germantown Water Co.* 54 Pa. 40.

The defendent carried on his mining operations according to the customary and usual methods employed by skillful and experienced miners. It was a custom of which the court was bound to take notice as a part of the law.

Koons v. *Miller*, 3 Watts & S. 271; *Watt* v. *Hoch*, 25 Pa. 411.

Messrs. **H. Maltzberger** and **A. G. Green,** for defendant in error:

It is charged that in the declaration in the first suit plaintiff avers possession in the tannery and claims damages to his possession; while in the latter he avers the possession to be in his tenant and claims damages to his reversionary estate. The answer is that we complain of the defendant's tortious acts; that they are still continued, and that they cause the same injury to the property affected as they did before; and as the suit extended back six years, so far as the plaintiff had possession during that time—which was a little over four years, the suit having been brought in January, 1885—he would be entitled to recover; and the evidence of the record of the former action would be confessedly appropriate and admissible.

Kilheffer v. *Herr*, 17 Serg. & R. 319; *Smith* v. *Elliott*, 9 Pa. 346; *Rockwell* v. *Langley*, 19 Pa. 502; *Casebeer* v. *Mowry*, 55 Pa. 419; *Coleman's App.* 62 Pa. 272.

In view of the continuance of the defendant's wrongful acts, the court was justified in instructing the jury to give such damages as would deter the defendant, although the amount should exceed the actual damage done.

3 Bl. Com. 220; Sedgwick, Damages, 6th ed. 162; *Williams* v. *Esling*, 4 Pa. 486–490; *Wheatley* v. *Chrisman*, 24 Pa. 298–302.

There was competent evidence to go to the jury of wrongful abstraction, diminution and corruption of the water, which clearly negatived the fact of a reasonable and proper use on the part of the defendant.

If the jury can apportion the damages occasioned by different *tort feasors* (*Seely* v. *Alden*, 61 Pa. 302) they might approximate the damages from different causes. If both lawful and unlawful acts contribute to foul the water and bring sediment into a dam, it is easy to see that while the lawful cause might require twenty years to fill it, in combination with other unlawful acts it might be filled in less than five.

The principle of *Wheatley* v. *Chrisman*, 24 Pa. 298, that "A proprietor of land over which a stream of water runs has, as against a lower proprietor, the use of only so much of the stream as will not materially diminish its quantity," is not yet obliterated from our law books.

Per Curiam:

The judgment in the former case was substantially for the diversion of the water of the same stream. It settled conclusively that the defendant below had no right to so divert it. If some other items of damage were considered in that case, it bears only on the measure of damages in this action. It does not open anew the question of right to so divert the water. The points submitted were correctly answered, and the evidence was fairly submitted.

Judgment affirmed.

Harvey TRAVIS *et al.*, *Appts.*,
v.
Elias LOWRY *et al.*

1. **Equity** will **not** interfere to **rescind** an **executed contract** when the parties have a full and complete remedy at law, especially if the interests of a third person are involved.

2. A **conveyance** of a farm worth $2,200, by a man seventy-seven years old, and weak in body and mind, to his son-in-law, in consideration of a promise, afterward fulfilled, on the part of the latter to take care of the grantor as long as he lived, and to bury him, **will not, in** the **absence of positive proof of fraud or duress,** upon the death of the grantor within a year after the conveyance, **be set aside at** the **instance of** his **heirs.**

3. In view of all the circumstances the **consideration** was **not** grossly **disproportionate** to the service which the son-in-law agreed to render, for he took the risk that the grantor would live to extreme old age. That it turned out otherwise, gave him an advantage rightly belonging to him.

(Argued Feb. 22, Decided March 14, 1887.)

JULY Term, 1886, No. 163, E. D., before Gordon, Trunkey, Sterrett and Clark, *JJ.*

Appeal from a decree of the Common Pleas of Lackawanna County, dismissing a bill in equity to set aside a conveyance. *Affirmed.*

The facts as they appeared before the Master, Henry S. Knapp, *Esq.*, were stated in his report, which was as follows:

"The plaintiffs are heirs at law of Enoch Hartman, who died at the house of his son-in-law, Elias Lowry, one of the defendants, upon the first day of January, 1881. The bill was filed upon December 10, 1884, and seeks to set aside the conveyance by Hartman of his farm, situate in this county, to the said defendant, Lowry.

"The bill recites that Hartman being the owner of a farm of sixty-seven acres of land, and being seventy-eight years of age and very weak and sickly both in body and in mind, was induced by the false and fraudulent representations of his son-in-law, Lowry (that the farm was heavily incumbered by judgments and mortgages, and that the creditors were about to cause it to be sold by the sheriff), to convey it to him, Lowry, upon his promise to pay off the debts; that Hartman died about four months thereafter, Lowry meantime taking possession of the farm by virtue of his deed, which possession he held until April 14, 1884, when, fearing that the plaintiffs were about to commence legal proceedings for the recovery of the property, he entered into a conspiracy with W. D. Spencer, the other defendant, to defeat their claims, and for this purpose conveyed the said property to said Spencer.

"The answer of Lowry denies all fraud or fraudulent representations upon his part to obtain the conveyance from Hartman; denies the fact of mental weakness on the part of Hartman, or that he was in any way incapacitated to make the conveyance, and denies any conspiracy with Spencer; but alleges a *bona fide* sale to Spencer for full consideration upon April 14, 1884, several years after the death of Hartman, and that Spencer paid him $500 in cash and gave him a mortgage for $2,000 to secure the balance of purchase money.

"The answer further alleges that the conveyance from Hartman to Lowry of August 28, 1880, by the terms of which Lowry agreed to maintain and support Hartman as a member of his family, as long as the said Hartman should live, and pay for necessary medical attendance and funeral expenses, and that in consideration therefor Hartman agreed to convey to Lowry his interest in the farm in question; that, in pursuance of said contract, Hartman lived with and was supported and maintained by said Lowry from the date of the contract until the time of his death about one year later.

"The answer of Spencer denies all the allegations of conspiracy between himself and Lowry, and alleges that he bought the property in good faith, for the sum of $2,500, of which sum he paid $500 in cash and gave a mortgage to Lowry for $2,000; that he had no notice of the matters of fraud alleged in the plaintiffs' bill at the time he bought the property from Lowry.

"It will thus be seen that the principal questions to be determined are these: 1. Was Lowry guilty of fraudulent conduct in obtaining the conveyance from Hartman; 2. Was Hartman incapacitated, by reason of mental weakness, disease and old age, to make a valid contract and conveyance of his interest in the land; 3. Did Spencer acquire his title with knowledge of the fraud by Lowry or incapacity of Hartman, if such fraud or incapacity existed?

"A question entitled to early consideration is whether the parties in interest are competent witnesses as to the matters arising before the death of Enoch Hartman, the grantor.

"The parties to the suit were all or nearly all of them sworn before the examiner, and their testimony was taken under objection. The thing in action is clearly the farm which was conveyed by the deed of Enoch Hartman; and the contract in action is the conveyance whose validity is contested; it is likewise clear that Enoch Hartman is the assignor of the thing or contract in action.

"Before the Act of 1869 the parties to the suit would have been incompetent to testify for any purpose. That Act does not apply to actions where the assignor of the thing or contract in action may be dead. The enabling Act of April 9, 1870, permits interested parties (who are excepted by the proviso to the Act of 1869) to testify to matters occuring since the death of the assignor of the thing or contract in action.

"This ruling will require the expulsion from the record of all testimony of parties in interest, as far as that testimony relates to matters transpiring, or existing before the death of Enoch Hartman.

"From the pleadings and so much of the testimony as appears to be admissible under the law, the following matters of fact are found:

"First, on the 13th day of June, 1872, J. M. Seamans and others, being the owners of a certain farm consisting of about sixty-seven acres of land, situate in the Township of Abington, in this county, contracted, by articles, to sell the same to Enoch Hartman for the sum of $3,000; Hartman took possession and made payments upon the purchase money until upon January 29, 1880, it was all paid except the sum of $600, together with about the sum of $30 accrued interest, the last payment upon the principal having been made in May, 1876. Seamans and others had assigned their interest in the articles of agreement which by various conveyances had become the property of William H. Stevens. A deed bearing date April 1, 1873, but not acknowledged until January 26, 1878, from Seamans and his cotenants to Hartman, was also in possession of Stevens to be delivered to Hartman when the purchase money was fully paid.

"Second, upon January 29, 1880, Enoch Hartman was nearly seventy-seven years of age, a widower, his wife having died nearly two years before, and the father of seven daughters, all of them married, four of whom, to wit: Eurah Travis, Christiana Evans, Sarah E. Mitten and Mary Brown, are plaintiffs in this suit, and one of whom, to wit: Emily Lowry, is the wife of Elias Lowry, one of the defendants in this suit; two of the daughters, to wit: Eliza Jane Peets and Malinda Cole, are not parties to the suit.

"At the time named Enoch Hartman had no other living children, but had two grandchildren, to wit: John H. Hartman and Christopher Hartman, sons of a deceased son, John Hartman, both of whom are also plaintiffs in this suit.

"Third, on the 29th day of January, 1880, Hartman entered into a written contract with Elias Lowry, one of the defendants and husband of Emily Lowry, before named, by the terms of which Lowry agreed to maintain and support Hartman during the term of his life and pay all expenses for medical attendance and burial; in consideration whereof Hartman agreed to convey to Lowry his interest in the farm mentioned in the first finding of fact. In pursuance of this contract Hartman became a member of Lowry's family, and so continued until he died upon the first day of January, 1881.

"At the time this contract was entered into Hartman executed an assignment of his contract with Seamans and others, and delivered the same to Lowry, and upon August 28, 1880, in further fulfillment of said contract, he executed and delivered to Lowry a deed of the said farm. Lowry took possession of the land and paid up the balance of purchase money to Stevens, receiving the deed of Stevens and others before mentioned, which with Hartman's deed to himself was recorded in the recorder's office of Lackawanna County, upon August 28, 1880.

"Lowry remained in possession of the farm until April 15, 1884, when he sold and conveyed it to W. D. Spencer, the other defendant, for the sum of $2,500, $500 in cash, and taking a mortgage for the balance.

"Fourth, for many years prior to his death Enoch Hartman was troubled by a disorder which some of the medical witnesses said was scrotal hernia, while by others it was denominated hydrocele, at any rate it had the appearance of a watery tumor in the region of the scrotum. It was so large that it might be observed when Hartman was fully clothed. This was annoying and uncomfortable at times, but was not especially painful and did not particularly affect his general health which was fair for a man of advanced years; he died of cardiac dropsy, and it is thought his heart must have been somewhat affected for a year or more before his death.

"Hartman felt very keenly over the loss of his wife, to whom he had been married very many years, and her death and the consequent breaking up of his home had a very depressing effect upon his spirits. He seems to have had difficulty in adjusting his domestic concerns to his liking after that event. He lived on the farm for a time without other companionship or help than a young girl whom he had taken to bring up. He then lived for a time with some of his sons-in-law. He rented the farm on shares for a time to his son-in-law, Isaiah Mitten, he occupying meantime a part of the house; during all this time he was frequently much depressed in spirits; bodily infirmities were advancing upon him; he was too old to work; his affairs were unsettled; the balance of unpaid purchase money upon his farm weighed upon his mind with a force exaggerated by his helplessness; he brooded over his troubles, and they grew greater to his mind, from too much contemplation; his intellect was weakened and somewhat disordered; his mind and memory were somewhat impaired. He did not, however, lose the use of his mental faculties; at the time he entered into the contract upon January 29, 1880, he had sufficient intelligence to understand the nature of the act he was performing and the consideration he was receiving therefor; It was his deliberate act, after mature consideration; he believed it to be the best disposition he could make of himself and his property.

"Fifth, it was not established in this case that Elias Lowry represented to Hartman that the farm was incumbered by judgments or debts of any kind and was about to be sold at sheriff's sale, nor that he made any false representations to Hartman whatever; nor is it established that he persuaded Hartman or induced him to enter into the contract of January 29, 1880, or exercised any undue influence over him.

"Sixth, the terms of the contract of January 29, 1880, were fully carried out upon his part by the defendant, Elias Lowry.

"Seventh, upon January 29, 1880, the farm was worth from $2,800 to $3,000: Hartman's interest in it was incumbered by about the sum of $630 unpaid purchase money. The rental value of the farm was about $175 per year.

"It now becomes necessary to consider the vital question in this case, and it is a mixed question of law and of fact, to wit: Was Hartman incapable, by reason of mental weakness, disease and old age, upon January 29, 1880, to make, with validity, the contract with Lowry, and also to ratify it by conveying the land upon August 28, 1880? Such contracts by aged persons, for their support and maintenance during life, have frequently been made; and in the absence of fraud or lack of contractual ability they will be sustained.

"Oftentimes the most beneficial arrangement a person, bereft of home comforts and desiring most of all a haven of peace and a rest from distracting cares, can make is to barter his small accumulation of property for a life support; justice requires that contracts of such persons should not be lightly set aside; for that is the period of life when they most need to be able to use freely, for their own support and comfort, that which in their stronger years they have been able to lay aside. The evidence falls short of establishing, in the mind of the Master, any degree of insanity whatever: and while there is evidenced a certain degree of weakess of body and mind, yet it is not shown that advantage was taken of such weakness.

"On behalf of plaintiffs it is strenously urged that the consideration was grossly inadequate, and that this circumstance establishes a presumption of fraud.

"If the consideration can be properly considered grossly inadequate, it would be a strong point against the defendant Lowry; but of this there seems to be great doubt. When the contract was made, the amount which Lowry was to pay was entirely unascertainable. It did not appear that Hartman was suffering from any malady which was likely to speedily terminate his life. What amount of care would have to be bestowed upon him, and for what period of time, how much medical attendance might he require? While such prudence and calculation are happily not usual elements in the relation of sturdy sons to their aged parents, yet these are questions which must be considered when measuring the adequacy of the price contracted to be paid by Lowry.

"Two thousand two hundred dollars would have been a fair price for Hartman's interest in the land at the time he entered into the contract, and this the Master believes he was willing, after due deliberation, to exchange for a life support and the payment of various necessary expenses. No person was dependent upon him for support; the contract was made with his son-in-law, in whom it may be supposed he had confidence, and in whose family it may be supposed he desired to spend the remainder of his life. Viewed as a purely business matter, it can hardly be said the contract was grossly inadequate; no effort was made, either by himself or any of his friends, to avoid it during his lifetime, and it was faithfully carried out by Lowry.

"Under the whole showing the Master does not consider that justice requires the deed to be set aside at this late day.

"The Master finds the following matters of law: 1. General weakness of mind not amounting to insanity, will not, of itself, be sufficient to avoid the deed of its subject; 2. If a grantor, when making a deed, understands the nature of the act and its effect, and knows the consideration, and there is no fraud on the part of the grantee, the deed will generally be sustained; 3. Under all the facts shown in this case, the plaintiffs are not entitled to a decree setting aside the deed of Enoch Hartman; 4. The bill filed in this case should be dismissed."

To this report various exceptions were filed by the plaintiffs. Upon overruling the exceptions and confirming the report, ARCHBALD, *A. L. J.*, after reviewing the facts, delivered the following opinion:

"Unless undue influence, fraud or imposition appears in the case, or a relation of confidence is established between the parties, as the evidence shows that Hartman was of sufficient mental capacity to understand his acts and the effect of them, according to the decisions in Pennsylvania, the agreement is not one which equity will disturb.

"In *Kelly's Appeal*, 15 Pittsb. L. J. 323, the plaintiff had transferred to his nephew all his property upon mere verbal promises of maintenance and trust, and himself brought a bill to rescind the arrangement. *Mr. Justice* Gordon, commenting upon the case, says: 'On the ground of inadequacy of consideration, he (a chancellor) might interfere to protect one who had improvidently agreed to devest himself of all his property on a mere oral promise of maintenance. But it is otherwise with an executed contract. Inadequacy of consideration alone will not induce a chancellor to rescind such contract. *Graham* v. *Pancoast*, 30 Pa. 89; *Aiman* v. *Stout*, 42 Pa. 114.

" 'Nor according to the same authorities will mental weakness, when not sufficient to prevent a comprehension of the contract, nor mere hardship, warrant a rescission. As to the case in hearing, the court below agrees with the auditor, that there was neither such mental incapacity on the part of the grantor as would of itself avoid his deed, nor was there evidence of actual fraud on the part of the grantee. But the case is put on the ground of constructive fraud; and *Judge* Story is quoted as saying that equity will grant relief in cases where a confidence has been reposed, and that confidence has been abused. But such abuse of confidence is rather an actual than a constructive fraud. Constructive fraud is a legal implication and depends neither upon the good or bad faith of the contracting parties, as between themselves.

" 'Here, however, admitting the ability of the one party to contract, and the good faith of the other in accepting the benefits conferred upon him by the contract, and there is no room for the intervention of a legal policy, since by the transaction no implication can arise of the infraction either of law or public policy. We know of no obstacle, legal or moral, in the way of one who is of sane mind and free of debt, making a gift of a part or the whole of his property to another, much less in his transferring it in consideration of maintenance.'

"In *Graham* v. *Pancoast*, 30 Pa. 89, it is thus said by Strong, *J.*: 'The power of a chancellor to decree a rescission of a contract, and order its surrender, though undoubted, is one of the most delicate powers which he is ever called upon to exercise, and is never to be put forth except in a clear case. It is not sufficient to put him in motion that suspicion and distrust have been thrown over a transaction. In such a case he will move neither to rescind nor to decree its specific performance. * * * Inadequacy of price, improvidence, surprise, and mere hardship, have each been held sufficient to stay the active interposition of a chancellor. Yet no one of these, nor all combined, furnishes an adequate reason for a judicial rescission of a contract. For such action something more is demanded, scuh as fraud, mistake or illegality. In the present case the bill of the complainant charges that the contract was obtained by fraudulent representations from an old man physically and mentally imbecile, and that the price agreed to be paid for the property was grossly inadequate. It may be observed that the false and fraudulent representations specifically charged in the bill are but two: that the lots bargained to be sold were of the value of $5,000, and no more, and that they were in danger of being sold for taxes. Neither of these alleged representations is supported by any evidence in the cause, and they are denied in the answer. Nor, if they had been proved, are they such representations, as if false, are fraudulent. They are not such as would reasonably have been relied upon by Graham, and they constituted no material inducement to his entering into the contract. There is no relation of confidence between the vendor and vendee. In regard to the value of the lots and their liability to sale, both parties had equal means of information: and when that is the case, a representation, though undue, will not be considered fraudulent.'

"Appropriate quotations illustrating the same principles, might also be taken from *Nace* v. *Boyer*, 30 Pa. 99, nd *Hetrick's App.* 58 Pa. 477, but they would swell this opinion to an inordinate length.

"In the case of *Dean* v. *Fuller*, 40 Pa. 474, an extreme position is taken by our supreme court, which I do not believe the court, as at present constituted, if brought to the test, would again take. The decision fails to recognize, in my opinion, the relation of confidence which existed between the contracting parties; or as said by the learned American editor of Leading Cases in Equity (Vol. 2, p. 1211), the error 'seems to have been in analyzing that which should have been considered as a whole. Jackson's advanced age, distress and weakness, Fuller's position as a confidential friend, and that he was present at and directed the preparation of the instrument of gift, were circumstances which, in the aggregate, threw the burden of proof on him, though each of them might have been inadequate if standing alone.'

"I refer to the case mainly to show that the general leaning of our highest court has not been in the line of the cases to which counsel for plaintiffs have referred me.

"Beyond our own State somewhat similar limitations upon the equitable doctrine under consideration are to be found in *Howe* v. *Howe*, 99 Mass. 88; *Harrison* v. *Guest*, 6 DeG. M. & G. 424, and *Greer* v. *Greers*, 9 Gratt. (Va.) 332.

"At the same time there are other authorities which go far to sustain the plaintiffs' case. Thus in *Allore* v. *Jewell*, 94 U. S. 511 [Bk. 24, L. ed. 264], it is said by *Mr. Justice* Field: 'It may be stated as settled law that, whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside.'

See also *Harding* v. *Handy*, 11 Wheat. 103 [24 U. S. bk. 6, L. ed. 429]; *Seeley* v. *Price*, 14 Mich. 541; *Whelan* v. *Whelan*, 3 Cow. 537.

"In 2 White & T. Lead. Cases, Eq. part 2, ed. 1877, p. 1233, it is said: 'Another and not infrequent form of undue influence is where one whose mind has been enfeebled by age or disease, or who truly or erroneously considers himself unfit for the transaction of business, enters into a negotiation with a friend or relative, which results in a transfer of his property subject to a trust or in consideration of an agreement to provide for his support. * * * From the very nature of such a transaction, confidence is reposed by one party and accepted by the other; and the conveyance will not be allowed to stand, unless the grantor proceeds understandingly, deliberately, and of his own accord, nor if it appears that the grantee gained an undue advantage at the expense of the donor, or of those on whom the property would have devolved in the ordinary course of events.'

"I would cheerfully apply the somewhat broader doctrine of these latter authorities to the case in hand, if I did not feel myself controlled by those which I have cited from our own reports. There are many circumstances which warrant the suspicion that the transfer by Hartman was not his own free act, and no direct evidence to show that it was. The testimony of Mrs. Stevens comes nearest to establishing this; but the statements of Hartman to her, after all, amount to no more than an assertion of what he intended to do. They throw little light on how that intention was produced, which always lies at the root of the question of undue influence.

"The conclusion of the master in his fourth finding of fact, that it was Hartman's deliberate act, after mature consideration, and that he believed it to be the best disposition he could make of himself and his property, I do not think has sufficient support from the evidence; and I would therefore strike it out. But this makes no material difference. The specific charges of fraud and imposition, in the bill, are met and denied by the answer; and no competent proofs are adduced to overcome such denial.

"The case then stands thus: under the authorities to which I have first above referred, and others, it is established that where no fiduciary relation is shown between the contracting parties, some element of actual fraud or imposition must be proved. But the case must proceed on one or the other of these grounds. If there was any confidential relation between the parties, then on the ground of public utility the grantee is not allowed to take any benefit to himself from the transaction, without showing the entire fairness of it, and that it was the deliberate and well formed purpose of the grantor's mind after full advice from some indifferent source. The burden in such case is upon the party seeking to sustain the transfer. He must show that the benefit he will derive from it was clearly understood and intended by the grantor. It is to be supported, not as a contract, but as a gift.

"But that is not this case. There is no charge in the bill of any fiduciary relation between Hartman and Lowry at the time of the contract, or even of the deed, although the distinction between these is not material. Nor is this made out by the proofs. The most that can be said is that out of the relations of the parties a certain amount of confidence and dependence might spring. It would be natural and proper that it should. I confess that at first I was inclined to consider this as sufficient, and so require of the defendant a corresponding burden of proof. It is difficult to resist the thought that such a course would more nearly comport with justice, and that the opposite may legalize a fraud. But after a full consideration of the question, I am constrained to hold that something more than this is required, to establish the confidential relation upon which the rule in equity is based. There must exist some close relationship of blood or marriage, as of parent and child, or husband and wife, or a special relation of confidence, in accordance with which one party has customarily resorted, or does at the time resort, to the other for direction and advice in business or other intimate personal affairs. In either of these cases a dependence of the one mind upon the other necessarily results, and equity will not allow that it shall be used by the one party for his own selfish ends. To guard against this it is presumed in a matter of advantage to the one that the mind of the other has been unduly influenced and controlled.

"But the present case does not fall within these lines. It does not appear that the relations between Hartman and Lowry were in any way intimate prior to the time of the transfer. Hartman was not dependent upon his son-in-law in any way; so that we have the mere relationship by marriage, out of which to imply a confidential relation. Standing by itself it does not seem to be sufficient.

"The case then falls back upon the charge of influence unduly produced by misrepresentation and fraud. While, as I have said, there are some things to arouse a suspicion of imposition upon the mind of this feeble old man, it is hardly necessary to say that the court must have something more tangible than that to act upon. Moreover, it is denied in the answer; and upon that denial the defendant has a right to stand.

"The charges, therefore, in the bill upon which the case is made to depend, are not made out, and the proceedings must be dismissed.

"In accordance with the views expressed in this opinion, I will sustain the fourth and thirteenth exceptions of the plaintiffs; but this does not affect the result.

"Let a decree be drawn dismissing the bill, in accordance with the recommendations of the master, with costs."

The assignments of error specified the action of the court in holding that a relation of confidence had not been shown to exist between the parties in this case; in holding that because the intimate relation of the parties had existed for only a short time, it could not be treated as evidence warranting the inference of undue influence; in holding that there was no adequate evidence of actual fraud in this case to set aside the conveyance; in refusing to set aside the conveyance as prayed in the plaintiffs' bill of complaint; and in dismissing the plaintiffs' bill.

Messrs. **H. M. Hannah** and **C. H. Soper,** for appellants:

A transaction of this kind requires full and complete proof of fairness and honest dealing on the part of the person who is to profit by such a conveyance.

Darlington's App. 86 Pa. 512.

In the case of *Boyd* v. *Boyd,* 66 Pa. 283, no blood relation existed between the parties; they were merely friends and acquaintances who had done business for each other; and yet the court regarded it as a case where the beneficiary under the will should be called upon to assume the burden of proof and show the complete *bona fides* of the transaction.

In *Cuthbertson's Appeal,* 97 Pa. 163, the same doctrine was reasserted and very clearly defined; and the law as there settled requires an explanation from the defendant which he has not made nor undertaken to make.

In *Wilson's Appeal,* 99 Pa. 545, the person benefited by the will was an associate and friend, but he could scarcely be supposed to have more influence than a daughter and a son-in-law. And yet the court, quoting the decision in *Cuthbertson's Appeal,* says: "He (the beneficiary) must make it clearly appear that the gift to him was the free and intelligent act of the testator."

A court of equity will, in favor of heirs, relieve against a contract and sale of real estate, where there has been great disparity in the mental capacities of the contracting parties; and where the inadequacy of the consideration was so gross as to leave no doubt that the vendor must have been laboring under the effect of some strong delusion in his own mind in relation to the subject; although the grantor was not, strictly speaking, a *non compos mentis,* and although it does not strictly appear that the bargain was induced by false and fraudulent affirmations on the part of the purchaser.

Chitty, Cont. 10th Am. ed. p. 757.

Where the vendor was a man of a weak and eccentric disposition, and at the time of the sale was without the assistance of a disinterested legal adviser, there exists in the whole case such an inequality between the contracting parties that it is impossible for the court to recognize the claim of the defendant to hold the property for anything more than the money he has advanced upon it.

Buswell, Insanity, 286, note.

While the contracts of persons not idiotic and not mentally diseased are not void because of weakness of understanding, yet when one undertakes to deal with such a person he is justly held to be under more than the usual obligation to abstain from deception; the court will regard such transactions with a jealous eye, and if it can see the least speck of imposition, or that the donor is in such a relation to the donee as may naturally give him an undue influence over him, in a word, if there be the least scintilla of fraud, a court of equity will interpose.

Cooley, Torts, 515, 516.

Inadequacy of consideration, the presence of hard and disadvantageous stipulations, or the mere fact that a right or advantage has been given or conceded, without an equivalent, will be a sufficient warrant for the interference of equity, when the weakness of the complainant, or the position held by the respondent, makes it the duty of the one to take that care of the other which the latter is unable to take of himself, although there be no actual fraud or the exercise of undue influence.

Huguenin v. *Baseley*, 2 White & T. L. Cas. Eq. part 2, 1156.

The case of *Harding* v. *Handy*, 11 Wheat. see note, 103 (Bk. 6, L. ed. 429), is a case where the parties to the conveyance bore the same relation to each other as in the case at bar, that of father-in-law and son-in-law; and yet the court treated it as a case coming within the rule, and the conveyance was set aside.

So in *Allore* v. *Jewell*, 94 U. S. 506 (Bk. 24, L. ed. 260).

The defendant's haste in offering the property for sale and selling it exhibits clearly that he was uneasy at what he had done and was anxious to get it out of his hands to prevent the heirs from asserting their rights.

Mr. **Lemuel Amerman,** for appellee, Lowry:

Nothing but very clear error will justify an appellate court in setting aside a master's finding of fact.

Burton's App. 93 Pa. 214.

Where the master's findings of fact are approved by the court below, an appellate court will not set them aside, except for the clearest error.

Kisor's App. 62 Pa. 428; *Phillip's App.* 68 Pa. 130; *Sproull's App.* 71 Pa. 137.

Nothing but fraud or palpable mistake is ground for setting aside an executed contract; and the evidence of these must be clear, precise and indubitable, and of that which occurred at the execution of the instrument.

Stine v. *Sherk*, 1 Watts & S. 195; *Irwin* v. *Shoemaker*, 8 Watts & S. 75; *Davidson* v. *Little*, 22 Pa. 245; *Graham* v. *Pancoast*, 30 Pa. 97; *Geddes App.* 80 Pa. 442; *Cummins* v. *Hurlbutt* and *Bierer's App.* 92 Pa. 165, 265; *Richard's App.* 39 Legal Int. 402; *Lynch's App.* 97 Pa. 349; *Nulton's App.* 103 Pa. 286.

The difference between the facts and circumstances necessary to move a chancellor to refuse the execution of a contract, and those necessary to induce him to rescind it is: In one case interposition will be refused on the ground of improvidence, surprise or even mere hardship; on the other a court will act only on the ground of fraud, illegality or mistake.

Yard v. *Patton*, 13 Pa. 278; *Rockafellow* v. *Baker*, 41 Pa. 319; *Edmond's App.* 59 Pa. 220; *Stewart's App.* 78 Pa. 88; *Lynch's App.* 97 Pa. 353.

Neither inadequacy of consideration, hardship, nor mental weakness not amounting to inability to comprehend the contract, when unaccompanied by evidence of imposition or undue influence, furnishes any ground for equitable interference in setting aside an executed contract.

Graham v. *Pancoast* and *Nace* v. *Boyer*, 30 Pa. 97, 99; *Aiman* v. *Stout*, 42 Pa. 114; *Kelley's App.* 32 Pittsb. Legal J. 328.

Under the facts in this case the court would not set aside even an unexecuted contract.

Hetrick's Appeal, 58 Pa. 477, was the case of a man who was eighty-six years of age, alone in the world, infirm in body, and feeble and weak in mind, conveying his entire estate, a house and lot worth $600, to the wife of an insolvent man, by deed in fee simple, upon the insolvent's agreement for his maintenance for life. He, himself, before the contract was fully executed, prayed the court to set it aside. The court dismissed his bill.

Mr. **M. E. McDonald,** for appellee, Spencer:

The plaintiffs charge Spencer with knowledge of the matters charged against Lowry, and also that Spencer had colluded with Lowry to defraud the plaintiffs.

This allegation is fully, specifically and absolutely denied by Spencer, in his answer and also in his testimony before the examiner.

This put the plaintiffs to the proof of the matters alleged in their bill and thus denied, by two competent and credible witnesses, or one witness and circumstances equivalent to a witness.

Campbell v. *Patterson*, 95 Pa. 447.

They have absolutely and utterly failed to do this.

Lowry was in possession of the farm from January, 1880, until April 14, 1884, when Spencer bought it.

There were no proceedings instituted, nor was there any notice given that the plaintiffs had or claimed to have any interest in the farm whatever.

Vigilantibus non dormientibus leges subveniunt applies in equity as well as at law.

Slemmer's App. 58 Pa. 168.

Equity will not aid those against one who has been misled by their laches.

Coates v. *Gerlach*, 44 Pa. 43.

Per Curiam:

The court below did well in dismissing the plaintiffs' bill. A chancellor ought not to interfere to rescind an executed contract when the parties have a full and complete remedy at law; and the more so in a case like the present where the interests of a third party are involved. Moreover, the complainants' case is unsupported by facts.

Enoch Hartman did, as he had a right to do, the best possible for himself, in providing for his own welfare in his old age; and Lowry's bargain turned out to be a good one, only because the old man died sooner than was expected. We agree with the master that the consideration received by Lowry, in view of all the circumstances was not grossly disproportioned to the services which he agreed to render; for he had to run the risk of Hartman's living until extreme old age had made him a serious and costly charge. That it turned out otherwise was an advantage rightly belonging to Lowry, and not to Hartman's heirs.

Decree affirmed and appeal dismissed, at costs of appellants.

Charles BRODHEAD, Admr., *Appt.*,
v.
Stephen D. HELLER

Stephen D. HELLER, *Appt.*,
v.
Charles BRODHEAD, Admr.

The **heirs at law** of an intestate decedent **agreed** in writing **that** (as they had apportioned the real estate of said decedent among themselves and as his widow had not made any claim for dower) **so long as** the **widow** should **make no claim for dower, each** heir **should pay her annually a certain sum,** etc., and that when the widow should claim dower the payments should cease; and provided that "nothing herein contained and no receipt by her (the widow) of any of the above mentioned payments shall be any bar to her application for such dower, but such payments shall be claimed as a credit on the amount of dower which may be claimed." The widow accepted this agreement and died without having claimed dower. **One of** the **heirs paid** the widow **only a part of** the **amount stipulated** to be paid by him, and in no year paid the full sum stipulated. **After** the **widow's death her administrator brought suit for** arrearages of **dower against one who had purchased** a portion of said real estate **from said heir.** *Held*,

(*a*) That the **widow did not waive** her **right** under the law by receipt of payments under said agreement, nor was there any reason under the facts of the case why she should not recover all statutory arrears, subject to a credit as stated in the agreement.

(*b*) That the **contract repels** an **inference** that the **widow released** the whole or any part of the amount due her, unless in case of actual payment as agreed.

(*c*) That as the claim in suit relates only to a separate tract now owned by the defendant, and as the rule is that each purpart is to be separately appraised in ascertaining the value of the widow's estate, the **recovery** herein was properly **measured by one third** the **annual** value of the **rents,** issues and profits **of** the **particular land in suit,** without reference to the value of other lands of the deceased husband.

(*d*) That the facts failed to establish an **estoppel** against the widow's right to assert her claim to dower in the land in suit.

(*e*) That said **heir** was **incompetent to testify** to matters which occurred between himself and the widow in her lifetime.

(*f*) That as said heir took other lands besides the tract in suit, the value of which other lands equalled that of the tract in suit, the **purchaser** from him (the present defendant) was only **entitled to a credit** of not more than one half of the amount paid to the widow by said heir.

(Argued March 11, Decided March 28, 1887.)

JANUARY Term, 1887, Nos. 281, 315, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Cross appeals from a decree of the Common Pleas of Northampton County, in an action to recover arrearages of dower. *Modified and affirmed in the first appeal. Affirmed in the second.*

Bill in equity filed by Charles Brodhead, as administrator of Catherine Shimer, against Stephen D. Heller to recover arrearages of dower, in a certain tract of land, of seventy-eight acres and seventy-eight perches, in Hanover and Bethlehem Townships.

The case was referred to Robert T. Jones, Esq., as master, before whom the facts appeared as follows:

Conrad Shimer died in Hanover Township April 30, 1866, intestate, leaving a widow, Catherine, and three children, Samuel C., Asher D., and Camilla M. No letters of administration were taken out, and his estate was amicably divided among his children, who, on December 10, 1866, entered into the following agreement in writing:

"*Whereas*, Samuel C. Shimer, Asher D. Shimer and Camilla M. Brodhead, children and heirs at law of Conrad Shimer, deceased, have this day apportioned the real estate of the said decedent among themselves; and *whereas*, Catherine Shimer, widow of said decedent, has not made any claim for any dower out of said real estate, now the parties, above named, hereby agree with each other that so long as said Catherine shall make no claim for dower they will each of them pay annually to the said Catherine during life as follows, to wit: the said Samuel the sum of $200 annually; the said Asher the sum of $100 annually, and the said Camilla the sum of $200 annually, the said amounts to be paid half yearly, and to be paid into the Dime Savings Bank, of Bethlehem, or such other bank as said Catherine may require, on the first Monday of January and July of each year to the credit of the said Catherine Shimer, commencing with the first Monday of January next, 1867; and nothing shall be considered a payment within the meaning of this agreement, unless the money shall have actually been deposited in such bank; and if the same shall not be paid at the days and times set by any of the parties hereto, any one of the parties, having paid his or her share, shall have authority, and is hereby authorized to bring suit in his or her own individual name as agent and for the use of the said Catherine Shimer, and recover the same as debts of like amount are recoverable by law; and this agreement shall have sufficient power and warrant for such suit; and the said Asher Shimer hereby covenants and agrees in consideration of the larger share of the estate, which he has obtained, that the said Catherine Shimer shall have the exclusive use, occupation and control of the brick house wherein she now resides without payment of rent or other charge during her life; that he will also furnish her with such flour, feed, grain, potatoes and such other farm produce as she has been accustomed to receive from the farm during the lifetime of her husband; that she shall also be permitted to take such eggs and poultry for her own use as she has been accustomed to do in the past, or keep her own poultry along with the said Asher and have them fed as heretofore; that he, the said Asher, will keep two cows for her, giving them yard and stable room and pasture them in the summer, and feed them in the winter in the same manner as he keeps and feeds his own; that he will also furnish her with a safe and comfortable horse and carriage for visiting and other purposes; that he will always keep her provided with good, dry wood, prepared for the stove, and of a quality fully equal to that which is used in his own house, and delivered at the place where she was accustomed to get it during the lifetime of her husband; that her friends and visitors shall always have ready and convenient access to her house by the ways commonly used, and that stabling shall always be provided for her guests and visitors; that she shall at all times have free access to and joint use of the spring house and summer and wash kitchens as in the past, and shall in no way be restricted therein; that he will in the proper season in each year furnish her with three hogs, killed and dressed, and weighing from 250 to 300 pounds each; that he will wagon such coal as she may purchase at the most convenient depot or coal yard to her house, and have the same put in its proper place as she may properly request; that she shall also have the same portion of the garden that she has been accustomed to have, and shall have it manured as in the past, that she shall have the privilege of as much fruit as she may desire from the orchard on the farm for her own use.

"If Mrs. Shimer moves out of the house then Asher is to have the use of it until she may wish to move back.

"Whenever Catherine Shimer shall claim her dower at common law then these payments and privileges shall cease, but nothing herein contained and no receipt by her of any of the above mentioned payments shall be any bar to her application for such dower; but such payments shall be claimed as a credit on the amount of dower which may be claimed. And in the event of claim being made on the 318 acres of the homestead farm, this day conveyed to Asher Shimer, for the dower of the said Catherine, the said Camilla M. Brodhead hereby agrees to pay so much thereof as may be chargeable upon $12,285 worth of said farm, valuing the woodland at the sum of $200 per acre and the farm at $150 per acre, that amount having been paid by the said Asher D. Shimer to the said Camilla M. Brodhead in consideration of her releasing her interest in said farm, and he being entitled to be relieved of any claim for dower to that extent.

(Signed) Sam. C. Shimer,
A. D. Shimer,
Camilla M. Brodhead.

Dated December 10, 1866."

After entering into the above agreement the said Asher D. and Camilla M. executed conveyances to Samuel C. Shimer of six tracts of land of the estate of Conrad Shimer, including the land in question, which was worth about as much as the five other tracts combined.

Samuel C. did not comply with his agreement, having only paid to the widow $250, at different times and in smaller sums than stipulated. In the year 1870 he executed a mortgage of $6,000 to the Society of the United Brethren for Propagating the Gospel Among the Heathen. From their minutes it appeared that Samuel C. represented that there were no liens on the premises, and it was on the faith of such representations that the society gave him the money and took his bond and mortgage.

In 1879 a judgment was entered against him which became a lien on such property, subsequent to the mortgage to the society, and the property was advertised for sale October 11, 1879, at which sale the following notice was read:

"To all bidders at the sheriff's sale of the real estate of Samuel C. Shimer:

"Take notice that I, Catherine Shimer, widow of Conrad Shimer, deceased, am entitled to and shall claim my statutory dower and thirds of such widow in the lands and tenements late of the said Conrad Shimer, deceased, and now about to be sold as the property of the said Samuel C. Shimer; that I have received no part of the said dower and thirds and claim the same from the time of my late husband's death to the time of payment thereof, and with interest thereon according to law.

(Signed in German)
Catherine Shimer.

Bethlehem, October 4, 1879."

At such sale the property was purchased by Isaac Treible for the consideration of $50, subject to the mortgage of the society. December 4, 1879, Treible sold the premises, to Stephen D. Heller, the defendant, for the consideration of $1,000, subject to the aforesaid mortgage.

Heller testified at the trial that shortly before buying of Treible he called upon the widow Shimer relative to her claim for dower.

He asked her what her claim was on Sam's property for dower; and she said that she wanted nothing—that he should go to Sam, and as he made it she would be satisfied. He said he would like to buy the land but would not like to have a lawsuit, and that he intended buying the farm Sam had owned. She said there would be no lawsuit about it, and that he should buy the farm, and that her husband always said it was a good piece of property.

Heller testified that on the faith of what Mrs. Shimer said he bought the land from Treible. There was also testimony of conversation by the widow Shimer with other parties, that she would claim no dower out of any of the land which had belonged to Samuel.

Shortly after the purchase by Heller he paid the mortgage of $6,000 and the accrued interest.

The widow Shimer died May 9, 1881, never having made any demand on Heller for dower or interest. Charles Brodhead, the plaintiff and husband of Camilla M., took out letters of administration, and brought this action against Heller, to recover arrearages of dower.

The defendant contended before the master that at the time of the agreement of December 10, 1866, and the partition of lands of her deceased husband, the widow relinquished her claim to dower and accepted in lieu of such dower and as a substitute for her claims the aforesaid agreement, and that by her declarations, on the strength of which the defendant purchased the farm and paid the aforesaid mortgage, she was estopped to claim dower.

The master held that the widow was no party to the agreement between the children; that under the law she had an estate in the land which could not be devested except by a conveyance or by such conduct on her part as would amount to equitable estoppel; that the mere fact that the children agreed to pay her a certain annuity in lieu of dower, and that she took the money, does not in law affect her claim; that the evidence of Heller as to the declarations of the widow Shimer were incompetent because of her death, and that the conversations with other parties relative to her claim for dower, made after Heller had bought would not amount to an estoppel, for both Heller and Knecht (another purchaser) had already acted, and although Heller paid for the mortgage afterwards, he had already agreed to do this, having bought subject to it.

The master took evidence as to the rental value of the premises, and allowed the sum of $133.33, annually, from April 30, 1866, to May 9, 1881, fifteen years, amounting to $1,999.95, less the sum of $250 paid by Samuel C. to the widow. Exceptions to this report were filed by both parties; they were dismissed, and the report of the referee confirmed by the court below. Both parties appealed.

Brodhead assigned as error: 1, the action of the court in estimating the dower upon the basis of one third of the annual rents, issues and profits instead of one third of the annual interest upon the estimated value of the land; 2, in not allowing the interest on the same sum found due, from the time of the death of the widow; 3, in deducting from the amount found due the plaintiff the sum of $250.

Heller assigned as error the action of the court in dismissing the following exceptions to the master's report:

1. The master erred in holding: "So far as concerns the question before the master, it is not material whether Samuel owned other land than the seventy-eight acres and seventy-eight perches, because the bill only seeks to have the statutory dower set apart so far as the Heller tract is concerned."

2. The master erred in holding: "The widow was no party to the agreement between the children." He should have found that she accepted under the agreement and had her living under it, until Samuel was sold out by the sheriff.

3. The master erred in holding that Catherine Shimer was not estopped by reason of her declaration made to Knecht, on the ground that "both Heller and Knecht had already acted, and although Heller paid for the mortgage afterwards, he had already agreed to do this because he bought subject to it." He should have held that Heller was not bound to pay the mortgage, and would have declined to pay it, had he not relied on Mrs. Shimer's statement, communicated to him by Knecht, that she would claim no dower in any of the lands that belonged to Samuel.

5. The master erred in holding that it was of no importance that in case the plaintiff recovered, distribution would be made to Samuel C. Shimer of his share in his own debt."

6. The master erred in holding that: "The declarations of Samuel C. Shimer to parties from whom he borrowed money, are clearly inadmissible to affect the question arising in this controversy." He should have held that Samuel's mother had always referred all inquiries about dower to Samuel; that she had record notice that Samuel had incumbered the farm with a $6,000 mortgage, and was bound by all that Samuel said about the dower.

9. The master erred in not finding that Samuel C. Shimer's children are in equity estopped from recovering in this suit, money which their father was bound to pay.

10. The master erred in deciding that Samuel C. Shimer was not a competent witness on the call of the defendant.

8. The master erred in not dismissing the bill, at the costs of the plaintiff.

7. The master erred in finding that the rent, issues and profits of the Heller farm amounted to $400 per year, giving the widow $133.33 each year. If there were any dower chargeable, it would be a proportionate share of $200 per annum for the six tracts; and then it would begin to run only from the time that Heller bought the land, and had the yearly income, or from the time that Mrs. Shimer abandoned her claim under the agreement and made her claim against the land.

Mr. **Fred Green,** for Brodhead.

Mr. **W. E. Doster,** for Heller.

Mr. Justice **Trunkey** delivered the opinion of the court:

Upon the death of Conrad Shimer, intestate, his widow became entitled to the use of one third of his real estate during life. She was not a party to any instrument which devested that estate; and it may be noted that in the agreement signed by the heirs, dated December 10, 1866, they call her estate dower, and speak of her claim of dower at common law; but the agreement considered in its entirety reveals no intent to change her estate, or deprive her of remedies to which she was legally entitled. This cause must be considered with reference to the right of the widow, defined by statute.

The contention of Heller is that the widow accepted the agreement, and is bound by its terms. That we think is correct; and the first inquiry is, What are the terms relating to herself? At the outset it is stipulated that so long as the widow shall make no claim for dower, each heir shall pay her annually a certain sum, and one of them shall allow her to occupy a house and furnish her specified articles, with permission to enjoy definite privileges. And it is finally stipulated that when the widow shall claim her dower the payments and privileges shall cease, and "Nothing herein contained and no receipt by her of any of the above mentioned payments shall be any bar to her application for such dower; but such payments shall be claimed as a credit on the amount of dower which may be claimed."

Thus it is expressed that she may claim her dower, and whenever she shall claim it, the prior payments shall be a credit. There is no room for implication that by receipt of the payments she waived her right under the law; nor is there any reason in the facts of this case why she should not recover all arrears, subject to a credit as stated in the agreement. It is unnecessary now to consider the question whether, had the annual payments been made, the widow could recover for the years covered by the payments. The contract repels an inference that the widow released the whole, or any part of the amount due her, unless in case of actual payment as agreed.

It is not the intendment that the widow must demand her legal right in all the lands of which her husband died seised, if she elected to do so in the land taken in severalty by one of the heirs. In making the division the value of the widow's interest was not ascertained. She continued to be entitled to her estate in each portion; and it is evident that each heir was to satisfy her, or hold his portion subject to her estate.

Heller claims that if the widow was entitled to dower in his land, to ascertain the amount due it is necessary to ascertain the value of all the lands of which her husband was seised at the time of his death, and determine the amount by the proportion of the number of acres in his tract to the number of acres in all said lands. But such is not the statutory rule for ascertaining the value of the widow's estate.

The inquest shall divide the real estate into as many purparts as there are heirs, if it can be done without prejudice; and if that cannot be done, then to divide the real estate into as many purparts as can be, without prejudice to the value of the whole, and make a just appraisement of each. And the heir who accepts, shall pay the widow the interest on one third the appraised value, or the amount of his bid if he bid higher than the appraisement.

Not until the Statute of 1867 was the court authorized to decree that the share or purpart of the widow in the whole of the decedent's real estate, where it consists of several tracts, shall be charged on one or more of the tracts, and the others be discharged. That Act makes no change in the rule that each purpart shall be separately appraised.

The widow might have compelled partition, and valuation of the real estate. Instead, she acquiesced in the agreement of the heirs which recognized her right, as already noted. That she could, under the circumstances, maintain a bill in equity, to recover the sum due on her statutory estate, was decided in *Merrill's Appeal*, 16 W. N. C. 491.

Her administrator has the same remedy. This claim relates to a separate tract now owned by Heller. The owners of other tracts are in no way jointly liable with him. Nor does it concern him whether any other person shall be compelled to account for the widow's interest in the land. In any form of procedure, either a separate appraisement of this tract would be made, or the rental value thereof ascertained.

In *Merrill's Appeal* the sum demanded was measured by one third the value of the rents, issues and profits; and this seems a just basis where all the interested parties, by neglect or agreement, omitted to avail of the statutory proceeding for partition and appraisement. If the widow wanted more than one third the rental value of the land, she should have enforced partition. Although her right remained unimpaired by the contract, she had no disposition to assert it until the land was about to be sold by the sheriff. To have proceeded then for partition would not have availed for recovery of anything prior to commencement of the proceeding. We are not convinced that the master and court below erred in ascertaining the amount of arrears due the complainant. Nor are we persuaded that the ruling relative to interest, under the circumstances, is erroneous. The first and ninth assignments in Heller's appeal, and the first two assignments in the administrator's appeal, are not sustained.

We think the master rightly failed to find the alleged estoppel. The testimony was insufficient to establish it.

Nor was there error in ruling that Samuel C. Shimer was incompetent to testify of matters which occurred between himself and the widow in her lifetime. None of the assignments in Heller's appeal are well taken.

In the appeal by the administrator, the third assignment must be sustained. Samuel C. Shimer paid $150 in 1869, and $100 in 1870; in no year did he pay the widow the sum stipulated in the contract. He took other lands besides the tract described in the bill. Fenicle's testimony shows that the value of the other lands fully equals the value of Heller's tract. Therefore, Heller is entitled to a credit of not more than half of what Shimer paid, and the decree must be corrected by adding $125 to the sum due the complainant.

In the appeal of Brodhead, administrator, it is now considered and decreed that the decree of the court below be corrected by striking out the words "one thousand seven hundred and forty-nine" and inserting instead thereof the words "one thousand eight hundred and seventy-four." The appellee, Stephen D. Heller to pay the costs. Record remitted.

In Heller's Appeal—Decree affirmed and appeal dismissed, at costs of appellant.

Frank S. BERNHART *et al.*, Trading as Bernhart & Koch, *Plffs. in Err.*,

v.

Agnes MITCHELL.

1. Where a **wife claiming** as her own, **in sheriff's interpleader,** personal property taken in execution by her husband's creditors as his property, relies for her title on desertion by her husband and her subsequent acquisition of the property **under the Act of May 4, 1855,** in course of the trade in which she engages, the **question of desertion is one of fact for the jury.**
2. **Property acquired in carrying on a business by a married woman,** whose husband neglects or refuses to provide for her, is her own, under the Act of 1855, and is not liable to execution for her husband's debts, although the basis of the credit upon which she commenced business was a policy of insurance on her husband's life assigned by him to her creditor, she paying the premiums out of the business; and although she used property belonging to the husband in the conduct of the business.

(Argued March 1, Decided March 14. 1887.)

JULY Term, 1886, No. 57, E. D., before Mercur, *Ch. J.*, Gordon, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Berks County, to review a judgment on a verdict for the plaintiff in a feigned issue. *Affirmed.*

On the 18th of September, 1876, Messrs. Bernhart & Koch obtained judgment against David Mitchell for $942.55. This judgment was revived on the 23d of August, 1884, for $1,378.48; whereupon, on the 19th of August, 1885, execution issued, and the sheriff levied upon the personal property in question in this case.

When this levy was made Agnes Mitchell, the wife of the defendant, presented her petition to the court, claiming that the property upon which the sheriff had levied, as the property of David Mitchell, was her property and not her husband's. This issue was thereupon framed to determine the ownership.

At the trial before ERMENTROUT, *J.*, it appeared that on August 26, 1876, Mrs. Mitchell procured from Bernhart & Koch, a credit to the extent of $300, upon a policy of life insurance owned by her husband, and for that purpose assigned by him to Bernhart & Koch. Under this arrangement she procured flour from time to time as she needed it in carrying on the bakery business, which had formerly been conducted by her husband. About twelve days after the securing of credit as aforesaid, an execution having been issued against her husband, the sheriff levied upon his personal property.

The husband claimed the benefit of the Exemption Law, and $300 worth of property was appraised to him. This property remained on the premises and was absorbed in the business which Mrs. Mitchell conducted. Mrs. Mitchell carried on the business in the house of her husband for more than a year, when, in 1878, the house too was sold by the sheriff. She continued the business and the property in question was the accumulations. The premiums on the policy of insurance were paid by Mrs. Mitchell.

The plaintiff offered to prove that about twenty years ago David Mitchell, her husband, contracted the habit of drinking intoxicating liquors; that he persisted in the habit, and that he became so drunken and profligate by reason of his habit of drinking that about the year 1878 he entirely neglected and refused to provide for his wife and family; and from that time, that is to say, from 1878 up to the present time, he had entirely neglected and refused to support his wife and family; to be followed with proof that Agnes Mitchell, the plaintiff, from 1873 up to the present time, had solely, exclusively, without any assistance or help from her said husband, David Mitchell, supported herself and her family by her own earnings; and also to be followed with proof that the property described in the interpleader in this case was purchased by Agnes Mitchell with her own earnings, without any assistance from her husband, during the last nine years.

To this the defendants objected; but the court overruled the objection and admitted the testimony.

There was testimony that the only articles embraced in this issue which were taken by David Mitchell under his exemption were several jars, two kitchen tables and one mirror; and for these articles the jury found against Mrs. Mitchell. All of the other articles Mrs. Mitchell testified were bought by her out of the earnings of the business.

The defendants submitted, *inter alia*, the following points, which were refused by the court:

"1. There is no evidence in the case from which the jury can find that David Mitchell, the plaintiff's husband, had either neglected or refused to provide for her, or deserted her, before the time at which she alleges that she took up and carried on the business in her own name. Therefore, any flour, stock or other materials purchased by her on credit at the time of her commencing the business in question, and the increase thereof or accretions thereto, became the property of David Michell; and it appearing from the plaintiff's own testimony that the property in question is part of the increase of the said business, the jury would have to find for the defendants.

"3. Not only does the plaintiff's testimony fail to show that her husband, David Mitchell, neglected or refused to provide for her, or that he deserted her, but on the contrary, the plaintiff, in her own testimony, has clearly stated that her husband had carried on the business up to the time of the sheriff's sale, and that the said business (immediately after the sheriff's sale) had begun to be carried on by her, and that she and her family had always lived and been supported out of the same. The plaintiff, therefore, having been supported out of her husband's business up to the very time of her obtaining credit and commencing the business for herself, it follows that at the time of her obtaining credit and commencing the said business, the conditions contemplated by section 2 of the Act of May 4, 1855, did not exist; that she was not then a *feme sole* trader, or invested with the rights of such, and that the flour, stock and materials so purchased, with all the accretions, became the property of her husband; the plaintiff having also testified that the property embraced in this issue was part of the accretions of the said business, the verdict will have to be for the defendants.

"4. The undisputed testimony submitted by the plaintiff herself shows that the business which was commenced after the sheriff's sale and all the accretions of which the plaintiff admits that the property in question was part was so commenced upon credit procured from Bernhart & Koch by the assignment of an insurance policy then owned by David Mitchell, together with the property retained by said David Mitchell under the exemption law. The said business was, therefore, in law the business of the said David Mitchell; and all the profits thereof and accretions thereto, including the property in question, likewise belong to him; and the verdict must be for the defendants.

"5. It appearing from the testimony of William N. Coleman, a witness of the plaintiff, and from that of the plaintiff herself, and from the policy of insurance on the life of David Mitchell with the assignment indorsed thereon, that the basis of the credit upon which the plaintiff commenced the business in question was the said policy of insurance owned by the plaintiff's husband and by him for that purpose assigned to Bernhart & Koch, it follows that the nucleus of the said business, or the original capital with which the plaintiff commenced the same, was furnished by her husband, and the said business and its accretions belong to the husband; and the plaintiff having herself testified that the property in question is part of the accretions of the said business, the verdict will have to be for the defendants.

"6. Under all the circumstances of the cause the jury will have to find for the defendants."

Verdict and judgment were for the plaintiff.

The assignments of error specified the admission of the testimony referred to, and the refusal of defendants' points.

Messrs. **William P. Bard** and **Cyrus G. Derr,** for plaintiffs in error:

Evidence to prove the wife's title, must be clear and satisfactory, clear and full proof, clear and unequivocal; it must exclude reasonable suspicion that the property was the husband's.

Tripner v. *Abrahams*, 47 Pa. 228; *Baringer* v. *Stiver*, 49 Pa. 129; *Flick* v. *Devries*, 50 Pa. 266; *Curry* v. *Bott*, 53 Pa. 400.

The property of a husband is not to be covered up or withheld from creditors upon equivocal, suspicious or doubtful evidence of a wife's right to it. The family relation is such and the probabilities of ownership so great, on the part of the husband, that a plain and satisfactory case should be made out before the wife can be permitted to hold property against honest creditors.

Earl v. *Champion*, 65 Pa. 194.

When a creditor seizes property in the possession of a husband, for his debt, the presumption is that it belongs to him and not to the wife; and this is a violent one, and is adhered to for the purpose of protecting creditors. If the wife sets up a claim to it as against the husband's creditors, she must show that it is hers; the burden of proof is upon her, and the evidence must be clear and satisfactory.

Kingsbury v. *Davidson*, 3 Cent. Rep. 551, 112 Pa. 383.

Where a wife claims property as against her husband's creditors she must show affirmatively, by clear and full proof, that she paid for it with her own separate funds. She must make it clearly appear that the means of acquisition were her own, independently of her husband. It was not the intention of the Legislature to dispense with the presumption which ordinarily and of necessity arises in favor of creditors, in transactions between husband and wife affecting the ownership of property in the wife's name.

Leinbach v. *Templin*, 105 Pa. 527.

Messrs. **C. G. Reber, J. Howard Jacobs** and **H. Willis Bland,** for defendant in error:

A *feme sole* trader, although in fact married, is in law as capable and free as though she was sole in fact.

By the Act of February 22, 1718, § 1, 1 Sm. Laws, 99; 1 Purd. Dig. 801, "Whenever any mariners or others are gone, or hereafter shall go to sea, leaving their wives at shopkeeping or to work for their livelihood at any other trade in this province, all such wives shall be deemed, adjudged and taken, and are hereby declared to be, as *feme sole* traders."

"So, by the custom of London, a *feme covert* may act as sole in the way of trade, if she buys and sells in trade for herself, with which her husband does not intermeddle."

Cro. Car. 69.

So it shall be, if the husband formerly used the same trade, but at the time of the contract is a soldier beyond sea, and does not intermeddle. *Id.*

"By the custom of London, and in some States, by virtue of statutes, a married woman may be authorized to carry on trade as a *feme sole*."

2 Bouvier, Inst. p. 85.

A *feme sole* merchant is defined by Jacob (Law Dictionary) to be "A married woman who, by the custom of London, trades on her own account independently of her husband."

It is said in 4 Bouvier's Institutes, 274, § 3999, that "A married woman may also acquire separate property by becoming a sole dealer and trader, by permission of her husband, even without deed; in this case she becomes entitled to all her earnings as her separate estate."

And, if a husband should desert his wife, and by aid of her friends, she should be enabled to carry on a separate trade, her earnings in such trade will be protected in equity from the claims of his creditors.

Cecil v. *Juxon*, 1 Atk. 278; *Lamphir* v. *Creed*, 8 Ves. 599.

The Act of Assembly gives a *feme sole* trader a capacity of contracting debts and being sued for them, not only touching matters of her trade, but for the maintenance of herself and children; she is placed upon a different footing from a *feme sole* trader in London, and a much better one.

Burke v. *Winkle*, 2 Serg. & R. 190.

A married woman who is a *feme sole* trader can, in Pennsylvania, maintain an action in her own name, for a distributive share of her ancestor's estate.

Valentine v. *Ford*, 2 Brown, 193.

Under the custom of London the husband must, for conformity, be joined in legal proceedings.

Comyn, Dig. title, *Feme Sole Merchant.*

A married woman can be invested with the capacities of a *feme sole* trader under the Acts of 1718 and 1855, without having been so decreed under the fourth section of the Act of 1855.

Black v. *Tricker*, 59 Pa. 13.

The Act of May 4, 1855, § 2, P. L. 430, 1 Purd. Dig. 801, extends the powers and immunities of a *feme sole* trader, to the wives of drunken and profligate husbands, and husbands who have deserted their wives.

"Whenever any husband, from drunkenness, profligacy or other cause, shall neglect or refuse to provide for his wife, or shall desert her, she shall have all the rights and privileges secured to a *feme sole* trader, under the Act of February 22, 1718, * * * and be subject as therein provided; and her property, real and personal, howsoever acquired shall be subject to her free and absolute disposal during her life, or by will, without any liability to be interfered with or obtained by such husband; and in case of her intestacy shall go to her next of kin, as if he were previously dead."

"The section was designed to suspend the marital rights of the husband, as a consequence of the acts enumerated, and at the same time to relieve the wife from her marital disabilities. It was intended to put her on a footing, where she could acquire and exercise dominion over property, to sue and defend; and when the Act declares that property acquired under the circumstances described, the proof of or establishment of those circumstances is surely all that is required in this as in the other Act."

Black v. *Tricker*, 59 Pa. 17.

A *feme sole* trader, having capital and tools of her own, may even employ her husband to superintend the business, and have the benefit of his skill and labor, and the additional property produced thereby belongs to her, and cannot be levied upon by his creditors.

Gibbs & Sterrett Mfg. Co. v. *Goe*, 1 Pennyp. 238; *Rush* v. *Vought*, 55 Pa. 487; *Welch* v. *Kline*, 57 Pa. 428.

The conduct of the defendants in dealing for years with the plaintiff as if the property were hers, estops them to deny it.

Where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

Pickard v. *Sears*, 6 Ad. & El. 469.

Where an act is done or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair, the character of an estoppel shall be given to what otherwise would be mere matter of evidence. It is not necessary that the party against whom an estoppel is alleged should have intended to deceive; it is sufficient if he intended that his conduct should induce another to act upon it, and the other, relying upon it, did so act.

Bidwell v. *Pittsburgh*, 85 Pa. 417; Bisph. Eq. § 290.

Mrs. Mitchell had a perfect right to use any property of David Mitchell to start in business for herself. The law recognizes her reasonable right to do that.

The Act of 1718 (1 Purd. 801, ed. 1885) contemplates that the wife shall have been started in business by the husband and that he shall have furnished the capital. In the state of the law of married women in 1718, the stock of goods in a shop or store of a married woman living with her husband would have been the property of the husband. The Act contemplates a business of shopkeeping existing at the time the husband goes to sea, and provides that:

"When any mariners, or others, are gone, or hereafter shall go to sea, leaving their wives at shopkeeping, * * * all such wives shall be deemed adjudged and taken, and are hereby declared to be, as *feme sole* traders."

We cite generally upon the proposition that the property in controversy is, under the facts of this case, the property of Mrs. Mitchell:

Act February 22, 1718, 1 Purd. Dig. 801; Act May 4, 1855, 1 Purd. Dig. 801; *Ellison* v. *Anderson*, 1 Cent. Rep. 624; *Black* v. *Tricker*, 59 Pa. 13; *King* v. *Thompson*, 87 Pa. 365; *Elsey* v. *McDaniel*, 95 Pa. 472; *Orrell* v. *Van Gorder*, 96 Pa. 180.

Per Curiam:

There is no error in the answers to the points submitted, nor in the admission of evidence. Whether the husband had neglected or refused to provide for his wife was a question of fact. The evidence that he had done so for a great length of time was amply sufficient to submit to the jury. It tended to prove not only that he persisted in not supporting his wife and his children, but that she actually supported and provided for him. It was well submitted to the jury.

Judgment affirmed.

George M. LOCKARD *et al.*, *Plffs. in Err.*,
v.
Zebulon S. ROBBINS.

1. A **right to remove, or use at will,** a **house built on another's land is** merely **a revocable license** to let the building remain until a reasonable time after notice that it must be removed, and up to that time to use it where it stands.
2. The **licensee's right is not personal.** He may lease the house.
3. If the owner of the land obtains possession of the house from the tenant of the licensee upon the understanding that possession shall be restored to the tenant when demanded, this does **not** amount to a **revocation of the license.** The **licensee can maintain an action for use and occupation against** the **owner of** the **land** to recover compensation for such possession.

(Argued March 1. Decided March 14, 1887.)

JANUARY Term, 1887, No. 397, E. D., before Mercur, *Ch. J.*, Gordon, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Columbia County, to review a judgment on a verdict for the plaintiff in an action of assumpsit. *Affirmed.*

This was an action by Zebulon S. Robbins against George M. and John K. Lockard, trading as G. M. & J. K. Lockard. It originated before a justice of the peace. The plaintiff's claim, as set forth on the justice's docket, was for $262.50 "rent for the use and occupation of a grain house on the property of the defendants, agreeably to an article of agreement made between the said parties."

The agreement referred to was dated March 3, 1873, and was signed without seals by J. J. Robbins, J. M. Robbins, W. V. Robbins and the plaintiff, Z. S. Robbins, of the one part, and the defendants of the other part. The parties of the first part were individual members of a corporation entitled "The Columbian Iron & Manufacturing Company," which owned the land upon which the grain house in question stood. The agreement was as follows:

"*Whereas*, the said Lockards have purchased one fifth of claims due to the Columbian Iron & Manufacturing Company on their books, amounting to the sum of $1,087.95 (the one fifth) and have given their notes for the same, it is therefore agreed between the said parties that in case any part of the said claims are uncollectible or debts against the said corporation are presented to reduce the net amount of said claims to less than the sum above mentioned, then the amount reduced is to be credited on the notes given by the parties of the second to the party of the first part, dated the day above written.

"It is further agreed by and between the said parties that the said parties of the second part shall have the option to purchase so as to become owners of one sixth of the whole stock of the corporation at any time within one year from the 10th day of February, A. D. 1873, from the parties of the first part, at par, and to be paid for as may be agreed at the time of purchase, that is so that John K. Lockard and George M. Lockard shall each become the owner of one sixth of the said capital stock of the company; Lockards to pay the proportion of the improvements. The said parties of the second part for value received do hereby assign, transfer and set over, to the said parties of the first, certificates of the capital stock of the said company numbers five and six, as collateral security for the payment of four notes, each $1,000, dated the date hereof, said certificates to be held by the parties of the first part until notes are paid.

"The grain house on the Manufacturing Company's lot belongs to Z. S. Robbins and can be removed or used by him at will.

"It is agreed by the parties that the corporation is free from debts beyond those on their books or statement."

The agreement was not executed by the corporation.

On October 24, 1873, the corporation assigned all its property to C. R. Woodin, for the benefit of creditors. The deed was executed by the corporation and by the plaintiff, Z. S. Robbins, as one of its directors, and contained no reservations. The defendants remained in possession of the property to take care of it after the assignment, at the request of C. R. Woodin, the assignee, until the spring of 1874, and the plaintiff removed to Shenandoah, Schuylkill County.

On November 26, 1874, the assignee sold the property to M. W. Jackson at public auction; and on December 22, 1874, he executed a deed pursuant to said sale by auction, without any reservation, including buildings, etc.

About January 1, 1875, the defendants again took possession of the property under a lease from M. W. Jackson. Soon after this J. H. Stecker took possession of the grain house. Stecker was a friend and son-in-law of Z. S. Robbins. In October, 1876, Stecker gave the key to the grain house to John K. Lockard, one of the defendants, with the understanding that said Lockard could use the grain house until Stecker wanted it again. Soon after this Stecker removed to Three Rivers, Michigan, and never requested that the key be returned to him. George M. Lockard, the other defendant, had nothing to do with obtaining or receiving the key from Stecker.

On October 14, 1879, Jackson conveyed the property to the defendants, including buildings, and without any reservation. Soon after this the Lockards removed the grain house and set it up temporarily on props.

ELWELL, *P. J.*, charged the jury as follows:

"In this case the plaintiff claims for the use and occupation of a house (and the ground on which it stood) from October, 1876, to the time of the commencement of this suit February 14, 1882, at the rate of $50 a year. In such an action the right to recover is based upon contract. The plaintiff must establish by satisfactory evidence that the use and occupation have been with his consent and so as to infer an acknowledgment of his title. It is not necessary that there should be an express contract; it may be implied; as, if A labors for B, with B's knowledge and consent, there arises the presumption of B's agreement to pay, although no such bargain in terms be proved.

"If one enter upon another's land under claim of ownership, he may be liable for trespass or in ejectment, but not in action for the occupation and use, because there is no contract between him and the person on whose land he trespasses. Ordinarily the declaration sets forth that the defendant, being indebted to the plaintiff for the use and occupation of certain lands described, undertook and faithfully promised to pay what the use and occupation thereof should be reasonably worth; but the declaration here contains only an allegation that the defendants occupied the plaintiff's land. However, the case is trying upon its merits, as much as though the other allegation were expressly made.

"We must look through the evidence and ascertain whether there is anything from which a contract can be implied on the part of the Lockards to pay Robbins rent. We begin in 1873, the title not being traced further back, when [the Columbia Iron & Manufacturing Company, the owner of the land upon which the building in question then stood, in March, entered into an agreement among themselves, providing that these defendants might purchase a fifth part of the claims of that company, amounting to a certain sum, making a further agreement in regard to the stock of that concern, and containing this clause: 'The grain house on the Manufacturing Company's lot belongs to Z. S. Robbins, and can be removed or used by him at will.' It was perfectly competent for the parties to this agreement to declare in writing the ownership of this building described by one of the witnesses as temporarily set on blocks or props, not permanently fixed upon a foundation fastened in the soil. The parties had a right to consider it as severed from the realty, and did in fact treat it as personal property].

"Perhaps it might, under the evidence here, have been levied upon and sold as a personal chattel belonging to Robbins; but the question of his right to occupy the ground of his associates is another matter and is for the court.

"It is claimed for the plaintiff that he has a right to keep his building where it was as long as he chooses, enjoying access to it and the use of it. That amounts almost to a claim of fee simple in the soil, at any rate to the claim of a life estate in Robbins. [But I construe the agreement to give him a license, merely, to let his house stand and to use it, or to tear it down and remove it, to do whatever he pleases with it, until the owners of the soil should give him notice to take it away, a revocable license, not the grant of a perpetual right, authority to let the building remain until a reasonable time after notice that it must be removed, and up to that time to use it where it stood], unless the title was devested by the subsequent conveyance.

"[While the building stood on the spot of its erection, unmolested by the defendants, used by Robbins or his tenants, Robbins had the right to the use, the defendants acquiescing; but when they assumed the right to move it, if Robbins had any remedy, it was some other form of action than the present, because that act of removal without leave and apparently under claim of ownership put an end to all contract between the parties for the plaintiff's use of the building at the place where it originally stood.]

"The conveyance by this corporation, in October, 1873, to Woodin, assignee, for the benefit of creditors, being for the land and for all ways, woods, water courses and buildings, is said to be without reservation, and to take away all the plaintiff's title in the grain house, whatever it might have been before.

"A conveyance in writing under seal must stand unmodified by parol, unless fraud or mistake be shown. [Robbins, as one of the company's directors, united in the conveyance which devested all the company's right. Woodin, the assignee, held that title just as the corporation held it. He was not a purchaser; he merely took the conveyance for the benefit of creditors, and he held just as the corporation did. But if the conveyance had been made to a *bona fide* purchaser without notice of the claim of Robbins, that purchaser would have taken the whole title to the property, the buildings and everything else upon the soil] and under the soil and above it, the conveyance being sufficient to transfer all rights.

"Whatever was said by M. E. Jackson, attorney for Woodin, or by the plaintiff, at the assignee's sale, would be of no validity as affecting the question of reservation to Robbins of title to the grain house, would not alter Robbins' right in the building; but if the purchaser at that sale had notice of Robbins' claim he took the property subject to Robbins' title whatever it is and was. If the title is worthless, the claim and the notice amount to nothing; if the title is good, the notice binds the conscience of the purchaser.

"[Whether all persons connected with this property did, or did not, fully know of and understand Robbins' claim to it, is submitted to you to find from the evidence. Robbins says that some time in 1873 he leased to J. H. Stecker, at $50 a year, and that Stecker occupied as his tenant for two or three years and paid him rent. Stecker, in his deposition, says he paid for about a year and a half, at $100 a year—from about 1873 to the fall of 1876, says Robbins; and says also 'It was worth $50 a year, Stecker paid me that.'

"In the view that I take of the case, the rights of the parties depended upon Stecker's tenancy and his delivery of the key to J. K. Lockard. If the Lockards obtained possession under Robbins' tenant, knowing him to be such, they stood in Stecker's shoes and are bound to acknowledge his landlord as theirs. *Cooper* v. *Smith*, 8 Watts, 539.

"'The title of a landlord to real estate, though perfectly good, would frequently be rendered the next thing to worthless, etc. * * * He must surrender up the possession, and then, and not till then, will he be in a situation to controvert the title of the landlord.'

"Was Stecker, during these years from some time in 1873 to 1876, Robbins' tenant in the occupancy of this grain house? One of the Lockards testifies that for a while after the assignee's sale to Mordecai W. Jackson, they were 'looking after' the property for him. Upon the other side it is testified that Stecker was renting the building, carrying the key, and controlling the possession, and that J. K. Lockard asked his permission to use the building, asked and obtained the key, promising to return it to Stecker, which is not denied by Lockard. Did the Lockards take possession by permission of Robbins' tenant, with the understanding that the possession should be restored to him? If so, and if the object was by managing with the tenant to oust the owner, the Lockards stand precisely where the tenant stood; the landlord would have to be turned out by due course of law, not by overreaching or colluding with his tenant.

"If Stecker's tenancy existed, and if the Lockards gained possession in the manner stated by him, then the plaintiff is entitled to recover the reasonable rental of the property, from the time it was taken by the defendants down to the time that they removed the building (at some time between 1878 and March, 1880), with interest from the time the credits accrued, which will be for you to find.]"

Verdict and judgment were for the plaintiff for $171.25.

The assignments of error specified the portions of the charge inclosed in brackets.

Messrs. **E. H. Little** and **Robert R. Little,** for plaintiffs in error:

The court misapprehended the fact in charging that the corporation owner transferred the grain house on the company's lot to Z. S. Robbins. The agreement referred to shows that it was individual members who undertook to transfer the building; and that it was not the act of the corporation either by a vote of the directors or by any of its officers or agents.

Unless the individual members of a corporation are authorized to do so they cannot bind it by any express promise.

Allegheny Co. Workhouse v. *Moore*, 95 Pa. 408.

There is no evidence that the grain house was set up temporarily on props, until after it had been removed by the Lockards in 1879. According to the evidence it was a fixture, until after the Lockards leased the property from M. W. Jackson, January 1, 1875.

See Schouler, Personal Property, 136–140.

"The rule is a general one that upon the sale of the freehold any and all fixtures attached to it will pass unless there is some express provision to the contrary."

Schouler, Personal Property, 150.

Robbins should have removed the fixture at the time he sold, or within a reasonable time thereafter.

Davis v. *Moss*, 38 Pa. 346.

Robbins waived his right to the grain house by assenting to the assignment for the benefit of creditors without reservation.

Buck's App. 2 Pennyp. 327.

When chattels are so far annexed to the

freehold as to become fixtures, they pass to a grantee of the land, unless expressly excepted in the conveyance.

Davis v. *Buffum*, 51 Maine, 160; *Noble* v. *Bosworth*, 19 Pick. 314; *Union Bank* v. *Emerson*, 15 Mass. 159; *Terhune* v. *Elberson*, 3 N. J. L. (2 Penn.) 726; *Miller* v. *Plumb*, 6 Cow. (N. Y.) 665; *Preston* v. *Briggs*, 16 Vt. 124.

Robbins' interest was not a revocable license, but even if it was the deed of assignment for the benefit of creditors, executed nearly seven years before the Lockards removed the grain house, operated as a revocation of the license. If there was a revocable license by a former owner, the sale and conveyance of the land operated as a revocation.

Vollmer's App. 61 Pa. 118.

An unsealed memorandum given by the owner of land, stating that A is the owner of a house upon the premises, and authorizing its removal, is a mere license to enter, and is revoked by a subsequent conveyance to B.

Whitaker v. *Cawthorne*, 3 Dev. Law (N. C.) 389.

A parol license to enter and occupy land is revoked by the death of the owner of the land, or by a conveyance by him, and, therefore, cannot bind his sucessors, unless it is irrevocable.

Eggleston v. *New York etc. R. R. Co.* 35 Barb. (N. Y.) 162; *Carter* v. *Harlan*, 6 Md. 20, 38.

The deed to C. R. Woodin for the benefit of creditors, expressly conveys all buildings, without any reservation; and the words are employed by Z. S. Robbins, the plaintiff, for he executed the deed as one of the company's directors.

The words of an instrument shall be taken most strongly against the party employing them.

Broom, Legal Maxims, p. 254.

In the absence of ambiguity, no exposition shall be made which is opposed to the express words of the instrument.

Id. p. 266.

Again, if the court were right in construing the agreement of March 3, 1873, as giving Z. S. Robbins a revocable license, it does not give a license to Stecker, nor to any assignee of Robbins, nor to any person but Robbins, personally.

"A license is a personal privilege and is not assignable; an assignment by a licensee determines his rights."

Dark v. *Johnston*, 55 Pa. 164, 171.

It is not contended that there was any express contract on the part of the Lockards to pay rent to Robbins. And the question here raised is whether the law will imply a contract, on the part of the undisputed owners of property, to pay rent to a party having no title whatever.

A tenancy by implication will in general arise when the ownership of premises is in one person and the occupation is in another, while there has been no distinct agreement.

Jackson & G. Land. & T. 18.

Hence, Stecker as a trespasser was liable to pay the Lockards and not Robbins for the use of the property.

"A tenancy by implication can never arise under a party who has not the legal estate of the premises in question."

Taylor, Land. & T. 15, 21.

"If the position of the parties to each other can be referred to any other ground than that of a distinct tenancy, no promise to pay rent can be implied."

Id. p. 491.

"In no case does the action for use and occupation lie, unless the party has the legal estate, nor where the title is in dispute; for the court will not try the title in this action, the proper remedy in such cases being by ejectment."

Id. p. 492.

Mr. **John G. Freeze,** for defendant in error:

To lay the foundation for a recovery in assumpsit for use and occupation of real estate, the relation of landlord and tenant must exist under a contract express or implied.

Clark v. *Clark*, 25 Am. Law Reg. 768.

The ownership of a building, with the right to use it, carries with it the right to put a tenant into it and receive the rents from him; and leasing the building is in no legal sense an assignment; and the authorities referred to by the plaintiffs in error do not touch the case before the court.

2 Bl. Com. chap. 20.

Even under the strict doctrine of the old cases relative to landlord and tenant the plaintiff below in this case is entitled to recover, because he proves: first, ownership; second, the right of use; third, reservation of the building at sale; fourth, acknowledgment of ownership in plaintiff by defendants below after the sale; fifth, tenancy under himself by Stecker, and payment of rent; sixth, the succession of defendants below, to the tenancy, by their request of the key, and agreement for its return.

But the contractual relationship is not so strictly held in the later cases, and the relaxation seems to be on just and equitable principles.

A contract to pay rent may be implied, from the title of the plaintiff and the occupation of the defendant.

Mercer v. *Mercer*, 12 Ga. 421; *Cummings* v. *Noyes*, 10 Mass. 432; *Nat. Oil Refining Co.* v. *Bush*, 88 Pa. 335.

Per Curiam:

Each of the twelve specifications of error is to the charge of the court. The evidence was sufficient to submit to the jury, and it was submitted in a clear and correct charge. We discover nothing therein calculated to mislead the jury. The facts found by them relieve the verdict from all legal difficulty, and well support the judgment.

Judgment affirmed.

William Henry KIME *et al.*, *Plffs. in Err.*,
v.
Thomas B. POLEN *et ux.*, in Right of Wife.

In **ejectment** by Polen against Kime for a lot of ground, both claimed under Tripp, who in 1852 was the owner of a tract including the lot in question. In 1858 the tract was sold at sheriff's sale, on a judgment against Tripp, to Sharps, who conveyed to Shoemaker. In 1873 Shoemaker conveyed to Polen. Kime was in possession claiming by a defective paper title, and by adverse possession. Kime's fence in 1873 included part of the lot and he alleged it had stood in the same place since 1860, but the evidence was indefinite. Shoemaker's title to the lot was clear and his deed to Polen mentioning other adjoiners besides Kime's line as well as the amount of land conveyed, indicated an intention to convey the lot to Polen without regard to Kime's fence. The court below left the question of Shoemaker's intention to the jury.—*Held*, affirming judgment on a verdict for Polen, that the **question** was merely **one of lines** and that the justice of Polen's claim **was plain from the deeds, which need not have been submitted to the jury.**

(Argued Feb. 22, Decided March 14, 1887.)

JANUARY Term, 1887, No. 37, E. D., before Gordon, Paxson, Trunkey, Sterrett and Clark, *JJ.*

Error to the Common Pleas of Lackawanna County, to review a judgment on a verdict for the plaintiffs in an action of ejectment. *Affirmed.*

The facts as they appeared at the trial before ARCHBALD, *J.*, were stated in his charge to the jury, which was as follows:

"I ask that you pay particular attention to the charge that I now shall deliver to you, not because the case possesses greater importance than any other case; it is of sufficient importance to merit your attention in any event, but because I think possibly the true issue, in your minds, may have been lost sight of in considering and hearing evidence upon matters that only indirectly affect that issue.

"A great deal of evidence has been directed to the question of where the fence of the Kimes was in 1873, or prior to that. [Now, it may be that you will find, as the defendants contend and as is sustained by perhaps the greater part of the evidence, that there was a fence at the brow of the hill as early as 1860 or 1861, and that it was continued a long time, and that it stood in the same position in 1873. But even if that fact be established, it still does not entitle the defendants to your verdict, as I shall explain to you.] It is a circumstance to which I shall call your attention in due course, but I state this in the beginning, because too much has been said back and forth and so much evidence directed to the location of that fence, and its establishment as early as 1873.

"This action brought by Mr. and Mrs. Polen (Mrs. Polen being the owner in whom the title now is, or is supposed to be) to recover possession of a piece of land such as is described in the writ, 'bounded on the north by land formerly used for a burying ground,' that would be up the valley, 'and now a common,' the boundary on that side is spoken of as 'a common,' 'on the easterly side,' that is the side down the hill, or towards Scranton from Hyde Park, 'by land used for a burying ground, and by land supposed to belong to one or both of the defendants and now or lately to one Alsworth; on the southerly side by Price Street,' that is on the side down the valley, 'formerly Franklin Street and on the westerly side;' that is up the hill, 'by a street called or known as Fairview Avenue; said described lot being about sixty feet in front on said Fairview Avenue and about the same in the rear, and about thirty-eight feet in depth.'

"[There is sufficient evidence to submit to you, as to the identity of the land described in this writ, which I have now read, and the land in dispute between these parties. There is very little doubt in regard to what land is in dispute between the plaintiffs and the defendants. It is a question for you, whether the description in this writ corresponds with and is identical with the land which has been discussed and shown to be in dispute between the parties. The sheriff has made a return which has not been disputed, and according to law that return is evidence that the defendants are in possession of the land which is described in the writ. In my mind there can be very little question but what there is a sufficient identification of the land described in the writ, with the land which is in dispute between the parties].

"Now, this land being in the possession of the defendants, the plaintiffs, in order to recover, must show that for some reason they are entitled to that possession. If they are the owners in law of the land in dispute, and have shown a title to it, then the law always gives a party the possession of land to which he has shown a title. So the first question for us to direct our attention to is the title of the plaintiffs to this land.

"[The defendants' show of title and the plaintiffs' disclose to us a common source of title, as it is called.] It appears by the evidence, that Mr. Benjamin S. Tripp, this old gentleman, who has been on the witness stand here, owned the whole of the land, reaching from what is now Wyoming Avenue or Ninth Street from the border of the Fellows estate up the hill, covering this whole tract in dispute, and extending up to Main Street, as I remember the testimony, embracing nine acres in all. We may start then from that point, with the ownership of the whole land covering this piece in dispute from Wyoming Street away up to Main Avenue. That circumstance is important, and gives us the basis of the consideration of the plaintiffs' title, and the respective rights of the plaintiffs and the defendants.

"Now, from that common source, although the defendants' title really starts from Mr. Tripp before the plaintiffs' title, I will trace the plaintiffs' title down first.

"On the 15th of July, 1858, Mr. Tripp then being the owner of the whole tract, as I have stated it to you under the evidence, a judgment was entered against him in Luzerne County; and on the 12th of April, 1862, upon that judgment a sheriff's sale was had, and a sale made to Stephen J. Sharps. The sheriff subsequently, on the 23d of April, 1862, executed, acknowledged and delivered to him a deed for this land.

"I will read the description in that deed. 'Commencing at a corner on Chestnut Street' (that street, as you will remember the evidence, is up on the hill parallel to Fairview Avenue, which is just on the brow of the hill—that is, Chestnut Street is westerly then, under the evidence, from Fairview Avenue.) 'Commencing at the corner of Chestnut Street, in line of land belonging to the Baptist Church and running thence in an easterly direction along the line of land of said Baptist Church, lands of Timothy and John Gardner and lands supposed to belong to the burying ground 255 feet, more or less, to a corner.'

"That would be, as I understand it, starting at Chestnut Street and running easterly in a direction which would cross Fairview Avenue and come down the hill 255 feet, more or less, to a corner; 'thence in a southerly direction' (or down the valley, a course at right angles from the other line) along said burying ground and the rear end of other land in possession of Timothy and John Gardner and land of David J. Davis 160 feet, more or less, to a corner; 'thence in a westerly direction,' (turning up the hill again), 'along the line of land of said Tripp and the rear end of lot owned by William Silkman and land of Timothy and John Gardner, 255 feet, more or less, to said Chestnut Street; thence north, (turning up along Chestnut Street) about 150 feet, more or less, to the place of beginning.'

"You will notice that the easterly boundary of the land levied upon and sold and conveyed by this sheriff's deed is the tract of Timothy and John Gardner, among others, bounded by the burying ground and by David J. Davis, and also by the land of Timothy and John Gardner.

"This sheriff's deed on the 24th day of March, 1868, was assigned by Mr. Sharps to William S. Shoemaker; then on the 10th of December, 1873, William S. Shoemaker conveyed to Mr. Polen, subsequently Mr. Polen conveyed to William Jacobs, who conveyed back to Mrs. Nellie C. Polen.

"That is the claim of the title that the plaintiffs make to this land in dispute.

"The defendants' title, starting from the common source, Mr. Tripp, with the plaintiffs' title, appears by the recitals in the deed of Timothy Gardner to John Gardner, to have originated from Mr. Tripp in a contract on the first of November, 1853. Mr. Tripp at that date contracted to sell to Judson M. Clark. Subsequently a sheriff's sale was had of Mr. Clark's interest, and Mr. William Sweatland became the purchaser. A deed by the sheriff was delivered to him on the 11th of May, 1859, and on the 30th of September, 1859, Mr. Sweatland, on the back of the sheriff's deed, assigned his interest under the sheriff's sale to Timothy and John Gardner.

"Timothy Gardner on the first of August, 1865, deeded his interest in the land to John Gardner. I will read the description in that deed:

"'Bounded as follows: northerly by what is called the Fellows burying ground,' that would be on that (the right) side; 'easterly by land formerly in the occupancy of Sylvanus Fellows, now Wyoming Avenue; southerly by land of Benjamin S. Tripp;' that is down the valley; 'now belonging to David J. Davis; and westerly by other lands late belonging to said Tripp, the same being fifty feet in width on said Wyoming Avenue and running back from the center of said Wyoming Avenue said width 150 feet; coal and minerals with the right to mine and remove the same reserved.'

"This deed, from Timothy Gardner to John Gardner, by its recitals is shown to be the same land that was contracted in 1853 by Benjamin S. Tripp to Judson M. Clark; that is, in 1853 Mr. Tripp, under the evidence, being the owner of the whole tract of land, contracted to sell to Judson M. Clark a piece of land fifty feet wide, running from the center of Wyoming Avenue up the hill 150 feet.

It is fixed by the evidence that Wyoming Avenue was contributed and dedicated to the public by Mr. Tripp, on the one side and Mr. Fellows on the other; that the line between Tripp and the Fellows estate goes through the center of that street. That will explain why, possibly, in this description the center of the street is taken as the beginning of the 150 feet which runs up the hill.

"Now the title of Timothy and John Gardner to this land, vested subsequently as I shall explain to you, in Anna M. Kime and William Henry Kime, two of the defendants.

"[You will notice that in 1853, when the title started, Mr. Tripp had the rest of the land still. It was not until the sheriff's sale in 1862, nine years after, that the title, which is now claimed to be vested in the plaintiffs, passed from Mr. Tripp by the sheriff's sale. The effect of this, then, was to leave in Mr. Tripp the balance of the land, and the balance of that land having been levied upon by the sheriff subsequently and sold by him and conveyed to Sharps, and Sharps having assigned to Shoemaker, the title was vested in Shoemaker of the whole of the balance of the land, down to the Gardner line, down to a point 150 feet from the center of Wyoming Avenue.]

"Now, on the 30th of December, 1872, John Gardner and his wife, who were the owners of this Kime lot at that time, contracted to sell to Dr. W. H. Heath; subsequently Dr. Heath assigned his interest under that contract to Anna M. Kime and William Henry Kime, so that their title is derived under this contract from John Gardner to Dr. Heath and the Gardner title is derived under this contract from Benjamin S. Tripp to Judson M. Clark.

"The description in this contract to Dr. Heath reads as follows: 'Beginning at the corner on the line of the People's Street Railway and running thence along the line of land formerly owned by Benjamin S. Tripp and the line of the old cemetery north 51 degrees west 150 feet, be the same more or less, to the top of the hill, to line of land now or formerly owned by William S. Shoemaker.'

"[The mistake in that description is evident to you from the diagram which has been put in evidence—the Street Railway being here much farther up than the center of Ninth Street or Wyoming Avenue. Beginning 150 feet from the Street Railway would run it up the hill, but counting from the middle of Wyoming Avenue 150 feet, up the hill, and it draws the rear end of the Heath or Kime lot, or Gardner lot, much farther down the hill, being down here (pointing to the map) instead of at the top of the hill.]

"You will notice that this description also runs up to the land of Shoemaker and would be bounded, of course, by the point where Shoemaker's land begins. The fact that under that, there was less land than Gardner could deliver, or contract to sell to Dr. Heath, cannot affect the plaintiff's title to the land, beginning at a point here in the rear of what is claimed to be the true rear line of the Kime lot and extending the balance of the way; the plaintiffs are not answerable for a mistake made in that description.

"Mr. Gardner could not contract to sell what he did not have title to; he might have contracted to sell 250 feet, or 500 feet; but a mere contract to sell that amount would not give any title unless he had it.

"[The mistake made in this contract—and it is an evident mistake—probably is the starting of this whole controversy. Limiting then this contract to the title which Gardner had and which alone he was able to contract to sell, it covers and shows title to no part of the land in dispute.]

"Now, however, I must call your attention to this fact, that the right of a plaintiff to recover in an action of ejectment does not depend upon the weakness of his adversary's title to the land. The plaintiff must recover upon the strength of his own title. If I am in possession of land, then I have the right to retain that possession against everybody who cannot show a proper title to it. Provided, always, I have not intruded without any color of right upon the possession of another person.

"[So the question is really brought down to this: the defendants showing no title to the land in dispute, have the plaintiffs shown a title to this land? There is no doubt that the title to the land in dispute was fully vested in William S. Shoemaker, so that the whole question turns upon the Shoemaker deed. Did the deed from Wm. S. Shoemaker to Mr. Polen, in 1878, convey title to the land in dispute? That is, did it embrace within its description the land in dispute? If it did, then the plaintiffs are entitled to recover. If it did not, then the plaintiffs are not entitled to recover.]

"I will read the description: 'Beginning at a corner on the easterly side of Franklin Street 140 feet from Chestnut Street; thence in an easterly direction sixty feet to land of the Baptist Church; thence in a southerly direction along the land of the Baptist Church, Sperry and lands supposed to belong to the burying ground, about 140 feet, more or less; thence in a southwesterly direction along said burying ground and the rear end of land now in the possession of Kime and Alsworth sixty feet; thence in a northerly direction along the east side of said Franklin Street about 140 feet to the place of beginning. Excepting and reserving twenty feet in width across said lot for road or street, called High Street, containing about 7,200 square feet, more or less, it being lots numbers 8 and 10 and ten feet off of the southerly part of lot No. 6. Excepting and reserving all the coal and other minerals.'

"Something has been said in the argument and your attention has been called in the evidence, to the fact that Mr. Shoemaker, if the position taken by the plaintiffs in this is correct, would have a greater number of feet in length in his whole tract than his deed called for. That does not make any difference. As I have explained to you, the balance that was left to Mr. Benjamin S. Tripp, after he had contracted to sell to Judson M. Clark the whole balance of the tract from the end of the Gardner lot up to Main Street, was sold out at sheriff's sale, and the title, as far at least as Chestnut Street (I am not familiar enough to say whether farther or not) was vested fully in William S. Shoemaker.

"Now then, the description in the deed to Polen begins at a point fixed on the easterly side of Franklin Street distant 140 feet from Chestnut Street, and beginning at that point on Franklin Street it runs thence in an easterly direction; that would be running in a direction parallel with Fairview Avenue sixty feet; that would be across the lot to the land of the Baptist Church; thence running in a southerly direction along lands of the Baptist Church and Sperry and land supposed to belong to the burying ground 140 feet, more or less; thence in a southwesterly direction along said burying ground and the rear end of land now in possession of Kime and Alsworth sixty feet; that is, [the 140 feet, beginning at the point fixed in this deed, is to be carried its full extent, unless there is something else in the deed to limit it and stop it before the full 140 feet are reached, provided of course, Mr. Shoemaker had title to that full 140 feet and we have seen that he did have it.]

"Now, is there anything in this deed, or in the circumstances in the case, that shows that that whole 140 feet is not to be allowed to Mr. Polen under this deed? If there is, then he must stop short at the point the deed fixes less than 140 feet; that is what we must do under this description in the deed and the evidence in the case. If not, then he is entitled to go the the full 140 feet, beginning where he does.

"Now, the boundary on the southerly, as it is here called, or as we have been talking of it, the easterly side of this tract of land conveyed to Mr. Polen, is fixed by the rear end of land now in the possession of Kime and Alsworth and the burying ground; that is three abutters, as we call it, three adjoiners—three pieces of land are spoken of as the boundary on the easterly or southerly side of the Polen lot; land in the possession of Alsworth, the burying ground, and land in the possession of Kime.

"[We have then as the boundary on the rear of the Alsworth lot, the rear of which is not defined, the land in the possession of Kime, and the burying ground.

"Not only are these dimensions and these boundaries given in the deed, but we also have a statement in it of the amount of square feet that was supposed to be in the land covered by this description, that is, 7,200 square feet, more or less. Now, if you take a tract of sixty feet by 140 feet and allow for the twenty feet of road way that is reserved out of it, you will find that it comes to 7,200 feet.

"There is in this a circumstance which you are to weigh, in considering whether the intent of this deed is to give to Mr. Polen the full 140 feet. Of course the title to the land in dispute is not in Kime; it is either in Mr. Shoemaker or it is in Mr. Polen.

"Did then Mr. Shoemaker by this deed intend to deed all that he had there down to the line of Kime? Or did he intend to keep in himself the narrow piece there on the brow of the hill just where it falls over, and a rocky piece of ground at that without particular value, as has been said here by some of the witnesses? That is the question for you to determine.

"The position of Kime's fence in 1873, compared with its position now, as bearing upon the claim of the plaintiffs of title to land in dispute, is only of importance in guiding us to what was the intent of Mr. Shoemaker when he made this deed.

"With proper caution Mr. Shoemaker has given a description which does not compel him to warrant the title to the land in dispute. That is, he only conveyed down to a point where Kime could establish title and right of possession under this deed. Unless it is shown that Mr. Shoemaker intended to retain title in himself to the small strip of land there, the land that is in dispute, then this deed conveyed title to that land to Mr. Polen.

"It seems to me clear, from all the circumstances put in evidence in this case, which, of course, you are to pass upon, that Mr. Shoemaker by his deed did intend to convey all the land he had down to the true line of Kime's lot; that is, to that boundary of Kime's lot which alone he could rightfully claim possession to, and that Mr. Shoemaker did not intend to limit the conveyance simply to the position of Kime's fence as it was in 1873.

"If you are satisfied from the evidence of this, then the deed does not confine the plaintiffs to that line, that fence line as fixed in 1873, or prior to that, but is sufficient to cover the land in dispute and to show the title perfect in the plaintiffs to it; and if you so find, then the plaintiffs are entitled to your verdict; on the contrary, if you find from all the circumstances in the case, under such explanations and instructions as I have given you in regard to them, that it was not the intent of Mr. Shoemaker, by this description, to cover the land in dispute, but that he intended to reserve to himself title in that, that is, that the description excludes the land in dispute, then the plaintiffs are not entitled to recover, and your verdict should be for the defendants.]

"I will now read the points which have been submitted. I will first read the defendants' points:

1. "'If the jury find from the evidence that the description of the boundary line between the plaintiffs and the defendants is described in the deed from Wm. S. Shoemaker and wife to Thomas B. Polen, dated December 10, 1873, as follows: thence in a southwesterly direction along said burying ground and the rear end of lands now in possession of Kime and Alsworth, sixty feet, and that this is the boundary line of the land conveyed to the plaintiffs, and that at and before the said 10th of December, 1873, the land in dispute was in possession of Kime and Alsworth, the verdict should be for the defendants.'

Ans.: "I cannot affirm this point.

2. "'A call for adjoiners will prevail over a designation of courses and distances and they must govern though neither courses, distances nor contents correspond.'

Ans.: "This is true as a general proposition of law, and I affirm it. Of course it is qualified by what I have already instructed you.

"The plaintiffs' points are as follows: * * *

2. "'The possession of the defendants of the land in dispute is no defense to this action, unless continued in for thirty years and unless it was actual, visible, notorious, distinct, hostile, continued and exclusive.'

Ans.: "If the plaintiffs have shown title to the land, as I have instructed you, that is legal paper title, as it is called, then a claim of title by possession, if made on the part of the defendants, would have to be such as described in this point. I do not understand, however, that the defendants make any show of title by possession, as it is called."

A juror: "Please notice that second point again."

The Court resuming. "Possession must be continued in for twenty-one years: it must be adverse, hostile, continuous, open and notorious, in order to give title to land. There has been no showing of such possession on either side; so that I do not think this point is important, or that it illustrates in any way the issues here.

"The real question, as I have explained to you, is, whether Mr. Polen's deed covers the land in dispute. The defendants may have had possession of it for ten years or fifteen years; I do not know how long, but they have not shown continuous, adverse possession, such as would give them title. There is no evidence to submit to you on that point, and you should dispel it from your minds. They have no claim by virtue of possession, except the claim which a defendant always has, that he has the right to retain his present possession, however it may be obtained, unless the plaintiff has shown a legal title to the land. * * *

4. "'Under the Sharps deed and the assignment Mr. Shoemaker took title to all land down to the rear end or line of the Gardner lot, although it was more than 255 feet.'

Ans.: "This is affirmed. That is just as I have endeavored to explain to you. * * *

8. "'The jury must find for the plaintiffs for some of the land described in the writ under any circumstances.'

Ans.: "That is, there is a part of the land as claimed by the plaintiffs, to which they are entitled, that Kime does not lay claim to, running from the edge of Fairview Avenue down to the point where Kime's lot is, a little strip there, some fifteen or twenty feet wide; the evidence will show what it is.

"Now, gentlemen, in regard to that, I think the point as stated is correct, and that your verdict, in any event, would have to be for that small piece of land on the edge of Fairview Avenue and the line of Kime's fence as it was in 1873.

"Under the instructions that I have given you, however, if you find that the intention of the Shoemaker deed was, as I have explained, and the description in it applies to all the land down to the rear of where the Kime lot should end, then of course, your verdict would be for the plaintiffs for the whole of the land described in the writ. If you find only for part, you will mark off what part you find for, describing it. If, however, you are satisfied from the deed and from the other circumstances in the case and from the instructions which I have given you, that the plaintiffs have not shown a title to that part of the land lying between where Kime's fence is now, or was in 1873, down to a point where Mr. Shoemaker's title would end to that tract, and the title to the Gardner lot begins, then your verdict should be for the defendants."

Verdict and judgment were for the plaintiffs.

The assignments of error specified the portions of the charge inclosed in brackets; the answers to the points quoted; and that the charge as a whole tended to mislead the jury.

Messrs. **Lemuel Amerman** and **F. W. Gunster,** for plaintiffs in error:

The sheriff's deed to Sharps calls for only 255 feet from Chestnut Street and then calls for land "in the possession of Timothy and John Gardner" in the rear, and the deed from Shoemaker to Polen calls for "land in the possession of Kime" in the rear.

The courses and distances in the deed must yield to the marks and monuments made upon the ground.

Willis v. *Swartz,* 28 Pa. 413; *Ogden* v. *Porterfield,* 34 Pa. 191; *Cox* v. *Couch,* 8 Pa. 147; *Lodge* v. *Barnett,* 46 Pa. 477.

The quantity of land which passes by a sheriff's sale, to the purchaser, is to be ascertained by the extent of the levy.

The right of construing the written return of the sheriff generally belongs to the court; and the *quantum* of estate conveyed by a sheriff's deed is usually referable to the court alone: but when, from the generality of the terms used, or from uncertainty of description, a doubt is raised as to the boundaries of the levy or the position or limits of the land sold, evidence *aliunde* may be resorted to; and where such evidence is received, it is error for the court to direct peremptorily how the verdict is to be rendered.

Hoffman v. *Danner,* 14 Pa. 25.

The question is what limits the officer had in his eye at the time of the levy, and what proportion of the land he actually levied on. If he took less than in fact belonged to the defendant in the execution, just so much passed, and no more.

Hoffman v. *Danner,* 14 Pa. 25, 30.

What property is embraced in a levy which is obscure in its terms may be shown by parol evidence; and it is a matter of fact to be determined by a jury.

Scott v. *Sheakly,* 3 Watts, 50.

A tendency to mislead in the general tenor of the charge, although no particular portion is erroneous, is sufficient grounds for a new trial or for reversal.

Reeves v. *Delaware etc. R. R. Co.* 30 Pa. 454; *Pistorius* v. *Commonwealth,* 84 Pa. 158; *Bishing* v. *Third Nat. Bank,* 93 Pa. 80; *Leibig* v. *Steiner,* 94 Pa. 472; *Washington Mut. Fire Ins. Co.* v. *Rosenberger,* 3 W. N. C. 16; *Pa. R. R. Co.* v. *Berry,* 68 Pa. 278; *O'Hara* v. *Richardson,* 46 Pa. 387; Hilliard, New Trials, 513; *Goersen* v. *Commonwealth,* 99 Pa. 401.

While a judge has a right to express an opinion upon the evidence, he must not infringe on the province of the jury so as to relieve them from pronouncing an intelligent judgment for themselves—he must not mislead them or control their deliberations.

Mohney v. *Evans,* 51 Pa. 84; *Leibig* v. *Steiner,* 94 Pa. 472.

Mr. **Thomas F. Wells,** for defendants in error:

The court left it to the jury to say whether the land was sufficiently described in the writ; and the jury found that it was. The court also told the jury that there was sufficient evidence to submit to them, as to the identity of the land described in the writ with the land in dispute.

In one case a description that gave two boundaries of the land was held to be sufficient.

Clement v. *Youngman,* 40 Pa. 341.

Descriptions or amended descriptions can now be filed in actions of ejectment at any time after verdict.

Act of March 14, 1872, § 1, P. L. 25.

It would, therefore, be useless for the court to reverse on the ground of an imperfect description of the land in the writ, because a correct description could be filed at any time on return of the case to the lower court, on simple motion.

Besides it is the practice in the supreme court to consider an amendment as made, which is as of course.

Jones v. *Freyer,* 34 Legal Int. 282; *S. C.* 3 W. N. C. 365.

The testimony as to the location of the fence was immaterial, however, for there was no testimony that the Gardners were in possession up to it, and even if the Kimes were it was only since 1873—years after Sharps had his deed and had assigned it to Shoemaker. Not the fence, but the true line of the Gardner lot was the dispute, and it alone the material question.

Petts v. *Gaw,* 15 Pa. 218; *Cleaveland* v. *Flagg,* 4 Cush. 81; *Sparhawk* v. *Bagg,* 16 Gray, 583; *Cornell* v. *Jackson,* 9 Met. 154.

The plain request in defendants' first point was that the court should say to the jury that although Shoemaker owned the land in dispute, still under his deed to Polen he did not convey it to the latter, provided that the jury found that it was at that time in possession of the Kimes.

If Mr. Shoemaker then owned it, the possession of the Kimes was under him; and the question then was what was Mr. Shoemaker's intention when he made and executed his deed to Polen.

Means v. *Presbyterian Church,* 3 Watts & S. 303; *Cox* v. *Freedley,* 33 Pa. 124; *Miner's App.* 61 Pa. 283.

The return of the sheriff to the writ is *prima facie* evidence that parties served were in possession of the land described; Purd. Dig. 636 pl. 5; and by pleading "not guilty" they admit themselves to be in possession of the whole of the land in dispute, unless they disclaim.

Hill v. *Hill,* 43 Pa. 521.

The construction of the sheriff's deed was for the court and not for the jury; *Cox* v. *Freedley,* 33 Pa. 124; especially as there was no ambiguity in it.

Petts v. *Gaw,* 15 Pa. 218.

It called for a lot of land from Chestnut Street to the rear of Gardner's land; and the depth is said to be "255 feet more or less." These last words are of great force in determining the intent of the sheriff when he made the levy.

Coughenour v. *Stauft*, 77 Pa. 191.

In *Hoffman* v. *Danner*, 14 Pa. 25, these words were not used, and in that case the court said: "Where a return is intelligible in itself and ascertains with reasonable precision the particular tract taken in execution, no room is afforded for the introduction of explanatory proof, and none will be received in contradiction of the official act."

More than this it would seem as if they had placed themselves in a position where this court will not review this question at all, as they have not printed in their paper book the writ and levy offered in evidence on which the sale to Sharps was made.

See *Philadelphia* v. *Riddle*, 25 Pa. 259.

Even if it would have been better for the court to submit the question to the jury instead of declaring the true effect of the evidence, still, the judgment will not be reversed, as the evidence is all one way and the court would surely not have sustained a verdict against it.

Eister v. *Paul*, 54 Pa. 198.

An occupant of land is supposed to occupy in accordance with his legal title, if he has one.

McCracken v. *Roberts*, 19 Pa. 390.

A claim founded on adverse possession must be supported by clear evidence of actual, adverse, visible, notorious, hostile and continued possession for the full period of twenty-one years.

Nearhoff v. *Addleman*, 31 Pa. 281; *Petts* v. *Gaw*, 15 Pa. 218; *Huffman* v. *McCrea*, 56 Pa. 99; *Groft* v. *Weakland*, 34 Pa. 308.

That there was no error in the court's saying "there is no evidence to submit to you on that point" of adverse possession is plain, for there was none.

DeHaven v. *Landell*, 31 Pa. 120.

A fence will not be taken as a monument unless named in the description.

Sparhawk v. *Bagg*, 16 Gray, 583; *Stuven* v. *Kalchreuter*, 8 W. N. C. 44.

It was within the discretion of the court to give such instruction as was given; in fact the court might have given binding instruction under all the evidence to find for the plaintiff.

McCracken v. *Roberts*, and *Petts* v. *Gaw*, *supra*.

The sheriff's return of service upon both defendants was *prima facie* proof of their possession of all the land described.

Purd. Dig. 686 pl. 5; *Dietrick* v. *Mateer*, 10 Serg. & R. 151.

Subsequently, a general appearance and plea of "not guilty" was entered on part of defendants. This was an admission, as before said, that they were in possession of all the land in dispute.

Ulsh v. *Strode*, 13 Pa. 433; *Hill* v. *Hill*, 43 Pa. 521.

The court correctly applied the law, we believe; but even if immaterial errors were made it is not ground for reversal.

Galbraith v. *Zimmerman*, 100 Pa. 374; *Lycoming Mut. Ins. Co.* v. *Sailer*, 67 Pa. 108; *Bush* v. *Stowell*, 71 Pa. 208; *Hoskinson* v. *Eliot*, 62 Pa. 403.

Per Curiam:

In the case before us there are some eighteen assignments of error, but not one of them can be sustained. There was no dispute about title on either side since both parties claimed from a common grantor, so that the true and only question was one of lines, and that was fairly left to the jury. The sheriff's deed under which Shoemaker claimed, called for the rear end of the Gardner or Kime lot, and necessarily carried the land conveyed by it to that adjoiner, while the Tripp conveyance limited the defendants' claim to a length westwardly of 150 feet from the middle of Wyoming Street.

If, therefore, we were to consult the papers alone, the west line of the defendants' lot and the east line of the plaintiffs' would be readily ascertained by a survey of the defendants' lot. The learned judge, however, thought there was some evidence to go to the jury, and so left it, although we cannot see that it was of such a character as should have changed the *prima facie* effect of the deeds. There was a good deal of testimony about a fence in the rear of the Kime lot in 1860 or thereabouts; but for what purpose, or by whom erected does not appear. Kime claimed up to it in 1873, but before that date we have nothing concerning its purpose.

Evidence of this kind was of little moment either to establish a line, or on which to base title by the Statute of Limitations.

The judgment is affirmed.

MERRICK THREAD CO., *Plffs. in Err.*,
v.
PHILADELPHIA SHOE MANUFACTURING CO.

1. To make a **principal's ratification of** the **unauthorized act of** an agent effectual it must be shown that there was previous knowledge on the part of the principal of all the material facts and circumstances attending the agent's act.
2. Where there is no evidence of such knowledge, it is error to submit the **question of ratification** to the jury.

(Argued Jan. 27, Decided March 21, 1887.)

JANUARY Term, 1887, No. 133, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Green, *JJ.*

Error to Common Pleas No. 2 of Philadelphia County, to review a judgment on a verdict for the defendant in an action of assumpsit. *Reversed.*

The facts as they appeared at the trial in the court below were as follows:

This was an action of assumpsit, brought by the Merrick Thread Company against the Philadelphia Shoe Manufacturing Company, for goods sold and delivered from November 11, 1882, to April 3, 1884, amounting to $969.09. The defendant pleaded payment, and, subsequently, accord and satisfaction.

The Merrick Thread Company is a Massachusetts Corporation, organized for the sale of spool cotton, having its manufactory and office at Holyoke, in that State.

Franklin S. Hovey is the agent of the Company for the sale of its goods in Philadelphia, which are consigned to him to be sold on commission, he remitting the proceeds at stated periods after deducting his commission and other charges.

Among the customers of Hovey for these goods were Samuel Dunbar & Co., to whom, prior to the fall of 1882, large quantities of goods, on four months' time were sold. This firm was changed, in the fall of 1882, to the Philadelphia Shoe Manufacturing Company, a co-operative association. Hovey continued to sell this Company the Merrick Thread Co's goods, on the same terms as he had sold to Dunbar & Co. Some time in the fall of 1882 or spring of 1883, Hovey was asked by a representative of the Shoe Company to take some stock of the Company in payment for the Merrick Thread Co's goods. This Hovey declined to do on his own account, but said he would submit the matter to his principal, the Merrick Thread Company, for acceptance or nonacceptance.

On February 15, 1883, the Shoe Company sent a letter to Hovey, by A. W. Smith, their bookkeeper, inclosing certificate of twenty-five shares of their capital stock, made out in his name in the following language:

February 15, 1886.

F. S. Hovey, Esq.

Dear Sir: Enclosed please find certificate of twenty-five shares of our capital stock. Not a share has been placed under par value. We agree, in consideration of the acceptance of this certificate, to give you for the Merrick Thread Company our trade indefinitely, averaging about $200 per month. Mr. McKnight, our treasurer, in his individual business, is a consumer of goods in your line to about the same amount, and at present not a customer of yours. We have his agreement also to give you the preference for his wants. We agree to credit our monthly payment of our purchases in your stock until full paid.

Yours, etc.,
(Signed) Philadelphia Shoe Co.
Per A.

This letter and certificate of stock were received by the bookkeeper of Hovey, who gave a receipt for it as follows:

Received, from Philadelphia Shoe Manufacturing Co., certificate twenty-five shares of the capital stock, in the name of F. S. Hovey, No. 29, to be submitted by Mr. Hovey to the Merrick Thread Company for their approval, and if approved, to be taken out in the purchase of thread.

Shortly after this time a son of Hovey, Franklin H. Hovey, went to Holyoke on business, and submitted the proposition of the Shoe Company to the president of the Merrick Thread Company, Mr. Merrick, who promptly declined to accept the stock on behalf of the Corporation, but suggested to Hovey that some stockholder might be induced to take it. Nothing more was said, and the matter was dropped.

In July of the same year, Mr. Franklin S. Hovey, the agent, visited Holyoke, and asked one or two of the stockholders to take this stock, but they all declined.

The Merrick Thread Company, until informed by Hovey, did not know that the Shoe Company was a purchaser of its goods, nor did it know that after it had declined the proposition the agent continued to furnish the Shoe Company with its goods; nor did it know that a certificate of stock had been delivered to its agent. It ships its goods direct to Hovey in large quantities, and does not know who his customers are.

Hovey neglected to notify the Shoe Company of his principal's refusal to take the stock in payment, until November of 1883, when a demand was made by his bookkeeper, on the Shoe Company, for payment of the account. The Shoe Company's agent replied that it had considered the stock accepted, and had credited the purchases on the stock, but promised to refer the matter to the board. The agent, Hovey, made repeated demands for payment, but the stock was not returned by Hovey to the defendant company until May or June of 1884. The goods were furnished continuously by the agent, Hovey, to the defendant, between the dates mentioned above, but the orders were never increased after the defendant's alleged assumption of the acceptance of its stock in payment.

The court refused to affirm plaintiff's seventh point, which was—"Under all the evidence in this case, your verdict must be for the plaintiff," and submitted the case to the jury, on the facts, to say whether the plaintiff's acceptance was to be inferred therefrom.

Verdict and judgment were for the defendant.

The *assignment of error* specified the refusal of the point quoted.

Messrs. **Henry W. Hall** and **Dwight M. Lowry,** for plaintiff in error:

The question is solely whether or not there was sufficient evidence, or rather whether there was any evidence at all, of ratification upon the part of the plaintiff, of the unauthorized acts of the agent, Hovey, subsequent to the refusal of the plaintiff to accept the stock of the defendant in payment for its goods.

The defendant knew that the agent had no authority to receive the stock in payment, without special authority from his principal, and that when the proposition was submitted to the plaintiff it was promptly and unqualifiedly rejected.

The act of the agent, although unauthorized at the time, may become binding upon the principal by ratification and adoption. But to make such ratification effectual it must be shown that there was previous knowledge on the part of the principal of all the material facts and circumstances attending the act to be ratified.

Adams Express Co. v. *Trego*, 35 Md. 69; *Ritch* v. *Smith*, 82 N. Y. 629; *Pittsburgh etc. R. R. Co.* v. *Gazzam*, 32 Pa. 340; *Rafferty* v. *Haldron*, 81 Pa. 438; *Lance* v. *Deacon*, 15 Phila. 318; *White* v. *Langdon*, 30 Vt. 599; *Stewart* v. *Woodward*, 50 Vt. 78; *Wheeler & Wilson Machine Co.* v. *Givan*, 65 Mo. 89.

The ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded in mistake and fraud.

Owings v. *Hull*, 9 Pet. 629 (34 U. S. bk. 9, L. ed. 254).

Where there is no evidence of knowledge of such material facts upon the part of the principal it is error to submit the question of ratification to the jury.

Moore v. *Patterson*, 28 Pa. 505.

Messrs. **B. F. Fisher** and **Crawford & Dallas,** for defendant in error:

The claim of the plaintiff is for the money price of goods sold and delivered by its general agent, with the largest powers arising from possession of the goods, guaranty of the sales, and a knowledge of the customers and their accounts, exclusive of the plaintiff. And it is submitted that the case is not one raising a question of simple ratification, but of a principal, under a sale by such an agent, claiming to recover upon the contract of the agent, and to repudiate the condition on which it was made with him. A party seeking to enforce a contract made by his agent, is bound by his declarations made at the time, although he exceeded his authority. If he would have the benefit of the bargain, he must adopt it as his agent made it.

Keough v. *Leslie,* 92 Pa. 427, 428.

Mr. Justice **Trunkey** delivered the opinion of the court:

The plaintiff's demand is admitted. To defeat the action the defendant alleges a contract made with the plaintiff's agent who sold the goods, for sale of twenty-five shares of stock at the par value of $1,250, to be paid by credit of purchases of goods from the plaintiff. Previous to the time of making this contract the defendant had repeatedly purchased goods from the same agent of the plaintiff, always to be paid for in money.

It is not pretended that the agent had authority to buy the stock for his principal. The written proposition of the defendant contemplated an acceptance of the stock by the plaintiff, and the agent's receipt stated that it was to be submitted to the plaintiff, and "If approved to be taken out in the purchase of thread."

There is evidence tending to show that the agent did submit the proposition, as he promised, and that the stock was at once refused. There is no evidence that the plaintiff knew that the agent held the certificate after said refusal, or that any goods had been sold or purchased with an understanding that the price should be applied in payment for the stock. The defendant not only failed to adduce testimony of authority in the agent to sell goods for stock, but very clearly showed its own knowledge that the agent had no such authority. It was proved that Hovey agreed to communicate with the plaintiff, inform the defendant of the result, and if the stock should not be accepted to promptly return the certificate; but it was not proved that the plaintiff had any knowledge of what Hovey had promised the defendant.

The principal is not liable to a third party when such party had knowledge that the agent in the contract acted out of the scope of his authority. But it is unnecessary to refer to this principle, for Hovey did not make a contract for the stock as agent for the plaintiff. Whatever agency existed in Hovey in relation to the stock was created by the defendant, at whose instance Hovey acted and promised, and no promise made to or by the plaintiff was broken.

Nor is there any question of ratification, in absence of proof that the plaintiff had knowledge of the facts; and for like reason there was no implied acceptance of the proposition for sale of the stock. Hovey allowed longer time without payment for the goods, after his negotiation about the stock, than before. Prior sales and payments were through Hovey, and his delay in demanding the money, in itself, does not warrant the inference of an acceptance of the proposition, or of a ratification by the plaintiff.

The principle which controlled in *Keough* v. *Leslie*, 92 Pa. 424, cited by defendant, has no application when the declarations made by the agents were neither inducement to the making of the contract, nor part of its conditions.

The plaintiff's seventh point ought to have been affirmed.

Judgment reversed, and venire facias de novo *awarded.*

Darlington R. KULP *et al., Plffs. in Err.,*
v.
James BIRD.

1. In an **action** of trespass **for cutting standing timber** contrary to the Act of March 29, 1884, *held*, that an **equitable title to land** by purchase from the owner and continuing to hold the same by virtue of the agreement until the trespass was committed, is **sufficient** to sustain the action.

2 *Held further*, that where the **latter part of a will** varies from the first part so that both cannot stand together, the latter part, as being the last thought of the testator upon the subject, **controls.**

3. A **land patent** is granted by the Commonwealth to the persons who are entitled and who have paid; and if another procures the patent to be made to himself, he takes as trustee, and it does not preclude the former from setting up whatever title they have to the property.

4. A **contract signed by parties competent to enter into it** is **admissible** in evidence, **notwithstanding** it is **also signed by parties incompetent** to contract.

5. Where the jury gave single **damages** only for the timber thus cut, the court has the right, under the Act, to **double** such **damages.**

6. A **tenant by the curtesy** has only a life estate, and when he dies nothing descends from him to his heirs.

(Argued March 3, Decided March 14, 1887.)

JANUARY Term, 1887, No. 2, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Columbia County, to review a judgment on a verdict for plaintiff in an action of trespass for cutting timber. *Affirmed.*

This action was brought by James Bird against Darlington R. Kulp, Curtis G. McWilliams and William C. McConnell doing business as Kulp, McWilliams & Co.

The facts sufficiently appear from the charge of the court given below.

The plaintiff offered in evidence a certified copy of the will of Henry Fisher, deceased, dated September 24, 1816, to show that the land was devised to the mother of James Bird and that from her, title vested in James Bird, the plaintiff; to be followed by proof that her title became vested in the plaintiff.

Objected to by defendants: 1, because by the second section of the will, the tract of land surveyed on warrant to Henry Fisher, given in evidence, was devised in fee unto John Fisher, and Caleb Fisher, without reservation; and if Sarah Bird acquired any right to the ten acres from said land devised by the second section to Caleb and John Fisher, by words expressly conveying the fee, it was only a life estate, as the will was executed and probated before the Act of April 8, 1833; 2, it is irrelevant for the purpose for which it is offered.

By the Court: These objections are overruled; the plaintiff alleges that he can show title in himself; we will have all the evidence out and then we can judge of the title.

Plaintiff offered in evidence the agreement between the plaintiff and his mother, brothers and sisters, for the purchase by him of this ten acres of woodland, to be followed by regular deeds of conveyance, executed and delivered according to law.

Objected to by defendants: 1, because according to the terms of the offer it is merged in the deeds subsequently executed and delivered to the plaintiff; 2, because it is signed by three married women, whose husbands did not join and did not acknowledge it as required by the Act of Assembly; and it is as to them, null and void; 3, because it is irrelevant for the purpose for which offered or for any purpose in this case.

By the Court: We will allow this to be read in evidence; it is void as to third parties.

Defendants, *inter alia*, presented the following points:

2. The plaintiff having alleged in his declaration that he was seised in his demesne as of fee of and in the ten acres of land described in his declaration filed in this case; and, having claimed triple damages for cutting timber trees upon the same, is bound to show that he was the owner of said land prior to the bringing of this suit; and, having failed to establish such ownership, cannot recover in this suit, and the verdict must be for the defendants.

Ans. I answer, substantially, as I have already charged, that if James Bird acquired an equitable title to an interest in the land on which the alleged trespass was committed, by purchasing from the legal owner, and continued to hold the same by virtue of articles of agreement until a trespass was committed thereon before the commencement of this suit, the allegation of his seisin and title as owner is sufficiently sustained for the purposes of the suit.

3. The plaintiff, having shown by the patent to John Fisher, offered in evidence by him, that the complete title was vested in the said John Fisher on the 15th day of July, 1873, and having failed to show any conveyance of this title to him, or that the same became in any way prior to the bringing of this suit vested in him, cannot recover.

Ans. I refuse to affirm that point. Under the evidence in the cause, John Fisher, having obtained a patent in 1873 of the land granted to Henry Fisher in 1814, the purchase money having been paid by Henry Fisher, and he John being the devisee of Henry Fisher of the amount of land in the contract except the ten acres, was trustee of the portion devised to his sister, Mrs. Bird. The rule of law is that the patent is granted by the Commonwealth to the persons who are entitled and who have paid. Here John Fisher was the devisee, along with his brother Caleb, of a portion of the land; it was therefore proper enough for him to procure a patent and to complete the title which had come down to him as devisee under his father; and therefore he applied to the land office and obtained a patent, which has been read in your hearing, for the whole of it covering the ten acres, an undivided patent. From what transpired in the trial of the cause, we may fairly presume that he claimed the whole of it on the ground that he and Caleb were first named in the will, and that therefore he had a right to it. He having taken a patent for the whole, and the Commonwealth in that patent setting forth that the purchase money had been paid by Henry Fisher at the time of granting the warrant, and that he, John, had derived title from Henry, that was true in part, because he had so derived it and his patent covered the whole.

It is claimed here that the plaintiff, having given this patent in evidence, cannot say that anybody else than John Fisher had the title; but when you take into consideration all the circumstances: that his sister Sarah, his brother Caleb, and he, were devisees under the same will and for portions of the same tract, and the recital that his title had come from Henry Fisher; in the judgment of the court, it does not preclude the defendants (plaintiff) claiming under Mrs. Fisher (Bird) from setting up whatever title she had to the property.

4. The plaintiff having shown that the title to the land vested in John Fisher in 1873, and the uncontradicted testimony being that the said Fisher title vested in defendants, and that they were the owners of the said lands at the time of the alleged trespass, the verdict must be for the defendants.

Ans. I decline to charge as requested in this point. The defendants stand where John Fisher stood; they have the rights of John Fisher, and what John Fisher had the right to do in respect to this property they had the right to do, and no more; they acquired his right, title and interest; and under that they make their defense. We have already said to you that for ten acres, wheresoever they lie, John Fisher was trustee for his sister, who died in 1879. She at that time was living, and he took it as trustee for her; of course when she died, the residue which she had descended to her children, provided she had not bargained it away or contracted to its being bargained away, as already stated.

5. That the plaintiff has shown no such title or possession as entitles him to recover.

Ans. This point is refused in what we have already said; we have explained our views on that subject.

6. If the court decline to affirm the above, then they are respectfully requested to charge the jury that the ten acres of land mentioned in the fifth section of the Henry Fisher will is required to be located at the northeast corner of the Henry Fisher survey, and not taken from the east end of said tract as claimed by the plaintiff, and should be located in the northeast corner, the course of the eastern line of said tract for the distance of twenty-one perches and thence by a line parallel with the northern line of said tract, a sufficient distance to make ten acres.

Ans. I decline to charge as requested in this point, and I submit to the jury the question upon the drafts and the evidence before the court of the location of the line of the ten acres, on the Henry Fisher tract. You know by drafts, what is called for on the east end of the tract and you have seen and will have before you the shape of the Henry Fisher tract, at the east end along the narrow piece of land. It is claimed by the defendants that this division would split the east end which is forty rods wide into two parts, making it forty-one or forty-two; that the division line ought to be in the center so as to be within the meaning of the will as to the northeast corner.

You are to take into consideration all the circumstances, among other things the shape of the tract, whether the meaning of it would be that it should be so as to include nothing but the northeast corner, and so run far enough down to make ten acres, or whether the language of the testator means in effect off the east end of the tract, or whether it is confined to that particular corner; I do not think that this is a matter of law for the court to determine under the evidence; especially, as it is shown before you that the grantee, James Bird, never laid off the ten acres in the way that is now claimed by the defendants, but laid it off many years ago from the east end of the tract, and, so far as appears, claimed that end of the tract down to the present time; and, if the east end of the tract was to be divided so as to make the ten acres lie upon the one side, the one half, whatever the course or location would be, then the proper way is to say that what lies on one side of the middle line, between this and the northeast corner on that side, the plaintiff is entitled to, and to no other portion of the land.

The court charged the jury as follows:

"In 1824 an Act of Assembly was passed, which provides that 'In all cases where any person or persons shall cut down or fell, or employ any person or persons to cut down or fell, any timber tree or trees growing upon the land of another, without the consent of the owner thereof, he or they so offending shall be liable to pay to such owner double the value of such tree or trees so cut down or felled, or, in case of conversion thereof to the use of such offender or offenders, triple the value thereof.'

"The action which we are now trying is brought under that Act of Assembly; the plaintiff, Bird, declares that timber was cut upon his land contrary to the provisions of that Act. Whether the defendants knew that they were trespassing, if they were, is immaterial; the law was unquestionably intended to preserve the timber in the then more sparsely settled portions of the Commonwealth, where it might be somewhat difficult to ascertain who cut the timber; and hence, rather in the nature of a penalty, damage was given beyond the value, for the purpose of preventing the depredations of marauders; so that the Act makes no distinction between those who cut knowingly and those who do not; if they cut upon the land of another and without his consent, it is a trespass for which the owner can recover under this Act of Assembly more or less, according to what the trespasser did upon the ground. If he merely felled the timber, double damages were given; if he felled it and converted it to his own use (which properly means carried it away), he incurred the penalty of triple damages, partly by way of compensation to the owner and partly to prevent trespasses.

"By this same Act, if the trespasser knew that he was cutting timber on the land of another, he might be indicted; but that would make no difference with the right of the owner of the land to recover for the damages which he sustained.

"The plaintiff here, seeking to establish title to the land on which the alleged trespass was committed, produced in evidence a warrant to Henry Fisher for a tract of land described therein, dated on the 8th day of September, 1824. In pursuance of that warrant, the deputy surveyor laid off ninety-three acres and some perches, and returned the survey to the land-office. This of itself did not confer a legal title; that passes from the Commonwealth only when it has given its deed, called a patent; but applying for a warrant for a quantity of land, having that land surveyed and returned to the land office, and paying the purchase money, gives an equitable title, which descends to the heirs of the warrantee.

"Henry Fisher died on the 11th day of September, 1824, having first made his will, the second clause of which gives to Caleb and John, sons of the testator, 'All that certain messuage' etc., describing it, 'with all the appurtenances thereto belonging or in anywise appertaining; to have and to hold to the said Caleb and John Fisher, their heirs and assigns forever, as tenants in common and not as joint tenants'—subject to their making certain payments. That was actually conveying the fee simple to the land therein described.

"In the fifth clause of the will, the testator provides: 'I do give and devise to my daughter Sarah, intermarried with James Bird, and to her heirs and assigns forever, all that certain messuage and tract of land, with the appurtenances thereto belonging, situate in Catawissa Township, Columbia County, containing ninety-two acres and forty-six perches, be the same more or less; also ten acres of woodland, to be taken off the northeast corner of the ninety acre tract which is devised to Caleb and John Fisher, and adjoining the Philip Mettler.' The larger tract is given to the sons and to the widow (daughter) and her heirs as strongly as language could provide, and then follows the clause that raises the question here, 'and also ten acres of woodland to be taken off the northeast corner.'

"It is claimed by counsel for the defendants that the clause giving the whole tract to the two sons in fee is inconsistent with the clause giving a part of the same tract to Sarah, and that the latter has not the same strength, not having the words, 'heirs and assigns forever' following it, and that therefore there was but a life estate in Sarah, the daughter; that the two clauses are, upon any other interpretation, irreconcilable, or that there is no way by which this will can be construed so as to make both these clauses consistent and operative.

"It is the duty of courts, in construing wills, to carry out if possible the intention of the testator; and that intention is to be gathered from the whole will and from all its parts, and if necessary, there may be a transposition of words in order to accomplish that matter, the carrying out of the intention of the testator; but where it is found, after proper endeavor, impossible to reconcile two clauses of a will, then the rule applies that a latter clause prevails over a former clause, just as the last will and testament must prevail over previous wills.

["Where the latter part of a will varies from the former part, so that both cannot stand together, then the latter, as being the last thought the testator had upon the subject, controls. I therefore instruct you that the ten acres off the northeast corner was by the will of her father given to Sarah; when he died in 1824 the ten acres became hers absolutely, in fee. I come to this conclusion from the phraseology of the will, which, after giving the ninety acres, then says: 'Also the ten acres,' mentioning where it lies. The word 'also,' as there used, means, 'in like manner,' 'I give her the ten acres as I have given her the ninety acres;' that is the meaning of the word 'also,' as I construe it, the same estate in the ten acres as was given in the ninety acres. The ninety acres were given to her and her heirs and assigns forever.]

"[Matters remained in that way down to 1837, when an article of agreement was entered into, purporting to be signed by the heirs of James Bird, the husband of Sarah Fisher, who had died in September, the exact date, I think, is not in evidence; the parties to this agreement called themselves his heirs; they were not his heirs as to this land; they were his heirs as sons and daughters, and therefore his heirs of whatever interest he had in this land; but he had no interest in this land, because the fact that he was the husband of Sarah, which made him tenant by the curtesy, gave him only a life estate; and when he died nothing descended from him to his heirs.]

"[That article of agreement is signed by three sons, I think, and three daughters of Mrs. Sarah Bird; we allowed it to be read in evidence, because there were upon it the names of parties who were competent to enter into such a contract; but these three married women could not dispose of their land except in the way pointed out by law, namely: by a writing executed jointly with the husband, and separately acknowledged by the wife, examined apart by the magistrate; that was not done in this case; therefore their signatures to the paper are absolutely void, and it passed no title whatever to James Bird.

"A contract signed at that time by the brothers alone would have bound them, and would have conveyed an equitable right, if they at that time had any title to the land; but their mother was living and they were not heirs of their mother while she lived. But Sarah Bird, who owned the land, signed that paper along with the others; her name, I believe, is not in the body of the instrument; but she signed it along with them, knowing that the land was to be sold to James Bird for the consideration mentioned in the deed. By assenting to the sale to be made by her daughters and her sons to her son James Bird, she acquiesced in the transfer; and although her children at that time had no title in the land whatever, she had; and if she agreed that they might make sale for valuable consideration, she had the right to do so, and, doing so, bound herself; and if she was bound, when she died her heirs were bound by her act in her lifetime; so that by her assent and acquiescence and joining in the contract, by which this land was conveyed to James Bird, he acquired an equitable title to it, such a title as any man acquires when he enters into a contract for the purchase of land for the consideration named; and when, from the terms employed, it is fair to conclude that he has the right of possession, he sustains any loss that accrues to the property bought.

"If one should purchase a dwelling house by contract with the former owner; and if before deed made, and before the purchaser paid, the house should burn down, it is the loss of the vendee and not of the vendor. So in the purchase of timber land; if one has acquired an equitable title and bound himself to pay, and a trespass is committed upon the land, he is the owner to such an extent as to entitle him to maintain trespass under the Act of 1824;. he sustains the loss, and ought to have the remedy which the law gives to redress the wrong committed upon him. Mere possession would not of itself entitle a claimant to recover against a trespasser under this statute; one having the possession or (and) the immediate right of possession can maintain trespass for any injury he has sustained. Cutting down timber is an injury to the inheritance, and he who has the equitable title may maintain trespass.]

"Counsel for the defendants request us to charge:

(The court here read and answered defendants' points and then continued.)

"If the cutting of timber trees was upon the ten acres at the east end of the tract, and if that was the land devised, then of course you will have to ascertain how much timber was cut upon that portion; if, on the other hand, it is divided so as to split the tract in two, then you have the difficult task of ascertaining how much timber was cut on the one side and how much on the other. If you say the trees in question were cut on the ten acres, taking them off the east end, you will go through the evidence to see how many trees or how much timber was taken from that quarter; if you come to the conclusion that the tract should be divived so as to make the ten acres in the northeast corner, then you will have to ascertain, as best you can, the value of the trees cut off that. But where a party seeking to recover damages fails in his evidence to show the amount of the injury that was done him, the jury have no right to guess at how much it would be.

"Much has been said in the course of this trial in regard to the possession of this land. It is unseated land, uncultivated land. The only possession that has been had, so far as the evidence goes to show, is the occasional (not every year) taking some timber for wood, or ties, or something else, in the course of a long period of time, off this tract. There is no evidence that either party has gained title by the Statute of Limitations, by peaceable, notorious, hostile possession, uninterrupted for the period of twenty-one years.

"The occasional coming for fire wood does not give title by possession, however long continued, at intervals, these trespasses may be; but if the person has an equitable title, and if the land has been taxed to him and he has for a long period of years paid the taxes, or those under whom he claims have for a long period of time paid all the taxes assessed against him, this payment of taxes, in connection with the equitable title, is worthy of some consideration on account of his right to the land and his possession of the property. While the title to the land of another cannot be gained by simply paying taxes upon it, yet, if there is payment of taxes, and the claimant exercises acts of ownership over the land, the fact of the payment of taxes may be taken into consideration in deciding the question of his possession.

"Something also has been said about the sale for the taxes of 1874 and 1875. The evidence shows an assessment of taxes during these years and a sale in 1876 to John Fisher, and it is claimed that that sale covered this land. In order to make a valid sale of unseated lands, there must be a valid assessment made by competent authority, and the taxes must have remained unpaid for one whole year before the sale. If the taxes were paid by the claimant of the land, a sale for taxes would not be valid, because the taxes were paid; a sale of the land where the taxes are paid is simply void, carries no title.

"Did James Bird pay the taxes for the years 1874 and 1875, the sale for which was made in 1876? He testifies that his father paid the taxes before; and that he, although he took no receipt, paid taxes for these later years, for years before and some afterwards, and all the time down to 1886; that being the case, the tax sale in 1876 was invalid and passed no title to John Fisher. The case stands then upon the title that he held before that time. I believe these are all the questions raised relating to the title.

"You turn your attention to the question whether the defendants either cut, or procured to be cut, timber upon this land. They claim to be the owners of the property through their purchase from John Fisher. It seems that they employed a man by the name of Shields to cut timber on that tract; and evidence has been given here (which you will call to mind) as to what these defendants did do in reference to cutting that timber. If they employed Shields to cut the timber, and knew and understood that he was cutting this timber on these ten acres, and if they employed men to haul off the timber that was cut, the cutting would be for their benefit and assented to by them; it would make them trespassers. If they employed Shields to cut the timber on a particular portion of the land, as a contractor, and restricted him to their land, and he cut over upon somebody else's, they would not be responsible; but, if they acquiesced in his act, drew off the lumber, they would be responsible for the acts of one who was their agent in that respect. If you find that the plaintiff is entitled to recover, the next question is the amount. You will have, I presume, from the counsel, a statement of the number and size of the trees alleged to have been cut and the quantity of lumber in them and the number of ties taken; it will be impossible for you to remember all these items without some such memorandum.

"The price of timber land is not the sole test of the value of the timber upon it, although it is worthy of your consideration. The value of the trees, where they stood when they were cut down, as standing trees, is the question, not as trees felled and the bark peeled off and carried away and sold; the law gives the value of the trees as trees, not as manufactured lumber or anything else, but as trees as they stood there on that ground. In ascertaining that, the character and quality of the timber, the size of the trees, the amount of lumber that was in them, what trees of that size and location would sell for, may be considered.

"If you believe the testimony on the part of the defendants, there is nothing in their acts or conduct that goes to show that they intended anything more than pursuing what they believed to be their rights; but I have already instructed you that this matters not, so far as the plaintiff is concerned, whether they acted sincerely or otherwise. It is not a case for vindictive damages; you have no right to go beyond the value of these trees, no matter what the conduct of these defendants was. In estimating the damages, you should be just to both parties, ascertaining the value of the timber cut.

"If you find for the defendants, the verdict should be, generally, 'For the defendants.' If you find that a portion of the property was cut down and was left on the ground, not converted, you will give double damages for that portion; but for what was converted, if any, triple damages; designating how much you find of double damages, and how much of triple damages; this may be difficult for you to ascertain, but you have to take the case where the parties leave it. As I understand it, at the time of bringing this suit, a good deal of timber beyond a certain size still lay upon the ground where it was cut, and has been taken away by these defendants since suit brought and within the last year. The plaintiff is restricted to damages sustained up to the time of bringing this suit in October, 1882, and cannot recover for anything this side of that; the rights of the parties are to be determined as of that date: whatever has been taken away since suit brought is not a subject for damages here; for the timber that lay there on the ground the plaintiff could have maintained trover, provided he has a right to this land. You may find, in looking at the testimony, that the witnesses upon the one side or upon the other put the damages beyond any reasonble amount, beyond anything that you ever heard of in the way of damages for timber cutting; or you may find them too low in their estimates; the facts are for you; and between the evidence that is given on the one side and the other you must endeavor to get at such a medium as will do justice between these parties, giving due consideration to all the evidence in the case. You have no right to compute any interest."

The jury returned the following verdict:

"We find a verdict for the plaintiff for $625.10.
447 oak at 70cts., $312.90 single damage.
223 chestnut at $1.40 $312.20 double damage.
———
$625.10."

Counsel for plaintiff moved the court to double the $312.90, single damage for oak; and increase the $312.20, double damage for chestnut to such an amount as would be treble the amount of single damage.

By the Court. "The declaration alleges the cutting of timber by the defendants on lands of the plaintiff and converting them to their use. The timber shown on the trial to have been cut was oak and chestnut, all that was cut was not converted by the defendants. * * *

"If the first words (of the verdict) are to be taken as the whole verdict, this motion ought not to prevail. It is manifest, however, that the jury did not so intend. Whether the verdict is strictly according to the evidence on the trial is not now the question, as neither party has asked for a new trial. It must now be construed by itself. And in order that it be rightly understood, or rather in order that it may be construed so as to be consistent with itself, the several parts must be considered with the whole.

"When a jury in such a case say that the damage which they find is double damage, the court has no right to double the amount so found. In this case the item, 223 chestnut, $1.40, $312.20, double damage, means just what it says, that the value and aggregate as put down are found to be double damage. Suppose the jury in any case under the statute should say in their verdict that they find for the plaintiff a named sum treble damages; it would be error for the court to enter judgment for treble the amount so found.

"The verdict declares that the damages have been already trebled by the jury. The same reasoning applies with equal force when the verdict finds a sum said by them to be double damage. If the jury intend in such a case that the amount shall be doubled by the court, that intention must be indicated in some other manner than by finding that the double damage is so much. When a sum is found by the jury as 'single damage,' they already show that they have neither doubled nor trebled the amount of damage which they have found for the plaintiff, leaving the increase for the action of the court, as shall be in acccordance with the law.

"Thus construed, this verdict is consistent with itself throughout, and means just this: We find for the plaintiff a verdict of $625.10, made up in this $312.90, damages subject to increase by the court and $312.20, damages which we find to be double the actual damages; total, $625.10, subject as aforesaid. Whether the jury so intended is to be gathered from their written verdict, and not from what the court might have found as fact under the evidence.

"In view of the fact that some of the oak cut was shown to have been converted by the defendants and some was not, we concluded that the counsel for the plaintiff, in view of the difficulty of ascertaining the proportions of each, have moved the court to double damages found for the oak. The motion to that extent we are of opinion ought to be granted, but as to chestnut I am of opinion that the amount of damages fixed by the jury cannot be either doubled or trebled by the court.

"Double damages for the oak, $625.80.
Damages for the chestnut as
found by the jury, 312.20.
Interest from date of verdict. ———
$938.00."

The assignments of error specified the admission of evidence as above noted, the answers to defendants' points, the portion of the charge inclosed in brackets, and the action of the court in increasing the amount of the verdict rendered by the jury.

Messrs. **John G. Freeze,** and **S. P. Wolverton,** for plaintiffs in error:

Under the pleadings in the case, the plaintiff was bound to show that he was the owner of the land at the time the timber was cut, to enable him to recover.

Purd. Dig. last ed. p. 1635, § 2; *Tammany* v. *Whittaker*, 4 Watts, 221; *Welsh* v. *Anthony*, 16 Pa. 255, 256.

By the second section of the will of Henry Fisher, the land was devised in fee, unto Caleb and John Fisher; and as the will was made and probated prior to the Act of April 8, 1833, Sarah Bird only took a life estate under the fifth section.

The court was in error in changing the verdict.

Hughes v. *Stevens*, 36 Pa. 320; *Newcomb* v. *Butterfield*, 8 Johns. 342; *Campbell* v. *Finney*, 3 Watts, 84; *Clark* v. *Sargeant*, 2 Cent. Rep. 352.

Messrs. **E. R. Ikeler, C. W. Miller** and **Grant Herring,** for defendant in error.

Per Curiam :

We have given to this case a thorough examination, and have carefully considered all the specifications of error; yet we are not able to find any error in the record. We do not discover that the learned judge, in his able and clear charge, stated either the law or the facts incorrectly. The rulings relating to the admission of evidence are free from error. The record shows affirmatively that the jury gave single damages only for the oak; this gave a clear right to the court to double those damages. *Clark* v. *Sargeant*, 2 Cent. Rep. 352, 112 Pa. 16.

Judgment affirmed.

Robert J. MENNER *et al.*, *Plffs. in Err.*,
v.
A. S. NICHOLS *et al.*

1. If the record in **proceedings to designate a curtilage subject to mechanics' lien,** under the Act of June 16, 1836, contains no irregularity, the decree will be affirmed on *certiorari*.
2. In such proceedings the **court has**

power to set aside the **report** of the commissioners and appoint others.

3. The Act requires **notice of** the **appointment of commissioners** to be given to the parties interested, but requires **no notice of** the **time of view.**
4. The **extent of** the **curtilage** necessary **for** the **use of** the **building** rests in the discretion of the commissioners and the court below.

(Argued Feb. 22, Decided March 14, 1887.)

JULY Term, 1886, No. 36, E. D., before Gordon, Paxson, Trunkey, Sterrett and Clark, *JJ.*

Certiorari to the Common Pleas of Wayne County, to review a decree designating a curtilage subject to mechanics' lien under the Act of June 16, 1836. *Affirmed.*

The case is stated in the opinion of the court below.

The following exceptions to the report of the commissioners were filed by judgment creditors of W. H. Dimmick, the owner of the premises:

I. The report and draft accompanying the same is imperfect, defective and insufficient for the information of the court, in not indicating the situation or location, upon said tract of land, of the three story building, known as the Irving Cliff Hotel building, mentioned in the petition, and in not setting forth that said building is situate upon the tract of land designated in the report as "necessary for the convenient use of said hotel building."

II. The report and draft accompanying the same is imperfect, defective and insufficient for the information of the court, in not mentioning or describing any of the improvements upon said tract of land.

III. The report and draft forming part thereof is imperfect, defective and insufficient for the information of the court, in not indicating the location of the following described buildings, situated upon said tract, and in not setting forth that said buildings are situated thereupon, viz.: 1, a two story frame dwelling house, sixteen by twenty-four feet, with two story wing, fourteen by sixteen feet, and a one and a half story wing, fourteen by eighteen feet; 2, a two story frame barn, twenty-six by thirty-six feet; 3, a one and a half story frame dwelling house, twenty by thirty feet.

The first mentioned house is situated about twenty-five feet from the road indicated in said draft as the "public road to Honesdale;" said barn, about fifty feet west of said house, and the last mentioned house about 200 feet from said road; said buildings, in fact, being all situate upon said land, about one quarter of a mile from the hotel building aforesaid, having no connection therewith, and not being at all necessary for the ordinary and useful purposes thereof; and none of the labor and material, for which the claims of the petitioners are filed, having been done, used or furnished in or about their erection and construction, or upon the credit thereof.

IV. The building mentioned and described in the third exception were erected many years before said hotel building was thought of, are remote from and in no way connected with it, are not necessary for its convenient use; the labor and materials for which the claims of petitioners are filed were not furnished upon the credit of said buildings, and they cannot by law be subjected to mechanics' liens for such labor and materials.

V. The amount of land set apart in said report, viz.: twenty-three acres and 62 perches, is an unreasonable quantity and excessive amount to subject to mechanics' liens. Such tract is not properly curtilage appurtenant, nor is it necessary for the convenient use of the said hotel building, for the ordinary and useful purposes thereof.

VI. The report includes a lot of land situate a considerable distance from the hotel building aforesaid, upon which is erected a pavilion, or dance platform, constructed of lumber furnished upon the credit of Wm. H. Dimmick, after the Irving Cliff Hotel Company had purchased the land, and after the said Irving Cliff Hotel Company had distinctly notified the person so furnishing the same, that he must look to Wm. H. Dimmick for his pay therefor; the said dance platform being altogether a distinct building, not having been intended to be used in connection with said hotel, and not being necessary for the convenient use thereof. Gross injustice would therefore be done judgment creditors, were such structure and lot now made liable for the debt incurred in the erection of said hotel building.

VII. The report, if confirmed, would work great and irreparable loss and damage upon these exceptants, who advanced many thousand dollars to aid in completing the building, at a time when the foundation alone had been erected, and before the mechanics' liens had attached. If such report is confirmed, great injustice will be done exceptants.

VIII. Exception is filed to the statement in the said report in which the commissioners return "That having been duly sworn, they went upon the premises, examined the building and the land carefully, all of us," as false and misleading.

IX. Improper conduct upon the part of all of the said commissioners; they having come to Honesdale in response to personal letters sent them by attorneys for mechanics' lien creditors, and having almost immediately upon their arrival, gone upon said premises, at the suggestion and instance of one of said attorneys, in his private conveyance, and accompanied by him alone; the said commissioners examining the premises and building aforesaid with said attorney, and without any other person being present, the circumstance of their so going upon the said premises being at the time wholly unknown to said exceptants, and no notice of their intention of so doing being given them, although the interests of exceptants are in every respect largely adverse to the interests represented by the attorney, who, as aforesaid, took said commissioners upon said premises.

X Great unfairness and partiality shown and manifested by said commissioners; they having immediately upon their return from their visit to said premises, with the said attorney, notified the parties in interest, resident in Honesdale, to appear before them at the Allen House about two hours thereafter, and at said hearing, unjustly and improperly refusing to hear the evidence of any witnesses whatever, and also refusing to go upon the premises a second time, in order that such of the creditors as were dissatisfied with the circumstances connected with their previous visit thereto, might go with the said commissioners and ascertain what land had been pointed out to them, and also present their views.

XI. Improper conduct upon the part of all of said commissioners, in making up said report hastily, imperfectly, unjustly and without any apparent consideration or wish in the matter except to fulfill the wishes and demands of the mechanics' lien creditors; in not affording all the parties in interest an opportunity to be heard, and in making up the report wholly in the interest and according to the expressed wishes of the attorney who, as aforesaid, was alone with them in their first and only examination of the premises.

Upon dismissing these exceptions and confirming the report, the court below filed the following opinion:

"In August, 1884, the Honorable William H. Dimmick purchased a lot containing about twenty-three acres of land and commenced the erection of a large building, to be occupied as a summer hotel. Subsequently the Irving Cliff Hotel Company was organized and the lot of twenty-three acres was conveyed by Mr. Dimmick to this hotel company. The curtilage to be covered by mechanics' lien and material men was not defined by the owner, but mechanics' liens for considerable amounts have been filed. The record shows also a judgment for purchase money given by Mr. Dimmick, which, with accumulated interest, amounts to between $1,600 and $1,700; and other judgments also were entered against Mr. Dimmick before his conveyance to the hotel company and after the erection of the building was commenced, amounting to about $8,000, which was shown to be for money borrowed, to be used in the erection of this building.

"In January last the mechanics' lien creditors presented a petition to the court asking for the appointment of commissioners to define the boundaries of this curtilage. Three commissioners were appointed, all of whom declined to serve. Three others were then, on the first of February, appointed, men whom the court believed to be fair and impartial and of good judgment. After considerable delay, by reason of the illness of one of the commissioners, and sickness in the family of another, and the severe weather of February, they reported, defining the boundaries of a curtilage containing 4¼ acres, giving no access from the hotel to any public road, but creating an easement on the twenty-three acres, for the gas, water and sewer pipes, already laid, and subjecting this whole twenty-three acres to the right of the hotel property, to lay any further or additional gas, sewer or water pipes, proper or convenient for the use of said building. It would seem from this report that the commissioners were unable to designate any portion of the twenty-three acres which might be liberated from subserviency to this hotel building.

"This report was set aside because of the indefinite easement created. Another commission was then appointed. The commissioners were selected with very great care, in order to avoid all suspicion of prejudice against or favor toward one side or the other. Three men, living distant from each other, each man of very high standing in the community where he lived, were elected by the court because of its belief in their integrity, good judgment and special fitness to pass upon the questions to be presented them. These three commissioners, after notice of their appointment, came together to the president judge for instruction. The Acts of Assembly bearing upon the subject were read and explained to them, and the purpose of this legislation was explained to them. They were informed that the lien of mechanics was primarily against the building into which their labor entered, and only against land because without land the lien against the building would be worthless; that judgment creditors had rights which must not be disregarded; that they were so to define the curtilage as to make the mechanics' lien effective, by embracing in it so much land as in their judgment was necessary for the ordinary and useful purposes of the building, but that they should not diminish the security of the judgment creditors by taking for the benefit of the mechanics' lien creditors any more land than was necessary for the enjoyment of the building for a summer hotel. The matter was discussed until the commissioners seemed fully to understand their duty. They reported, including the whole twenty-three acres in the curtilage.

"Exceptions to this report were filed and evidence taken, upon which we are asked to set it aside. We have examined this evidence carefully. It must be said of it that, taken alone, its weight is against the report of the commissioners and against the proposition that this whole twenty-three acres is necessary for the purposes of the hotel; but we do not think it is sufficient to overcome the judgment of three such men as the commissioners who have gone upon the premises for the express purpose of ascertaining how much land is necessary for use with this hotel building; especially when the last report of the commissioners is so strongly supported by the report of the former commissioners, who found that the entire lot must be made subservient to the hotel property. Both sets of commissioners examined the premises with this question directly in view. The witnesses who have testified have made no such examination, and while personally, with our indefinite knowledge of the premises, we are somewhat surprised at the report, it may be that more particular information would lead to the same conclusion reached by the commissioners. The law was too carefully explained to the commissioners to permit belief that they have misunderstood their duty.

"At the request of counsel for the mechanics' lien and judgment creditors and with the consent of all counsel, we have directed that a draft of the premises, showing the location of the buildings and their distances from each other, should be attached to and made a part of the commissioners' report.

"We know of no Act of Assembly, or order of court or practice, which requires that commissioners, to define boundaries of a curtilage, should note improvements. The draft now annexed to the report shows substantially what the exceptants desire, excepting the description of the buildings; and the first three exceptions are dismissed.

"That some buildings, erected years ago, stood upon the lands did not prevent the commissioners from embracing these lands within the bounds of the curtilage, if such lands were necessary for the enjoyment of the hotel building. The existence of such buildings, their location, size, comparative value, etc., were all matters for the consideration of the commissioners. The fourth and sixth exceptions are dismissed.

"The fifth exception involves directly the question, which by this Act of Assembly we were required to submit to the commissioners, and the exception is dismissed.

"The seventh is not properly an exception to any matter in the report, but only presents the fact that interests of judgment creditors are affected by the report.

"The eighth exception is dismissed. We do not recall any evidence to sustain it, but whether the fact be that the commissioners were sworn before or after viewing the premises, it is immaterial.

"The evidence does not, in our judgment, sustain the charge of misconduct against the commissioners, nor of partiality or unfairness, and the ninth and tenth exceptions are dismissed.

"And here, to prevent misconstruction, we desire to say that when the president judge called Mr. Waller into his chambers (as testified to by Mr. Waller), the commissioners, or one of them, had already informed him that Mr. Waller proposed to take or send them up to the hotel with his team, that they might view the premises, and Mr. Waller was called into the room by the judge for the purpose of suggesting to him and to the commissioners the prudence and propriety of taking with Mr. Waller some person who represented the adverse interests. Mr. Dimmick's name was suggested, if Mr. Waller intended going himself with the commissioners. This suggestion seemed to meet the approval of Mr. Waller and the commissioners, and they agreed to, and the evidence shows they did, invite Mr. Dimmick to go with them. It does not appear that any improper influence was brought to bear upon them, and they should not be convicted of misconduct.

"For the past three months these mechanics' lien creditors have been endeavoring to obtain a definition of boundaries of the curtilage appurtenant to the hotel building, so that they may have process for the collection of their claims. If this report should be set aside, their remedy is postponed past the summer; and so far as we can now see, the property must lie idle for another year. Such a delay would work great wrong to all parties in interest, and forbids that we should refuse our approval of this report, without clearer evidence against it than is presented, and the report is approved."

The judgment creditors thereupon took this writ, and *assigned as error* the action of the court below in setting aside the first report and confirming the second report.

Mr. **Edward O. Hamlin,** for plaintiffs in error:

This proceeding, so far as it affected the rights of the creditors who received no notice, is in violation of the principle that forbids an adjudication without giving an opportunity of being heard.

The Act of Assembly, it is true, does not in terms require that notice be given the parties interested. Neither, however, does the road law require such notice; yet it is well settled that notice must be given to land owners before any valid assessment of damages can be made by road viewers.

The general principle is uniformly recognized, that notice and opportunity to be heard are due to all whose rights are to be affected, in any proceeding, whether such notice be specifically provided for by statute, or not.

The principles that govern the subjection of a building already completed to a lien for the erection of other buildings, on the same lot or piece of land, have been settled by a variety of decisions.

When the land and the several structures erected upon it are intended for a united enjoyment, and are not capable of separation without injury.

Lauman's App. 8 Pa. 477.

When the new structure, detached from that already existing, would be comparatively valueless.

Parrish's App. 83 Pa. 111.

When the new structure is an accession to that already existing, largely increasing its productiveness and value.

Id. 125.

The present case is an attempt upon the part of mechanics' lien creditors to subject buildings already existing to a lien for the construction of a new building, in total disregard of these principles.

An entire tract of land cannot be subjected to a lien for the construction of a building in no way necessary to the use and enjoyment of the greater portion of the tract, only a small part of which is required for the purposes of the building, particularly when such a lien will operate to exclude judgment creditors from recourse to any part of the tract. Under the Mechanics' Lien Law of 1806 it was held that a farm or plantation (the extent of which does not appear) cannot be subjected to a mechanics' lien, for the erection of a barn, to the exclusion of judgment creditors.

Werth v. *Werth*, 2 Rawle, 151.

The Act of 1806 did not designate the quantity of land subjected to the lien, or even provide that the land covered by the building should be subject to it. The Act of 1836 provides that "The lien shall extend to the ground covered by the building, and to so much other ground immediately adjacent thereto, and belonging in like manner to the owner of such building, as may be necessary for the ordinary and useful purposes of such building."

"The legislative intention in passing laws to secure a lien to mechanics and material men, on the buildings erected, must not by construction be carried beyond the design of the enactment, and extended to other buildings, on which no labor was bestowed, and for erecting which no commodities were furnished. The ground upon which the building stands must from necessity be held within the grasp of the lien, else it could afford no security; and to the immediate site is added the necessary curtilage, to be determined either before or after the sale. This curtilage embraces no more land than is requisite for the enjoyment of the building, taking into consideration the object of its erection; and in no event can it include other buildings on which no labor was bestowed or materials furnished, unless they are connected with and indispensable to the enjoyment of the main construction."

Miller v. *Lenhart*, 1 Pearson, 95.

Wismer's Estate, decided in the Common Pleas of Bucks County, 2 Pa. C. C. R. 387, presents but a limited analogy to the present case, and goes beyond all limits heretofore recognized, as to the extent of the lien.

Messrs. **E. C. Mumford** and **George S. Purdy,** for defendants in error:

The commissioners alone were competent to judge what was necessary to the convenient use of the building for the purpose for which it was designed. The formation and character of the land, the approaches, the location of the spring, of the water and gas pipes, as well as the sewer pipes, would necessarily enter into their consideration. By a careful examination of the grounds, with all of these things before them, they formed their opinion and made their report. The court says it does not find any evidence of misconduct or partiality on the part of the commissioners.

Per Curiam:

This case coming before us as it does, on a *certiorari*, we can examine nothing but the record, and our inspection of that fails to reveal any irregularity. That the court had the power to set aside the report of the commissioners first appointed cannot be doubted; and as we have nothing by which to test the rectitude or wisdom of that act, we must decline to sustain the first assignment of error.

To the confirmation of the report of the second commission several exceptions have been taken. One is that there was no notice given to those interested of the time of the view. But this was not necessary. The Act requires notice of the appointment of the commissioners, which, as the record shows, was properly given; but it requires no other notice. Another complaint is that the curtilage designated by the commissioners is larger than necessary for the use of the building; but as this was a matter resting in the discretion of the commissioners and the court, we cannot review their action. So whether the mechanics' lien is made to embrace more than the Act of Assembly warrants is a matter not now before us.

Decree affirmed.

Benjamin F. FOLSOM, *Plff. in Err.*,
v.
Joseph M. COOK *et al.*, Trading as Joseph M. Cook & Co.

1. It is the **duty of** the **court to interpret a contract,** and of the jury to determine whether it is established by proof.
2. **If** the **verdict** does **not establish** the **contract,** the **construction** of it is **immaterial,** and therefore not ground for reversal.
3. **Depositing a letter** properly addressed with the postage prepaid, **in** the **post-office,** is **prima facie evidence** that the person to whom it was addressed **received** it.

(Argued Feb. 9, Decided March 21, 1887.)

JANUARY Term, 1887, No. 92, E.D., before Mercur, *Ch. J.*, Gordon, Trunkey, Sterrett and Green, *JJ.*

Error to the Common Pleas of Delaware County, to review a judgment for the plaintiffs in a feigned issue in estrepement. *Affirmed.*

At the trial before CLAYTON, *P. J.*, the following facts appeared:

In February, 1881, Benjamin F. Folsom, the defendant below, was the owner of a sugar house in the City of Chester. The house was fitted up with machinery, piping, vessels, etc., adapted to the manufacture of sugar from corn meal. William L. Cook, one of the plaintiffs below, applied to Mr. Folsom at that time for a lease of the sugar house, saying that his firm wanted it for the purpose of manufacturing sugar from starch; that they expected they would not go into the business very largely, but that they would want the whole house, and that the business would be somewhat experimental. Mr. Folsom proposed to rent them the house, with certain wharf privileges and some appurtenant ground, for an annual rental of $4,000. To this Mr. Cook objected, and upon stating that they expected to manufacture about 200 barrels per week, Mr. Folsom proposed to lease the house for $3,000 per annum, with a proportionately increased rent, regulated by the excess of product over 200 barrels per week, and certain other conditions.

The house was delivered to them as tenants, and the task of having the contract reduced to writing was assigned to Mr. Folsom. Some conversation was had at this interview, about the outlay which would be required to put the house in running condition. The parties differed as to the exact character of this conversation—Mr. Folsom alleging that he told Mr. Cook that the former lessee had represented to him that it would not require more than $300 for this purpose, but that personally he knew nothing about it; Mr. Cook on the other hand asserting that Mr. Folsom made this representation as of his own knowledge. The tenants had had no experience in the manufacture of sugar, and were led into the experiment by Mr. Marr, who had a secret in the process, and the mill was to be adapted by him, for his process—the Messrs. Cook furnishing the money for the purpose. It cost more money than the tenants had anticipated, and they began to complain about the outlay, and to put the blame on Mr. Folsom. They had Mr. Marr make the following written statement of the terms of the lease:

"Statement of William Marr. Dated March 29, 1881. Mem. The following are the terms and conditions upon which Mr. Folsom agreed to rent the Chester refinery:

"The rent was to commence on the first day of March, 1881, and to be paid monthly, and the tenancy was to be for one year from the first day of March, 1881. The rent was to be $3,000 for the year, and upon the basis that the quantity of goods to be manufactured would be 200 barrels per week: and for any excess in quantity over and above 200 barrels per week, for any one month a proportionate increase of rent was to be paid for said month. That the tenant was to have the use of the whole of the sugar house building, with the boilers, machinery, pumps, fixtures, materials, in fact all there was about the place relating to a sugar house or glucose factory, with the right to rearrange any portion or articles to suit his business with the proviso that any removals that might be made should be reinstated if desired by the landlord. The tenant was also to have the use of the ground around the buildings, with the use in common of the landing wharf; but not the use of covered inclosed sheds used for bonded stores.

"As a ground for the foregoing terms and conditions representations were made by the agent of the landlord, and confirmed by the landlord, that at the time of the former parties ceasing operations the boilers, machinery and other appliances were in good working order, and that proper care had been taken of them, and they were then in good working order and required only cleaning up and a small outlay, amounting to about $300, to set the whole again in operation."

After some efforts on the part of Mr. Folsom to have Mr. W. L. Cook join him in having a written lease prepared, Mr. Cook came to his office shortly before the 26th of April, and (influenced no doubt by the fact that preparations had been made for more extensive operations than had been at first contemplated) he proposed to Mr. Folsom to make the annual rental $4,000 instead of $3,000, leaving out any *pro rata* increase, and that on account of the great expense incurred and to be incurred in the adaption of the house for their purpose, the rent should commence on May 1, instead of March 1. This proposition was accepted by Mr. Folsom; and on the 27th of April Mr. Folsom had the lease reduced to writing. The part of it which was the subject of this controversy is, "out of the first quarter's rent the said lessees shall be allowed to retain the sum of $666.67, in consideration of the repairs, additions, alterations and improvements they have made or may make to the said building and machinery; and these repairs, additions, alterations and improvements shall remain, at the expiration of this lease, as the property of the said lessor; but should the lessor give to the said lessees ten (10) days' notice before the termination of this lease of his desire to have the machinery, fixtures, pipes, etc., restored to the position they occupied at the beginning of this lease, then the said lessees shall make such restoration at their own proper cost and expense. At any event, however, whether restored to their position or not, all these additions, repairs and improvements shall be the property of the lessor, without any liability on his part to account to the lessees therefor."

This document was placed in the hands of Mr. W. L. Cook on April 27 by Mr. Folsom, at the Girard House in Philadelphia, for the purpose of having it executed by the tenants. It was taken by Mr. Cook to Baltimore; and on May 7, he wrote the following letter to Mr. Folsom:

"My arrangement when I last saw you was for me to see my brother on my return to Balto. Saturday, as he was to come up Monday, and send it back with him. He took a notion to come Saturday instead, and we passed each other on the road, and I have been intending to come over each day since, but the first of week was too busy, and latter part been very unwell. I intend coming over Tuesday or Wednesday next, and if you can meet me at Chester then, telegraph me to that effect; if not, then please wire me when you can. However there is now no issue between us, and when rent is due you can get check for amt."

The lease was never signed.

The tenants paid the rent for two quarters, maturing on August 1 and November 1, at the rate of $4,000 per annum, and in the latter part of December commenced to remove the additions to the machinery which they had put in, when they were estopped by a writ of estrepement issued by the landlord; and an issue was framed in this case to try the right of the parties to the property which the tenants claimed the right to remove.

As to this letter Mr. Cook testified:

Q. What does this refer to? "If you can meet me at Chester, telegraph me to that effect —however there is now no issue between us and you will receive your rent when it is due."

A. It only refers to the difficulties we had had over the excess above the amount which he said would place the machinery in running order.

Mr. Cook also testified that he wrote, and mailed, properly addressed to Mr. Folsom, another letter "telling him that he surely did not mean that he should take all our machinery."

The court charged, *inter alia*, as follows:

Where the right is claimed by one party, which the law would otherwise vest in another, the evidence ought to be enough to satisfy the jury that the right really exists, and that the contract was made. If, therefore, you conclude from all the evidence that at the time of this letting, or afterward, the plaintiffs (the tenants are the plaintiffs), agree that the new machinery, which they brought upon the premises, should belong to the landlord, at his option, then your verdict should be for the defendant—that is, the landlord. [If, however, from all the evidence, you come to the conclusion that they did not agree, but that their agreement was that all the repairs and additions and improvements to the old machinery only should be and remain the property of the landlord, if you find that that is all the plaintiffs agreed to, then they have the right to remove the new machinery, and in that event your verdict should be for the tenants, the plaintiffs. * * * *First assignment of error.*

One of the tenants says that after he read over the lease the second time, giving the reason for not signing the lease that there was something ambiguous in it and that did not convey the meaning he had intended, he thought he did write a letter to that effect. Now whether the letter was received or not, if he wrote it and mailed it, it is evidence in the case; it does not bind the landlord, but it is evidence to relieve the tenant of the presumption that would otherwise arise, that he assented to the lease as it was written out. Therefore, whether that letter was received or not, if he mailed it, it is evidence and proper evidence for the jury, even though the defendant never received such a letter. *Second assignment of error.*

Now, this letter of May 7, you will notice is a very important piece of testimony, because it seems to intimate that the parties met and had some further talk; it winds up with the expression, or at least with the intimation, that it was not material whether the lease was signed or not, as he says all matters at issue are now settled. Listen again:

"My arrangements were, when I last saw you, for me to see my brother on my return to Baltimore, Saturday, as he was to come up Monday, and send it back with him; he took a notion to come up Saturday, instead, and we passed on the road."

You will remember that this is in answer to a letter from Mr. Folsom, wanting to know why the lease had not been signed and returned. And again: "I have been intending to come over every day since;" he had nothing to do but sign the lease and send it back; "but the first of the week I was too busy, and the latter part I have been too unwell; I intend coming either on Tuesday or Wednesday next; if you can meet me, telegraph to that effect, and if not, please wire me when you can."

I do not remember any evidence that he was telegraphed to, and I do not remember that the parties met; then comes the closing clause: "However, there is now no issue between us, and when the rent comes due you can get a check for the whole amount." What did he mean? That he had read over the lease and found that it was all right, or that he did not want to sign the lease until he saw Mr. Folsom; or that there was really no issue between them now, as it had been settled before in the trouble over the extra expense he had undergone? *Third assignment of error.*

If you find that the lease does not express what the parties meant, but that it contains something that the parties did not agree to, then you will say whether this paper (Marr's memorandum) is a correct memorandum of their contract. This is, therefore, a very important paper for the tenants; it is almost as strong testimony for their side of the case as the lease is for the side of the landlord. *Fourth assignment of error.*

The defendant submitted, *inter alia*, the following point:

"2. If the jury believes that the written lease is the terms upon which the property was demised, the verdict should be for the landlord."

Ans. This point I will answer after I have received your special verdict. *Fifth assignment of error.*

General verdict for the plaintiffs and judgment thereon.

Messrs. **W. B. Broomall** and **Richard C. McMurtrie,** for plaintiff in error:

The court ought to have construed the written lease to the jury. It is the right of every suitor to have the opinion of the court on the construction of written contracts.

Denison v. *Wertz*, 7 Serg. & R. 371; *Reaney* v. *Culbertson*, 21 Pa. 507; *Miller* v. *Fichthorn*, 31 Pa. 252; *Heath* v. *Page*, 48 Pa. 130; *Gass App.* 73 Pa. 39; *Bryant* v. *Hagerty*, 87 Pa. 256; *Nellis* v. *Coleman*, 98 Pa. 465; *Pegg* v. *Rist*, 15 W. N. C. 70.

It makes no difference that the writing is not directly the matter in controversy.

Foster v. *Berg*, 14 W. N. C. 215.

A suitor cannot give evidence of the contents of a letter mailed to his opponent, without first having given him notice to produce it.

Eilbert v. *Finkbeiner*, 68 Pa. 243.

If it be answered that Mr. Folsom denied on trial the receipt of such a letter, then clearly it is evidence of nothing. How can a tenant, after giving his acceptance of a lease, and after receiving the advantage of it, by the abatement of two months' rent under it, and paying the rent at the times prescribed in the writing, be permitted to introduce evidence of an uncommunicated objection to it, entertained after the acceptance of it?

There is no presumption of law that a letter mailed to one at the place he usually receives his letters was received by him.

First Nat. Bank v. *McManigle*, 69 Pa. 156.

Messrs. **George H. Earle, Jr., O. B. Dickinson,** and **Richard P. White,** for defendants in error:

It is the duty of the court to interpret a contract, and of the jury to determine whether it is established by proof.

Stokes v. *Burrell*, 3 Grant, 241.

In any event, as the finding of the jury made the construction of the paper immaterial, any error in this respect is no cause for reversal.

Bunce v. *Stanford*, 27 Pa. 265.

Parol proof of the contents of the letter of the plaintiffs, properly mailed to the defendant, was evidence, because there was no objection to the admission of it.

M'Cullough v. *Wallace*, 8 Serg. & R. 181; *Weckerly* v. *Geyer*, 11 Serg. & R. 35; *Powell* v. *Sedgwick*, 5 Whart. 336.

And also because no notice to produce was necessary, as the defendant denied ever having had such a paper.

The rule as to notice to produce is that it must be given to a party who is in possession of the paper; and its admitted purpose is to enable such party, so having the paper, to produce it at the trial; so that the very terms of the rule, were there no authorities, show that it cannot apply to a party who absolutely denies having ever had the paper, as, in such cases, the notice could serve no possible purpose.

Reading R. R. Co. v. *Johnson*, 7 Watts & S. 317; 1 Whart. Ev. § 161.

Mailing the letter raised a presumption of the receipt of the letter which made its admission perfectly proper.

Pearce v. *Langfit*, 101 Pa. 507; 2 Whart. Ev. §§ 1323, 1324.

The question whether it was conclusive evidence, or a presumption of law, or not, has nothing to do with this case.

The depositing in the postoffice, of a letter properly addressed, with the postage prepaid, is *prima facie* evidence that the person to whom it was addressed received it. The fact that the defendants had no additional proof that the letters were actually received is immaterial.

Briggs v. *Hervey*, 130 Mass. 186.

Mr. Justice **Trunkey** delivered the opinion of the court:

After the parties had made an oral agreement, the landlord prepared a writing and sent it to the tenants for their signatures. This writing, referred to in the testimony as the lease, was not signed by the parties and it is not evidence of their agreement unless it is established that they assented to its terms. The landlord claims that it sets forth the contract, but the tenants deny that they so agreed. It was submitted to the jury whether the "lease" expresses the contract, and if so they were instructed to find for the plaintiffs and annex a list of the property which could be lawfully removed; subject to the opinion of the court whether the contract set out in said paper gave the landlord the right to remove new machinery.

The defendant's second point was reserved. Had the lease therein mentioned been signed by the parties, it would have been competent for the court to reserve the question of construction. It was equally the right of the court to make the reservation when it was the province of the jury to determine whether the unsigned instrument set out the terms of the lease. Had the jury found that it did, then its construction would have been for the court. But the verdict put the alleged written lease out of the case, and the fifth assignment is not sustained.

As the cause was submitted, the jury found that the memorandum made by Marr is not a correct statement of the contract. That memorandum was made near the time of the making of an oral agreement testified to by the witness called by the defendant. It contains no note of obligation to leave new machinery on the premises. Although not established as evidencing the contract, the paper was important as effecting the testimony of the witness, Marr. The portion of the charge complained of in the fourth assignment is part of the instructions relative to the testimony of Marr, and we think it is not erroneous.

The plaintiff in error cites numerous authorities in support of the proposition that the construction of a written contract is exclusively the province of the court; and when a party requests the court to construe a writing in evidence, it is the duty of the court to do so and not submit it to the jury for construction. That is denied by nobody. But when the making of such contract is in dispute it is in the province of the jury to say whether it is established.

The jury failed to find that the contract is set out in either the unsigned lease or memorandum; but they did find that the tenants were entitled to recover certain machinery which they had furnished for use in their business. They were instructed as to the right of the tenants to remove the fixtures furnished by them, in case there was no agreement that they should become the property of the landlord, and that if the tenants agreed that the new machinery put on the premises should belong to the landlord, the verdict should be for defendant. Of all that the court said upon this subject there is no complaint, except the following sentence:

"If, however, from all the evidence you come to the conclusion that they did not agree, but that their agreement was that all the repairs and additions and improvements to the old machinery only should be and remain the property of the landlord, if you find that that is all the plaintiffs agreed to, then they have the right to remove the new machinery, and in that event your verdict should be for the tenants, the plaintiffs."

That is taken from the body of the charge. The first clause obviously relates to an alleged agreement mentioned in the sentence immediately preceding. With the context, the sentence complained of is free of error. By itself it might seem inconsistent, if not confusing, to say that if the parties did not agree, and did make an agreement; but read in connection with what preceded the meaning is plain. The first assignment of error is not well taken.

Without objection or exception one of the tenants testified that after he received the "lease" he sent a letter by mail to Folsom, properly addressed, "telling him that he surely did not mean that he should take all our machinery." It is not alleged that the court erred in admitting the testimony; but it is contended that the instruction (that whether the landlord received the letter or not, the sending of it by the tenant was evidence to repel the presumption that would otherwise arise that he assented to the lease as written) is error. The depositing of a letter properly addressed, with the postage prepaid, in the postoffice, is *prima facie* evidence that the person to whom it was addressed received it. Evidence that a letter was so sent, demanding payment of rent, is competent to rebut the allegation that no demand had been made. *Briggs* v. *Hervey*, 130 Mass. 186.

The second assignment cannot be sustained.

Nor is there error in the instructions set out in the third assignment. Cook's letter, dated May 7, 1881, was an acceptance of the lease, if Folsom was not mistaken in his testimony. If Cook testified the truth, that letter was not intended as an acceptance, for the parties had not agreed on the terms as written in the lease; and the clause stating that there was no issue between them, referred to the condition of the fixtures and the cost of their repairs. The references and meaning of the letter could only be determined by the aid of other testimony, and the whole was properly submitted.

Judgment affirmed.

SUSQUEHANNA MUTUAL FIRE INSURANCE CO., *Plff. in Err.*,
v.
Charles W. GACKENBACH *et al.*, Partners as Gackenbach & Seislove.

SAME *v.* SAME.

SAME *v.* SAME.

1. Where an Act of the Assembly provides that in an **action for the recovery of**

an **assessment** a **certificate of a mutual insurance company** shall be **evidence** to prove the claim to the assessment, unless the party sued will make a certain affidavit, **if** such **party makes** the **affidavit** the **company must prove** its **claim,** and must show the liabilities which make the assessment necessary, and that it was made according to the charter and by-laws.

2. The board of directors of a mutual insurance company, in making **assessments,** may exercise a reasonable discretion in fixing the amount to be raised; and an assessment so made is presumed not to be excessive until the contrary is shown.
3. A reasonable amount may be included in the assessment for **expenses and** for **losses** likely to occur **by** reason of **insolvency** of **members** of the company.
4. There is **no presumption** that the officers committed **fraud or gross mistake**; the presumption is that they acted honestly and with reasonable skill.
5. The **burden of showing fraud** or misconduct or other matter to defeat the claim or that the assessments are so excessive as to be in themselves evidence of fraud or gross negligence, **is on** the **defendant** when he relies upon such defense.
6. A by-law of the company which provides that all members whose policies are in force when an assessment is made shall be liable to the assessment, and all members whose policies have expired shall be liable to assessment for unpaid losses which existed at the expiration of such policies, is a **part of** the **contract** which the members are competent to make, and the **directors** have **no right to make** an **assessment on another basis.**
7. Where an **assignment of error** reveals a fatal defect in the case of the plaintiff in error, he shows cause for affirmance of the judgment.

(Argued Feb. 18, Decided March 21, 1887.)

JULY Term, 1886, Nos. 182, 183, 184, E. D. (in Common Pleas, No. 153, January Term, 1885, Nos. 162, 163, September Term, 1885), before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Lehigh County, to review judgments on verdicts for defendants in three actions to recover insurance assessments. *Affirmed in first action. Reversed in others.*

Three cases brought by the Susquehanna Mutual Fire Insurance Company against Charles W. Gackenbach and George Seislove, partners, to recover the amount of three assessments for losses incurred during the time certain policies issued to the defendants were in force.

At the trial before ALBRIGHT, *J.*, the following facts appeared:

On March 17, 1879, the defendants, Gackenbach & Seislove, made application for a policy of insurance in the company plaintiff for $2,000 for five years, on a stock of carriages and sleighs, finished and unfinished, and material contained in a frame carriage factory situate in the City of Allentown, the policy to be issued subject to the conditions contained in the application and the constitution and by-laws of the Company. The policy was issued March 19, 1879, for five years, but on October 4 was by agreement surrendered to the Company and canceled.

By the terms and conditions of the application and policy and the constitution and by-laws of the Company the insured became liable to assessments for losses incurred by the Company during the period of time their policy was in force.

During this period the Company sustained a large amount of losses, for a part of which they made four assessments, Nos. 9, 10, 11 and 12, to recover which this suit was brought. All of these assessments were made after the date of the surrender and cancellation of defendants' policy, but all policies liable to assessment and in force at the time the respective losses were incurred were included in the assessment, irrespective of whether the holders thereof were solvent or insolvent.

As soon as these assessments were made notice thereof was sent to the defendants, in accordance with the provisions of the by-laws of the Company, and payment demanded, and on the defendants' refusing to pay, these suits were brought.

The three cases were tried together. Before trial the defendants filed affidavits under the provisions of section 56 of the Act of May 1, 1876.

The provision of the charter of plaintiff corporation, material to this action, appears from the opinion.

The court answered plaintiff's first and second points, which are set forth in the opinion as follows:

"The Company is required to prove its claim, that is, that there were losses and expenses, and that it levied upon the members liable for said losses and expenses. In fixing the amount to be raised by an assessment the directors may exercise a reasonable discretion; proper allowances may be made for expense of collection and for losses, because of the insolvency of some of those liable. If the allowances are reasonable in amount and consistent with good faith on the part of the directors, they will not vitiate the assessment. As affidavits by the defendants, under Act of 1876, have been filed, there is no presumption that the assessments are valid and not excessive. The burden is not on defendants, as stated in the second point. The points are answered in the negative."

Plaintiff further presented the following:

3. There is no evidence in these cases from which the jury could find that the assessments for which these suits are brought are excessive. *Ans.* Negatived.

4. Under all the evidence in the case the verdict of the jury must be for the plaintiff, for assessments Nos. 9, 10, 11 and 12. *Ans.* Negatived.

The court charged the jury, *inter alia*, as follows:

One of the cases, marked No. 158, January Term, 1885, is not supported by any evidence. The plaintiff does not claim in that case, and therefore in that case your verdict will be recorded in favor of the defendants.

An Act of Assembly passed in 1876 provides that a certificate of a mutual insurance company, setting forth that an assessment was made, and how much the share of each party assessed is, shall be received as evidence in court to prove the claim in the first instance, unless the party sued will make a certain affidavit alleging certain things. In that event, the company must prove its claim as other claimants do.

In the cases you are trying, the defendants made the affidavits provided for in the Act of 1876, and therefore the Company must prove its claim; and we decided that the Company must prove that there were losses for which the Company was liable and must then show that an assessment was made, and that the defendants' share of the losses thus sought to be provided for in the assessment, was their just share.

The main question in this case is as to whether the corporation plaintiff has shown you that the assessments were valid; that they were made for losses that occurred while the defendants were insured, and were not made for more than was necessary; and as to each one of these four assessments you will make inquiry, and if the plaintiff has not proved that the assessments were necessary and reasonable, under the limitations which I will explain to you presently, you will say that it has failed as to that assessment, and your verdict must be in favor of the defendants.

Taking all and any one of these assessments, is it shown that there were such losses occurring during the time the defendants' policy was in force, and was it necessary to levy a margin for expenses of collecting and insolvency of some of those liable, and if so, were these assessments for too large a sum? If it appears they were not, then the plaintiff is entitled to recover. If any one of them is invalid, because of excessiveness, the plaintiff is not entitled to recover as to it.

I believe these are all the instructions it is necessary for me to give you. The plaintiff must prove its case, and must show that there were losses which had to be provided for, and that there were losses for which the defendants, along with others were liable; that the assessments were justly made, and fell ratably upon all who were liable to bear them, and that they were not excessive, making a reasonable allowance for a margin, as has been explained; that the assessment was not for more than was necessary. If the plaintiff has proved that as to one or all of these assessments it is entitled to recover.

Verdict and judgment were for defendants.

The assignments of error specified the answers of the court to plaintiff's points, and the portions of the charge given above.

Messrs. **John Rupp, Thomas B. Metzger** and **G. W. Van Fossen,** for plaintiff in error:

The plaintiff is a Mutual Insurance Company, organized under the laws of this Commonwealth. When the defendants made application for and obtained a policy of insurance in the company plaintiff, they became members of the Company and liable, by the terms of their contract, to assessments for the payment of all losses and debts incurred by the Company during the time their policy was in force, but not for any losses or liabilities incurred either before they obtained their policy or after its expiration or cancellation.

Peoples Fire Ins. Co. v. *Hartshorne,* 90 Pa. 465; *Akers* v. *Hite,* 94 Pa. 394; *Wilson* v. *Trumbull Mutual Fire Ins. Co.* 19 Pa. 372.

The directors are vested with the power to make assessments to pay the losses and expenses incurred by the Company. In making these assessments they may exercise a reasonable discretion in fixing the amount to be raised, having in view the losses and the practical workings of the Company; and they may make allowances for expenses likely to be incurred in the collection of the assessments, and losses likely to be sustained in consequence of the insolvency of some of the members.

Rosenberger v. *Washington Mut. Fire Ins. Co.* 87 Pa. 207; *Jones* v. *Sisson,* 6 Gray, 288.

Assessments so made by the board of directors are presumed to be fairly and properly made; and they are binding upon all the members of the Company, unless they can show fraud or gross mistake.

Hummel's App. 78 Pa. 320; *Buckley* v. *Columbia Ins. Co.* 92 Pa. 501; *Rosenberger* v. *Washington Mut. Fire Ins. Co.* 87 Pa. 207.

But it is contended, on behalf of the defendants, that section 56* of the Act of May 1, 1876, P. L. 1876, Purd. Dig. p. 918, pl. 73, changes this rule of law; and that the filing of the affidavit, by the defendants, provided for therein, overthows this presumption in favor of the regularity of the assessments.

It is evident that the Act was intended for the benefit of mutual insurance companies. Recognizing the fact that all the insured are members of such corporations, and that the officers thereof are the agents and representatives of the insured, it was intended to facilitate and not to hinder and obstruct the collection of such assessments. The Act must, therefore, be so construed as to give effect to this evident intention and object of the Legislature.

The last clause of the section, providing that if the defendant files the affidavit provided for, then the certificate shall cease to be evidence of anything whatever, and the company shall then be compelled to prove its claim as other claimants do, obviously means that when the affidavit is filed the company must prove its claim, the same as if the Act had never been passed. The affidavit prevents the company from proving its claim by the secondary evidence furnished by the certificate, and compels it to prove its claim as other claimants do, by primary, instead of secondary, evidence. That is its only effect.

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* "The certificate of any mutual fire insurance company now in existence, or hereafter incorporated, signed by the president and attested by the secretary of such company, with the seal affixed, setting forth that an assessment has been made upon the premium note, or notes of any member, and the amount due by such member, upon such note or notes, shall be *prima facie* evidence thereof in all the courts of this Commonwealth. But in all cases now pending, or hereafter instituted, in any of the courts of this Commonwealth against any member of any such company, in which such member has or may hereafter, within the time prescribed by law, file an affidavit setting forth that he, she or they, has or have, already paid his, her or their proportion of the loss for which the assessment was levied, or that the assessment is for more money than is necessary to pay the losses and necessary expenses of said company, or that his, her or their signature or signatures, was or were obtained by the practice of fraud or false, or fraudulent representations, such certificate shall cease to be evidence of anything whatever, and said company shall be compelled to prove its claims as other claimants do," etc.

The tenth assignment of error should also be sustained. Case No. 158, January Term, 1885, was brought to recover the amount due on assessment No. 9, the only one due when that suit was brought. Certainly we did claim to recover the amount due on that assessment in that suit. It needs no argument to show that the court erred in directing the jury to render a verdict for the defendants in that case.

Messrs. **Henninger & Dewalt, D. D. Roper** and **Edward Harvey,** for defendants in error:

It is not true, as the plaintiff contends and alleges, that its case is *prima facie* upon proof of the passage of a resolution, by the board of directors, levying an assessment. The proof of the plaintiff must go farther.

May, Ins. 2d ed. § 557; *Pacific Mut. Ins. Co.* v. *Guse*, 49 Mo. 329; *American Ins. Co.* v. *Schmidt*, 19 Iowa, 502; *Atlantic Mut. Fire Ins. Co.* v. *Fitzpatrick*, 2 Gray, 279; Bliss, Life Ins. 2d ed. § 428; *Thomas* v. *Whallon*, 31 Barb. 172; *Buckley* v. *Columbia Ins. Co.* 92 Pa. 501; *Rosenberger* v. *Washington Fire Ins. Co.* 87 Pa. 207; *Hummel's App.* 78 Pa. 320.

Conceding, for the purposes of this argument, that there was error in answering the points of the plaintiff, it does not follow that the judgment must be reversed. If, upon another trial, the verdict must, as matter of law, be the same, the judgment will not be reversed. No injustice having been done, and the plaintiff not being entitled to recover upon its own showing, it would be useless to subject the parties to the expense of further litigation.

It was admitted and not disputed that all of the assessments in suit were not laid as provided for in this by-law. Instead of assessing all the policies in force when the assessment was laid, the Company assessed only those that were in force when the loss occurred.

Mr. Justice **Trunkey** delivered the opinion of the court:

When the charter of a mutual insurance company provides that in an action for the recovery of the assessment, the certificate of the secretary of the company shall be *prima facie* evidence of the assessment and the amount due, the burden is on the defendant to show that the assessment is invalid for fraud or gross mistake. *Buckley* v. *Columbia Ins. Co.* 83 Pa. 288; 92 Pa. 501.

In the absence of such provision in the charter, or in the statute relating to such companies, the company is bound to prove the facts establishing the claim. The burden was on the plaintiff to show liabilities which made an assessment necessary, and that it was made according to the terms of the charter and by-laws. A reasonable amount may be included in the assessment for expenses and for losses likely to occur by reason of insolvency of members of the Company. If the plaintiff proves its claim without showing so large an excess in the assessment as in itself satisfies the jury of fraud or gross mistake, it is entitled to recover unless the defendant adduces evidence of matter which defeats the action.

There is no presumption that the officers committed fraud or gross mistake; the presumption is that they acted honestly and with reasonable skill. The burden of showing fraud or misconduct is on the defendant, when he relies upon that as a defense. *Rosenberger* v. *Washington Fire Ins. Co.* 87 Pa. 207.

The affidavit filed by the defendants precluded the use by the plaintiff of the certificate as evidence; and the plaintiff was bound to prove its claim as if the statutory provision relative to the certificate had not been enacted. The learned judge of the common pleas charged that the assessment had been shown to be legal and that the plaintiff "must prove that there were losses for which the Company was liable, and must then show that an assessment was made, and that the defendants' share of the losses thus sought to be provided for in the assessment was their just share."

The plaintiff's first and second points were in accord with that instruction, and they ought to have been affirmed. They are as follows:

"First. The board of directors of a mutual insurance company, in making assessments, may exercise a reasonable discretion in fixing the amount to be raised, and an assessment so made is presumed not to be excessive until the contrary is shown."

"Second. The burden is upon the defendants in these cases, to show that the assessments for which these suits are brought are so excessive as to be in themselves evidence of fraud or gross negligence."

If it was the misfortune of the plaintiff, in the attempt to establish its claim, to put in evidence a fact which would defeat recovery, that does not change the law of evidence. The defendants may avail themselves of that fact, or evidence tending to show it; but whatever the evidence relied on to establish fraud, or other matter affirmed to defeat the claim, the burden is on the defendants. The presumption that the officers, whose duty it was to make the assessment, acted with due care and fidelity stands until overcome by sufficient proof. The rule is the same where the defendant relies on the testimony on part of the plaintiff as when upon his own.

None of the remaining assignments of error, except the tenth, need be remarked; for there is no error in the instructions therein complained of, save that resulting from the refusal of the plaintiff's first and second points.

The tenth assignment is to the ruling of the court, that the action No. 158 was not supported by any evidence.

One of the by-laws provides "That all members, whose policies are in force at the time the assessment may be declared, shall be liable to assessment for all losses adjusted properly and unpaid, and all other liabilities then existing against the Company shall be subject to abatement as hereinafter specified. All members whose policies have expired, and are not in force at the time such assessment is declared, shall, nevertheless, be liable to assessment for all unpaid losses and other liabilities which existed at the time of the expiration of such policy or policies *pro rata* with those then in force; and the amount thus ascertained and levied upon such policies is to be deducted from the gross amount of liabilities of the Company for which such assessment is to be made, and the balance of liabilities remaining to be assessed upon the policies then in force."

This by-law is part of the contract of insurance and plainly designates what members are liable to be assessed for losses at the time the assessment may be declared. All are liable whose policies are in force; and all are liable whose policies have expired for unpaid losses which existed at the time of the expiration.

It is competent for the members to so contract, and the directors have no right to make an assessment on another basis. Decisions in cases where the contract contained no similar provision do not apply. Were this by-law not in the contract, the authorities cited by the plaintiff would sustain the contention that members are liable "to assessments for the payment of all losses and debts incurred by the Company during the time their policy was in force, but not for any losses or liabilities incurred either before they obtained their policy or after its expiration or cancellation."

The plaintiff concedes that the policies in force at the time the assessment was declared, which were not in force at the time the losses and liabilities were incurred, were not included in the assessments. Its secretary, called to prove the claim, testified that there were a large number of such policies, and that they were not included. It follows that assessment "No. 9" was invalid, and that the court rightly ruled that the plaintiff could not recover.

The ruling may have been based on other ground; yet, being free of error, it must be affirmed. In effect, the jury were instructed that the plaintiff had failed to adduce evidence to establish its claim. That the court erred in refusing the plaintiff's first and second points, as propositions, did the plaintiff no injury, for the court could properly have ordered a nonsuit, or could have directed a verdict for the defendant, without answering any proposition.

In two of the cases no assignment of error raises the question whether the plaintiff's evidence was sufficient to submit to the jury. The defendants urge that if it be conceded that the court erred in answering the plaintiff's points, it does not follow that the judgment should be reversed. But no precedent is cited for going outside the assignments which must be sustained, for a cause to ground a refusal of reversal. Where an assignment reveals a fatal defect in the case of the plaintiff in error, he shows cause for affirmance of the judgment.

Judgment affirmed, No. 153, January Term, 1885. In each of the other causes, judgment reversed and venire facias de novo *awarded.*

Jacob D. HEFT'S APPEAL.
ESTATE OF John F. JACKSON.

1. **Possession, on the part of a mortgagee of personal property,** capable of actual, corporeal occupation, is **essential to the validity of** his **lien as** against other creditors.
2. The **death of** the **debtor** gives to general creditors the right to deny the validity of such a mortgage when **possession** has **not** been **taken in** the debtor's **lifetime.**
3. By the **death of** the **debtor** his personal estate in possession passes into the custody of the law for administration; and the **mortgagee** has **no right to** undertake to **administer** any part of it for the satisfaction of his own debt.
4. But **where** the **mortgagee in good faith intervenes,** and **in administration** of the estate sells the pledge and settles an account of the proceeds, **he is entitled to commissions,** although he must pay interest for the proceeds in the meantime appropriated and used in his business, in the belief that they belong to himself.

(Argued Jan. 14, Decided March 21, 1887.)

JULY Term, 1886, No. 194, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Green, *JJ.*

Appeal from a decree of the Orphans' Court of Philadelphia County, in the estate of John F. Jackson, deceased. *Affirmed with modifications.*

The facts as they appeared at the audit of the first account of Jacob D. Heft, administrator of John F. Jackson, deceased, before ASHMAN, *J.*, were as follows:

The decedent died May 16, 1882, intestate, and letters of administration on his estate were granted to the accountant May 23, 1882. His estate was insolvent.

At the audit the following claims were presented:

E. K. Lemont & Son, on note and bank accounts, with interest to date of death, $533; Delp & Groff, on book account, with interest to date of death, $164.59.

These creditors claimed to come in on an equal footing as creditors of the estate with the accountant, who was also a creditor, and to whose claim of $2,525, with interest, the proceeds of the sale of the personal estate of the decedent, amounting to $2,530, had been appropriated by the accountant.

The decedent on September 7, 1879, borrowed from the claimant $2,000 and with the money purchased the stock and fixtures of a livery stable. Upon the day of the purchase he executed and delivered to the claimant, on collateral security, a bill of sale of the articles purchased. Decedent went into the possession of the premises and carried on business there in his own name until his death. The claimant afterwards loaned him the further sum of $525, for which the decedent gave his promissory note. The latter was still unpaid at the time of his death. On the day the decedent died, the claimant entered upon the premises by virtue of the bill of sale; and after continuing the business as his own for several months, he sold out for $2,530. The actual receipts of the business during his charge over the expenditures for conducting it showed a gain of $37.07.

The auditing judge, in his adjudication, said:

"The accountant, as creditor, certainly had the right at any time during the life of the debtor to take possession of the property which was the subject of the bill of sale; and the right would not seem to have been taken away by the death of the latter: if the instrument had been a mortgage, which is a conditional sale, and had provided for the delivery of the property within a given time, it would have bound even creditors if possession had been taken under it before process by creditors had been taken out. *Boyle* v. *Rankin*, 22 Pa. 171.

"The accountant insists that he is not to be charged with their value as assets of the decedent's estate, but sets up a title in himself. The auditing judge is of opinion that this title would prevail as against volunteers; and that the accountant might retain the goods or their proceeds in an amount sufficient to satisfy his debts, when the contending parties are legatees or next of kin. But he is entitled to no preference over other creditors. He permitted the decedent to act as owner and to obtain credit upon the faith of an ostensible ownership. He will therefore be charged with the proceeds of sale, and will prorate with the claimants in the fund for distribution. See *Boynton* v. *Isaacs*, 10 W. N. C. 190; *Martin* v. *Mathiot*, 14 Serg. & R. 214; *Crawford* v. *Davis*, 99 Pa. 576.

"The accountant showed that certain book debts which remained open on the books of the decedent were uncollectible, and that efforts had been made to secure their payment. The demand to surcharge him with their amount and to disallow his commission as administrator is refused.

"The account, vouchers having been produced for its credits, exhibited a balance due by the estate to the accountant of $75.93.

"Against which must be surcharged commissions improperly claimed on $2,530, which sum was charged in the debits, but were retained by accountant in payment of his own claim, and was not carried into the totals."

Exceptions to the adjudication were filed by the accountant because it surcharged the accountant with the sum realized from the property pledged to him by the decedent for his debt, viz.: $2,530, and because it disallowed commissions upon the sum of $2,530, although charging the accountant with said sum.

Upon dismissing the exceptions and confirming the account, PENROSE, *J.*, delivered the following opinion:

It is conceded that the bill of sale under which the accountant claims was given to secure moneys loaned by him to the decedent; his rights, therefore, were simply those of a mortgagee, the form of the transaction being immaterial. *Spering's App.* 60 Pa. 199.

That possession on the part of a mortgagee is essential to the validity of his lien as against other creditors where the subject of the mortgage is personal property capable of actual, corporeal occupation, is too well established to require the citation of authority; and that the death of the debtor gives to general creditors the right to deny the validity of such a mortgage when possession has not been taken in his lifetime, was expressly decided in *Kater* v. *Steinruck*, 40 Pa. 501.

"By the death of the mortgagor," it was there said, "his personal estate in possession passed into the custody of the law for administration, and the mortgagee had no right to undertake to administer any part of it for the satisfaction of his own debt. Even if there is enough to satisfy all the creditors, he cannot decide the question, but must leave it to the decision of the orphans' court. If there is not enough, his mortgage without possession became void as to creditors by the death of his debtor, for then the law took hold of the estate for the benefit of all. If there is enough, he cannot suffer much by waiting the due course of administration."

In that case an action of trover by the administrator against the mortgagee was sustained, and it was held that the debt intended to be secured by the mortgage could not be set off. The fact that the default, which, under the terms of the mortgage, first gave the right to take possession, did not occur until after the mortgagor's death, is not material. The point decided was that unless the lien is complete at the death of the debtor, priority cannot be claimed over other general creditors. See also *Merchants Bank* v. *Shouse*, 102 Pa. 488.

It is true that in *Collins' Appeal*, 107 Pa. 590, it was held (Clark, *J.*, dissenting) that the principle did not apply in favor of a decedent's general creditors in the case of a pledge of an intangible interest, incapable of delivery or manual occupancy, or of an expectancy to come into existence after the contract of pledge is made, and when the personal effort of the pledgeor is necessary, both to its subsequent existence and its actual maintenance. But this was not because the creditors of the decedent had only the rights of the general creditors of a living debtor, but simply because of the character of the pledge.

The same principle was held, therefore, to apply as against execution creditors, in *Wallace's Appeal*, 104 Pa. 559.

"The general rule," it was said in that case, "that possession of the thing pledged must be taken by the pledgee, to make the pledge valid against the creditors of the pledgeor, was recognized in *Collins' Appeal*, and the pledge of an interest in expectancy, or of an intangible interest, under certain circumstances, was considered an exception."

"Whether," it was added, "in Pennsylvania there can be any other exception need not now be determined." Certainly the present case furnishes no ground for another exception, and nothing short of the complete overthrow of the general principle itself can sustain the claim of priority on the part of this mortgagee.

There is nothing in the doctrine of *McClintock's Appeal*, 29 Pa. 360, or of *Yorks' Appeal*, 1 Cent. Rep. 354, 659, which, as we understand those cases, affects the question. *Yorks' Appeal* simply decides that creditors of a decedent do not become the equitable owners of the personal estate of their debtor so as to prevent the plea of the Statute of Limitations as against their debts; and there is no suggestion that while the debt continues the personal estate is not held, in the regular course of administration, subject to the duty of the administrator to see to its payment. To this extent the administrator is a trustee for the general creditors, although his obligation to them ceases, of course, when the debt is paid or when it has lost, by operation of law, the right of enforcement. The Act of Assembly declares that after payment of certain preferred debts all others shall come in on a footing of equality. Nothing less than a lien perfected during the life of the debtor can give a right of priority as between general creditors.

The auditing judge has found, and the account shows, that immediately after selling the property covered by his bill of sale the accountant appropriated the proceeds for the payment of his own debt. In so doing he was acting in hostility to the rights of other creditors; and, so far as this portion of the estate was concerned, it was entirely proper to disallow his commissions as against such creditors. *Greenfield's Est.* 24 Pa. 232.

The proceeds of sale, $2,530, were all received in or prior to October, 1882; and the account, which was not filed until March, 1886, contains no debit of interest. It is now asked, although the claim was not made before the auditing judge, that the accountant be surcharged with interest at the rate of 6 per cent. Had the money been deposited during the period preceding the filing of the account, with the other funds of the estate, the mere omission to invest or make it productive might, perhaps, have been excused, or a lower rate than 6 per cent adopted; but as it was applied to the payment of a debt to himself, and the accountant has thus had the use of it ever since, it is clear that he is chargeable with interest at the legal rate. The adjudication will be amended by adding to the balance for distribution interest upon the above sum from October —, 1882; and with this modification the exceptions are dismissed.

The assignments of error specified the action of the court in dismissing the exceptions to the adjudication, and in decreeing (in its opinion dismissing the exceptions) that interest should be added to the balance for distribution, such balance, under the opinion, including the entire proceeds of the pledged property.

Messrs. **Joseph deF. Junkin** and **George Junkin,** for appellant:

It is respectfully submitted that the lien in this present case was complete at the time of the death of the debtor, and that the essential and controlling distinction of fact and principle between the case of *Kater* v. *Steinruck,* 40 Pa. 501, and the present one, arises from the condition that in the former case default had not taken place, and the right of possession was not perfect; whereas, in the present one default was not necessary, the pledgee's title was perfect, and he had the absolute right of possession, the pledgeor having the custody of the property only as trustee for him, and not in any sense being in legal possession of the same.

See also *Collins' App.* 107 Pa. 590.

The disallowance of commissions to the accountant, and the surcharging him with interest upon the proceeds of the sale of the pledged property were by way of punishment.

Unless he has done something intentionally in fraud of the estate, or by which the estate was made to suffer, he certainly was entitled to his commissions, whether or not he received as pledgee the proceeds of the pledged property. It was not as if he had administered first and had then taken the proceeds of the pledged property and misappropriated them to his own use; but, on the contrary, after he had possession as pledgee, he voluntarily administers on the estate, and voluntarily brings before the court the entire proceeds of all of the property which was in the custody of the decedent at his death. An examination of the long account filed by him shows the greatest possible care taken by him to bring before the court, for a just and legal distribution, every penny that could possibly be charged against him, arising out of this transaction.

It seems to us that in place of this being bad faith and in disregard of duty, it was an instance of the exercise of the highest good faith, both to the court and to the creditors of the estate.

In like manner, the charging him with the full rate of interest upon proceeds of this property was very severe and not warranted by the facts of the case. If he is to be deprived of what he supposed to belong to him, and which he took in good faith, without any intention of defrauding this estate, his loss is severe enough; and having voluntarily brought the fund into court for disposition, it is respectfully submitted that a reasonable allowance on the interest should be made to him, if the decision of the court below is to be sustained.

Mr. **Lewin W. Barringer,** for appellees:

Where moneys have been used by the accountant, commissions will not be allowed, even if the employment may have inured to the benefit of the estate.

Wayland's Est. 17 W. N. C. 376; *Seguin's App.* 103 Pa. 143; *Robinett's App.* 36 Pa. 174; *Norris' App.* 71 Pa. 126.

He is chargeable with interest as compensation for such use.

Norris' App. 71 Pa. 123; *Walthour* v. *Walthour,* 2 Grant, 102; *Copely's App.* 82 Pa. 143.

Mr. Justice **Trunkey** delivered the opinion of the court:

The opinion of the learned judge of the orphans' court clearly shows that the property assigned to Heft, as security for a debt, remaining in possession of the assignor, upon his death passed into custody of the law for administration. For the reasons there given the decree, except as to commissions, must be affirmed.

Letters of administration were granted to the appellant in a week after the decedent's death. That he prudently disposed of the property is unquestioned. Nor is there anything to show that he did not believe he had a right, by virtue of the assignment, to appropriate the proceeds of the assigned property to payment of the debt which the parties to the instrument intended to secure. He was mistaken, and is liable for interest. The fund for distribution is as large as it would have been had he not claimed that the part derived from sale of the assigned property should apply on his debt. Creditors have lost nothing by his mistake.

Under the circumstances, we think he should be allowed the usual compensation for his services.

Decree affirmed, with modification that the appellant be allowed the commissions claimed in the *account; costs of appeal to be paid by administrator out of money of estate.*

Wilson D. SNYDER *et al., Plffs. in Err.,*
v.
Morris BERGER.

1. In an action of trespass to recover for **taking personal property,** *held*, that **whether** or not the **sale** to the plaintiff **was fraudulent** and void as to the defendant as a creditor of the seller **was a question for the jury** to determine from all the facts in the case, and that the court rightly refused to take the question from the jury.
2. *Held, further*, that the plaintiff had the right to give in **evidence** all the **facts regarding** his alleged **purchase,** in order to show that it was *bona fide* and for full value, **notwithstanding** that question had once been **determined in a prior suit** to which the plaintiff was not a party.

(Argued Jan. 21, Decided March 21, 1887).

JANUARY Term, 1887, No. 264, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Green, *JJ.*

Error to the Common Pleas of Northampton County, to review a judgment on a verdict for plaintiff in an action of trespass to recover the value of certain property and for damages for the detention of property. *Affirmed.*

The facts sufficiently appear from the charge of the court to the jury, given below.

The case has been twice tried. A verdict and judgment in favor of plaintiff in the first trial was reversed on appeal to this court and a new trial granted for error in the rulings of the court.

See 4 Cent. Rep. 764, in which the facts are fully stated.

On the second trial before SCHUYLER, *P. J.*, the plaintiff, Berger, offered to prove by Edward Shafer the whole transaction between witness and himself in substance, the same as on the examination at the former trial. Objected to as incompetent. Objection overruled. Exception.

Plaintiff presented, *inter alia*, the following points:

2. A debtor may lawfully prefer one creditor to another, and if the jury believe that Mr. Shafer sold out his undertaking establishment to Berger for the purpose of preferring his wife and other creditors, even to the exclusion of Mr. Jacoby, the sale was not fraudulent for that reason.

Ans. This is true.

3. And even if Mr. Berger knew that the purpose of Shafer in selling out was to prefer some creditors to others, the sale is not void for that reason.

Ans. This is true.

4. If the jury believe that the proceeds of the sale from Shafer to Berger were paid to *bona fide* creditors of Shafer, then Jacoby was not defrauded; for one creditor cannot be defrauded by the payment of another, although all the property of the debtor is exhausted by such payment.

Ans. This is true, provided you find that the sale was made upon full and valid consideration.

5. If the jury believe that Shafer was honestly indebted to his wife, he had the right to direct her to be paid out of the proceeds of the sale of his property in preference to Jacoby or any other creditor.

Ans. This is true.

6. If Berger purchased the property in dispute in good faith and for a full consideration from Mr. Shafer, it was the duty of Shafer to protect and defend Berger's title in the attachment suit before *Justice* Baum, and no fraud can be inferred from such defense.

Ans. This is true.

Defendants, *inter alia*, presented the following points:

3. In determining whether the evidence shows that Berger actively participated in the fraudulent purposes of Shafer, the jury should first consider whether the fraudulent purpose of Shafer was made known to Berger, at or before the alleged sale; and second, if they were so made known, whether he assisted Shafer in carrying them out. And if they can find that Berger took a transfer of all of Shafer's property, knowing that Jacoby had a claim against Shafer, which he was pressing for payment, and that Shafer left Jacoby out of the list of creditors which were to be paid out of the proceeds of the sale, that Shafer intended to prevent Jacoby getting his claim paid by suit, and that Berger, through Cope, then paid and settled with all the creditors except Jacoby, they are justified in finding that the fraud was the joint work of Berger and Shafer, and their verdict should be in favor of the defendant.

Ans. I cannot affirm this point. Whether or not the sale was fraudulent is to be determined from all the facts and circumstances in the case.

6. Under the facts in this case there was not sufficient delivery of the property as against creditors; and the court should declare the sale void, and direct a verdict in favor of the defendants.

Ans. I cannot affirm this point.

The court is requested to declare the transaction a legal fraud, because the judgment note for $1,200, dated December 4, 1883, given by Berger to Shafer, payable in five years from date, assigned to Mrs. Shafer and not recorded, contains a clause, which enabled Shafer to prevent the payment of two thirds of the purchase money for the undertaking establishment, by going into the same business again, any time within five years, and to defeat the validity of the bill of sale, dated the same day, to the extent of two thirds thereof. This was, in effect, creating a secret trust in favor of Shafer, which stamps the transaction as a fraud in law, and vitiates the pretended sale, as against creditors.

Ans. I cannot affirm this point. The clause referred to is a circumstance to be taken into consideration with the other facts and circumstances in the cause as to whether the sale from Shafer to Berger was a *bona fide* sale, or otherwise.

The court charged the jury as follows:

This is an action of trespass brought by Morris Berger against Wilson D. Snyder and Cyrus Jacoby to recover damages for seizing and selling one horse, and for seizing and detaining another horse and truck wagon as the property of Edward Shafer, and which the plaintiff alleges belonged to him.

It appears that the said Edward Shafer was the owner of an undertaker's establishment which consisted of horses, wagons and undertaker's materials and the like, and that, being largely in debt, he sold the same to the plaintiff on December 4, 1883. The property in controversy was a part of this undertaking establishment.

The plaintiff alleges that this sale was a fair *bona fide* sale for the full value of the establishment, and that he had taken possession of, and had assumed control over the property sold, under and in pursuance of a contract before the seizure made by the defendants. The defendants, on the other hand, contend that the sale was not *bona fide*, but was intended to defraud Cyrus Jacoby, one of the defendants, and a creditor of Edward Shafer; that, while the plaintiff was the ostensible owner, Edward Shafer continued to be the real owner of the establishment as much after the sale as before. You have heard the evidence on that subject, and all the testimony in the case, as well as the credibility of the witnesses, is submitted entirely to your determination to find the facts of the case.

The law applicable to the facts in this case is well settled. In order to pass title to personal property, when the rights of creditors are concerned, a sale must be *bona fide* and for a sufficient consideration accompanied and followed by open, notorious, visible and actual possession. The change of possession must accompany the transfer, or follow it as speedily as the nature of the case will admit.

If the sale by Shafer to the plaintiff was not *bona fide*, and for a sufficient consideration, the plaintiff cannot recover. If the purchase and sale were made for the purpose of putting the property out of the reach of Cyrus Jacoby, one of Edward Shafer's creditors, so as to prevent it from being seized and sold for Edward Shafer's debts the transaction was fraudulent, even though the plaintiff paid full value for the property; and he cannot recover. If, on the other hand, you find that the sale was *bona fide* and for a sufficient consideration, that the possession accompanied the sale, that the sale was not made for the purpose of hindering and delaying Cyrus Jacoby in the collection of his claim, the plaintiff may recover. If you find these facts in favor of the plaintiff, your next inquiry will be as to the amount of damages, which will be, so far as the horse sold by the defendants is concerned, the cash value of the horse at the time of the sale with interest, and, as to the horse and wagon returned by the defendants, their value to the plaintiff during the time they were detained by the defendants with interest.

If the defendants acted wantonly and maliciously in seizing the property, you will be justified in allowing, in addition to the value of the property, what are called exemplary damages.

If, however, you find that the sale from Shafer to Berger was not *bona fide*, or even if *bona fide* that there was no change of possession, you will have nothing to do with the question of damages, and your verdict will be for the defendants.

Verdict and judgment were for plaintiff.

The assignments of error specified:

1–5, the action of the court in affirming plaintiff's second, third, fourth, fifth and sixth points, thereby opening the judgment of the supreme court in the same case, in which it was held that Shafer disposed of his property with intent to defraud Jacoby, and that the finding thereof was final and conclusive.

6–8. The answers to defendants' third, sixth and last points.

9. The action of the court in overruling defendants' objection to plaintiff's offer of evidence, as above noted.

Mr. **W. E. Doster,** for plaintiffs in error:

Plaintiff's second point imputes to Shafer the innocent purpose of paying his wife. The third point imputes the same thing. The fourth point imputes to him the innocent purpose of paying *bona fide* creditors. The fifth imputes an honest indebtedness by Shafer to his wife, and preference to her. The sixth point imputes to Shafer the duty of defending Berger's title.

Certainly all these points might have been properly raised and answered, if Shafer's fraud on Jacoby had been in issue; but if that was *res judicata*, then the treatment of them by the court, as open, was a license to the jury to say that Jacoby was not cheated by him, that he was honestly paying his debts—in other words, giving them leave to reverse the finding of the justice as affirmed in *Jacoby* v. *Shafer*, 105 Pa. 610, and as pronounced finally and conclusively settled in *Snyder* v. *Berger*, 4 Cent. Rep. 764.

The action of the court in allowing Shafer to justify himself and contradict and impeach the judgment against him held to be final by *Judge* Sterrett, in 4 Cent. Rep. 764, was error.

Mr. **Robt. L. Cope,** for defendant in error:

Admitting that "the judgment of *Jacoby* v. *Shafer*, was conclusive, in this case, of the fraudulent purpose of Shafer, it is conceded that Berger may prove that he had no knowledge of Shafer's fraudulent intent. To do this it is certainly competent for him to show that all the acts and purposes of Shafer of which Berger might have had knowledge were not fraudulent in themselves. And if they were not fraudulent, the fact that Berger was cognizant of them could not impute fraud to him.

Walker v. *Marine Nat. Bank of Erie*, 98 Pa. 574; *Covanhovan* v. *Hart*, 21 Pa. 500; *Uhler* v. *Maulfair*, 23 Pa. 481; *Gallagan's App.* 5 Cent. Rep. 725; *Wingerd* v. *Fallon*, 95 Pa. 184.

Mr. Justice **Sterrett** delivered the opinion of the court:

When this case was here before [4 Cent. Rep. 764] we held that, as against Shafer, from whom plaintiff below purchased the property in controversy, it was definitively settled in *Jacoby* v. *Shafer*, 105 Pa. 610, that the latter, being indebted to the former, was about to assign and dispose of his property with intent to defraud his creditors, and that the judgment, in the case referred to, was final and conclusive as to the fraudulent purpose of Shafer; but, inasmuch as Berger was not a party to that suit, he was not precluded from showing that in good faith and for a full consideration he purchased the property from Shafer and had exclusive possession of it before the attachment issued. *Snyder* v. *Berger*, 4 Cent. Rep. 764, 18 W. N. C. 490.

The only question, therefore, for determination on the second trial of this case was whether Berger was a party to the previously adjudicated fraud of Shafer.

The burden of plaintiffs in error's complaint now is that the question of Shafer's fraudulent purpose, as well as Berger's active participation therein, was retried and submitted to the jury.

The effort of plaintiff below, to accomplish that result and thus, unintentionally, insure a reversal of the judgment, can scarcely be doubted; and that he did not succeed was not the fault of the learned counsel by whom he was represented. The only question, in regard to which we have any doubt, is whether he was not so far successful, in that direction, as to secure the affirmance of points calculated to mystify the real issue and thereby mislead the jury.

We find, however, that in his general charge, and by unqualified affirmance of defendant's first and second points, the learned president of the common pleas so fully and clearly presented the only issue of fact in the case that it is scarcely possible the jury could have been misled. In affirming defendant's first point he distinctly stated the facts that have been settled in *Jacoby* v. *Shafer*, *supra*, and that, as to Shafer's fraudulent purpose, the judgment in that case was final and conclusive. By unqualified affirmance of defendant's second point, he instructed the jury that if they believed "Berger actively participated in the fraudulent purpose of Shafer (under whom Berger claims), Berger cannot recover and the verdict must be for defendant."

Thus the only issue of fact involved in the case was fairly presented and submitted to the jury in such a way that they could not fail to understand it. We are not prepared, therefore, to say that there is any error in either of the first five specifications.

There was no error in refusing to affirm defendant's third point; nor in saying to the jury that whether the sale was fraudulent as to Berger or not is to be determined from all the facts in the case.

Defendant's sixth and seventh points were rightly refused. The facts were not such as to warrant the court in saying that the alleged sale to Berger was fraudulent in law and therefore void.

The testimony of Shafer, referred to in the last specification, was properly received. It was of course the right of the plaintiff to show, if he could, that his alleged purchase was *bona fide* and for full value. That was the fact in issue; and the testimony complained of was relevant for that purpose. The sixth to ninth specifications inclusive are also insufficient to justify a reversal of the judgment.

Judgment affirmed.

Daniel McCAFFERTY, *Plff. in Err.*, *v.* Thomas BRADY and Margaret, His Wife, in Right of Said Wife.

1. A **bailee** for safe keeping must return the thing bailed to the bailor, or according to the bailor's directions. He **cannot require proof** that the **bailor is** also the **owner.**
2. It is **no defense to** an action of assumpsit by the bailor against the bailee, for money deposited for safe keeping, to **allege** that the **money belonged to a third person.**

(Argued Jan. 6, Decided March 21, 1887.)

JANUARY Term, 1886, No. 276, E. D., before Mercur, *Ch. J.*, Gordon, Trunkey, Sterrett and Green, *JJ.*

Error to Common Pleas No. 4 of Philadelphia County, to review a judgment on a verdict for the plaintiffs in an action of assumpsit. *Affirmed.*

At the trial before Wilson, *J.*, the following facts appeared:

Sarah McGoldrick died at Orange, N. J., about November 8, 1881, intestate, and leaving five or six collateral heirs. She had previously been making her home with a Mrs. Manning, in New York.

In November, 1881, Daniel McCafferty and Margaret Brady went to New York and called on Mrs. Manning. There Daniel McCafferty had delivered to him by Margaret Brady, or by Mrs. Manning for Margaret Brady, $500, which appears to have been given to Mrs. Manning by Sarah McGoldrick, deceased, and which she, Mrs. Manning, evidently understood was to be given to Margaret Brady.

Sarah McGoldrick did not make a will, but a writing was found unsigned by her, in which $500 was given to Margaret Brady. This $500 went into the hands of Daniel McCafferty, all evidently regarding it as the property of the defendant in error. He took the money home, put it in a bag, and put the bag in a drawer in his safe, where he kept his own money and other valuables. He did not attempt to exercise any control over it, and at one time told his wife to give it to Margaret Brady. At another time, he said he would not let her have it; that he would rather burn it, some bitterness of feeling having arisen between Daniel McCafferty and Margaret Brady.

No demand was made on him for this money until May, 1883. About four months before that time, his wife, who was the sister of Margaret Brady, had died. Upon receiving the note demanding the $500 in question, he went to his safe where he had placed the money, and found that it was gone. He swore that he believed his wife had given the money to Margaret Brady, as no other person had access to the safe. He declined to pay the $500 to Margaret Brady, unless she would take out letters of administration upon the estate of her aunt, Sarah McGoldrick, deceased; whereupon, Thomas Brady and the said Margaret, his wife, brought this suit to recover the $500.

The charge of the court was as follows:

The plaintiff asks a verdict in her favor for $500, which she says she placed in the hands of the defendant for safe keeping, under an express promise on his part to return it to her when requested.

The defendant does not deny that he received such a sum of money; but he does deny getting it in such a manner as makes it his duty to return it to the plaintiff.

It is conceded on all sides that the money to which the controversy relates was at one time in the hands of a Mrs. Manning, who was a friend of Sarah McGoldrick, a relative of the plaintiff as well as of the wife (now deceased) of the defendant. Sarah McGoldrick had died, and her effects appear to have been left in the hands of Mrs. Manning.

The plaintiff claims that the money had been given to her, and that she received it from Mrs. Manning for her own use and property.

It is not at all clear to my mind, on her testimony, that she acquired this money in such a way as made it her own, but she does say distinctly that she received it; and further, that she placed it in the custody of the defendant under an express agreement on his part to return it to her whenever she should ask for it. On the contrary, he asserts that the money was received by him from Mrs. Manning, and denies any such promise. He says that the money was put by him in a bag, and in a safe belonging to him, and that in some manner unknown to him it disappeared. He also said that he was in the habit of keeping his own money in the same place, but that none of that was lost.

On these facts, and the whole evidence in the case, I instruct you that if you believe from the evidence that the money in question belonged to the plaintiff, that she had acquired the ownership of it, and that the defendant received it from her for safe keeping, to be repaid when demanded, she is entitled to a verdict for the $500, unless you also believe from the evidence that he took such reasonable care of the money as a prudent man would have taken of his own money, and that it was lost or stolen, or in some way disappeared without his connivance.

I also give you the same instructions if you shall believe from the evidence that the only right which the plaintiff acquired in the property was to hold it until some legal representative of the estate of the deceased Sarah McGoldrick should be appointed, although she had received no letters of administration. If Mrs. Manning placed the money as the property of this dead woman in the hands of the plaintiff, who then put it in the care of the defendant, she has, in my judgment, as a sort of bailee, or trustee, the right to demand the return of the money to her by him, and to recover a verdict against him for the amount stated, unless, as I have before said, he is excused from the obligation of repayment by the loss of the money without his fault. Such loss would be a sufficient excuse if it is satisfactorily shown.

If you are with the plaintiff, however, in your judgment of the case upon the evidence, you will naturally scrutinize carefully the testimony in regard to this excuse, for the reason that it can so easily be made, and with such difficulty be directly refuted.

If, however, the money was placed in the hands of the defendant alone by Mrs. Manning, or in the hands of himself and the plaintiff jointly, as the property of the deceased, Sarah McGoldrick, then the verdict should be in his favor.

The defendant submitted, *inter alia*, the following point :

"1. If the jury believe that the money for which this suit has been brought was money belonging to the estate of Sarah McGoldrick, deceased, your verdict should be for the defendant, as no person is entitled to that money except the executor or administrator of the estate of Sarah McGoldrick."

Ans. "I decline to affirm this point. In my general charge I have sufficiently stated my views upon the question raised."

Verdict and judgment were for the plaintiff for $500.

The assignments of error specified the charge of the court and the answer to the point quoted.

Mr. **Edward C. Quin,** for plaintiff in error:

The testimony on the subject of the ownership of the money is clear, consistent and uncontradictory.

It established that the money in question belonged to Sarah McGoldrick at the time of her death, and that she died intestate. This being conceded, the money went to her administrators and not to Margaret Brady.

It was therefore the duty of the court to withdraw the case from the jury, and to say to them that the evidence was not sufficient to support the plaintiff's claim.

Weidler v. *Farmers Bank*, 11 Serg. & R. 184; *Hyatt* v. *Johnston*, 91 Pa. 196; *Angier* v. *Eaton, Cole & Burnham Co.* 11 W. N. C. 146.

To leave a fact to the jury without any evidence is manifest error.

Calvert v. *Good*, 95 Pa. 65; *Wingerd* v. *Fallon*, 95 Pa. 184; *Junior Steam Fire Engine Co.* v. *Douglass*, 2 Pennyp. 63.

Where the language of the charge as to the true character of the testimony tends to mislead the jury, it is error and a ground for reversal.

Fawcett v. *Fawcett*, 95 Pa. 376.

The plaintiff below by taking the assets of the dead woman and claiming them as her own, thereby became an executor *de son tort;* and by committing that wrong she could acquire no right.

Meigan v. *M'Donough*, 10 Watts, 287.

If one who is neither executor nor administrator interferes with the goods of the deceased or does any other act characteristic of the office of an executor, he thereby makes himself what is called in the law an executor of his own wrong, or more usually an executor *de son tort.*

1 Wms. Exrs. p. 296.

A very slight circumstance of intermeddling with the goods of the deceased will make a person executor *de son tort;* such as the milking of the cow by the widow, the taking of a dog, or the Bible or the bedstead.

1 Wms. Exrs. p. 297.

Thus, where a son died in California, and his money was sent to his father; without more than the bare receipt of it, the father was held to be an executor *de son tort.*

Emery v. *Berry*, 28 N. H. 478; 1 Wms. Exrs. p. 305, note.

An executor *de son tort* cannot settle the estate of the deceased, nor make any valid disposition of the goods and effects; so that no trust can arise by any acts or doings of his in this Commonwealth. The trust estate is not vested in him, nor does any trust devolve upon him in consequence of his unauthorized intermeddling.

Campbell v. *Sheldon*, 13 Pick. 8.

The law holds such an executor to many liabilities, but gives him no action.

Francis v. *Welch*, 11 Ired. Law, 215.

The court declined to affirm the defendant's first point, although it was considered and ruled the other way in *Lee* v. *Wright*, 1 Rawle, 149.

A recovery in this case cannot be pleaded against a rightful administrator; and so much of the effects as belong to the intestate may be recovered a second time from the defendant.

Viner. Abr. 222-225.

Even in equity no such action could be suffered.

Humphreys v. *Humphreys*, 3 P. Wms. 349.

The exigencies of the case do not require that there should be a positive demonstration of what were the views of the court on the point expressed in the general charge. It is enough if there be a doubt, for the dogma is: "To be in doubt is to be lost." An equivocal answer by the court to a pertinent point is ground for reversal.

Foster v. *Collner*, 107 Pa. 305.

When a point is put to the court it is the duty of the court to put the matter in its true point of view, and tell the jury what the law is in the case before them.

Hughes v. *Boyer*, 9 Watts, 556.

A party is entitled to a full, fair, and explicit answer to a prayer for instructions if pertinent.

Hays v. *Paul*, 51 Pa. 134; *Noble* v. *M'Clintock*, 6 Watts & S. 58.

It is error not to answer directly.

Powers v. *M'Ferran* and *Smith* v. *Thompson*, 2 Serg. & R. 44, 49; *Fisher* v. *Larick*, 3 Serg. & R. 319; *Carpenter* v. *Mayer*, 5 Watts, 483; *Geiger* v. *Welsh*, 1 Rawle, 349: *Tenbrooke* v. *Jahke*, 77 Pa. 392; *Hood* v. *Hood*, 2 Grant, 229.

Where the point is based upon a hypothesis which is supported by actual testimony in the cause, the defendant has clear right to a definite instruction upon the effect of those facts.

Allegheny Valley R. R. Co. v. *Steel*, 11 W. N. C. 113.

The judgment in the present case cannot be set up as a defense in the suit by the administrator. It will therefore be seen that unless this judgment is reversed, the plaintiff in error must pay the money twice.

Messrs. **J. Levering Jones**, and **A. A. Hirst**, for defendants in error:

The whole of the evidence taken here establishes the fact that Margaret Brady received this money from Mrs. Manning, either as a trustee for the heirs of Sarah McGoldrick, or that she received it from her as a gift to her, from Sarah McGoldrick *inter vivos*—Mrs. Manning being the mere intermediary for the transfer of the gift.

It may be fairly inferred from the evidence and the circumstances surrounding the transfer of the money from Mrs. Manning to Margaret Brady, or her bailee, the plaintiff in error in this case, that the $500 was a gift to her, Margaret Brady, from Sarah McGoldrick.

The relationship of Margaret Brady to Sarah McGoldrick constituted a good consideration. This was a gift *inter vivos*. When the money was received by Mrs. Manning, the gift went into immediate effect. No actual delivery to the donee was necessary to vest the title; *Crawford's App.* 61 Pa. 52; and delivery may be to a third person as well as to the donee, and may be either symbolical or actual.

Davis v. *Ney*, 125 Mass. 590; *Hill* v. *Stevenson*, 63 Maine, 364; *Meriwether* v. *Morrison*, 78 Ky. 572.

Even if the $500 was not a gift by Sarah McGoldrick to Margaret Brady, the verdict should be sustained.

In the court below the two parties to this case gave their different versions of the events which took place at Mrs. Manning's house in New York. The jury—the only judges—decided that the story of Margaret Brady was the true statement of the facts, namely: Mrs. Manning gave her the money, and that subsequently she gave it to plaintiff in error. This makes him a bailee.

Bates v. *Stanton*, 1 Duer, 79.

A bailee cannot, in ordinary cases, dispute the title of his bailor, any more than a tenant that of his landlord.

Clark v. *Gaylord*, 24 Conn. 484; Story, Bailm. § 110.

A bailee cannot defend himself from an action to recover money deposited with him by showing that the bailment was fraudulent as against creditors of the bailor, and that the fraud was known to the plaintiff, without showing any attempt of such creditors to avail themselves of it.

Brown v. *Thayer*, 12 Gray, 1.

The depositary must return the thing deposited only to him who deposited it, or in whose name the deposit is made, or who is appointed to receive it. He cannot require him who made the deposit to prove that he is the owner of the thing.

Jenkinson v. *Cope*, 7 Martin, 284; *Hendricks* v. *Mount*, 2 South. 738.

The counsel for Daniel McCafferty argues with great vehemence that Margaret Brady was an executor *de son tort*, and hence cannot recover. No case is cited by him which sustains this doctrine; nor can such an inference be drawn from an examination of the reported cases in this State.

An executor *de son tort*, *i e.*, a stranger who takes upon himself to act as executor without just authority (2 Bl. Com. 507), is only liable to account to the executor or administrator, and not to the next of kin.

2 Kent, Com. 11th ed. note, p. 415; *Muir* v. *Trustees*, 3 Barb. Ch. 477.

And so in Pennsylvania: An executor *de son tort* is liable to the action of the lawful executor or administrator, or to that of a creditor.

Stockton v. *Wilson*, 3 Penr. & W. 129, 130.

As Margaret Brady did not attempt to administer the estate, and as Daniel McCafferty is neither the lawful executor, administrator, nor a creditor, it is difficult to see the application of the plaintiff in error's argument on this point. He does not refuse because he asserts any right himself to the thing bailed, nor because he is either the lawful executor, administrator, or a creditor. He simply alleges a belief in the existence of a better title in some third person, and refuses to deliver to the defendant in error until she proves her title.

In *Lee* v. *Gibbons*, 14 Serg. & R. 104, and *Lee* v. *Wright*, 1 Rawle, 149, the facts were in no wise analogous to those in the case now before the court.

The evidence as to the question of negligence was fairly left to the jury, and there was sufficient evidence of negligence to justify the submission of that question to the jury.

Mr. Justice **Trunkey** delivered the opinion of the court:

The plaintiff testified that she gave the money to the defendant for safe keeping, and that he was to return it to her whenever she asked for it. This money belonged to Sarah McGoldrick, at the time of her decease. Before bringing suit the plaintiff wrote to the defendant asking return of the money. He testified that when he received the note he had lost the money, and he did not deny that he had promised to return it to the plaintiff upon her request; but he says he received the money from the hand of Mrs. Manning.

The jury were warranted in finding that the owner or custodian of the money gave it to the defendant for safe keeping, by express agreement for its return on call. If they so found, they were instructed that the plaintiff was entitled to recover, unless the defendant had lost it without negligence or connivance on his part.

No excuse was shown by the defendant for violation of his promise. The trial was three years and six months after he received the special deposit, and it did not appear that an administrator claimed the money, or that he was willing to surrender it on any terms or conditions. His actual defense was that he had lost the money without fault, but the jury did not so find. Merely showing that the legal title was in the estate of a deceased person was not enough to relieve him from the obligation to return the money according to his agreement.

Judgment affirmed.

William HELLERMAN'S APPEAL.

Held, that by the words "**subject to** the **payment** of the sum of $125 **unto my widow**, for and **during** all the term of **her** natural **life**," following a devise of land, taken in connection with the rest of the will, **testator intended** that the land should be charged with the **annual** and not merely a single **payment** of said sum during the life of the widow, and that the words "per annum" were omitted by mistake.

(Argued Jan. 4, Decided March 21, 1887.)

JANUARY Term, 1886, No. 175, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Green, *JJ.*

Appeal from a decree of the Orphans' Court of Philadelphia County, confirming the report of a master ordering the payment of arrearages of a charge on land. *Affirmed.*

This was a petition filed by J. Evan Zorns, as executor of the will of Catharine Hellerman, deceased, to compel the payment of arrearages on an alleged annual charge on lands under the will of John Hellerman, deceased. The case was referred to a master, before whom the following facts appeared:

John Hellerman, by his will, among other things, devised to his son William, the appellant, a certain farm or tract of land, situate partly in the twenty-third ward of the City of Philadelphia, and partly in the Township of Cheltenham, Montgomery County: "To have and to hold the same unto him, the said William Hellerman, his heirs and assigns, forever; under and subject to the payment of the sum of $125, unto my widow, Catharine, for and during all the term of her natural life."

In the same will there are two other devises of land to daughters of testator, in which the charge is made in precisely the same words, except that the words "per annum" are inserted immediately after the "$125."

William Hellerman, the devisee, went into possession, and for five consecutive years after testator's death in 1867 paid to the widow $125 a year; but since that time he has not paid and refuses to pay said sum of $125 per annum; whereupon this suit was brought by the executor of the widow to recover alleged arrearages of annuity due at the time of her death.

The master reported that the words "per annum" in the charge upon the land in the devise to William Hellerman were omitted by mistake and should be supplied, and reported a decree in favor of the executor, for arrearages of such yearly charge or annuity. The court confirmed the master's report and entered a decree accordingly; whereupon, William Hellerman took this appeal, assigning such action of the court as error.

Mr. **William Hopple, Jr.,** for appellant.

Messrs. **Henry Trumbore** and **A. S. Letchworth,** for appellee.

Mr. Justice **Trunkey** delivered the opinion of the court:

The language of the will must be interpreted according to its proper acceptation, or with as near an approach to that acceptation as the context and state of the circumstances existing at the time of its execution will admit. A mistake in the will cannot be corrected, unless it clearly appears by fair inference from the whole. In this court the appellant has not contended that parol evidence is admissible of the actual intention of the testator for the purpose of controlling or influencing the construction of his will.

This will contains seven "items," and only the fifth contains no bequest to the testator's wife. He first bequeaths to her all his personal estate, except a specified portion. The second and fourth items contain devises of real estate, each "subject to the payment of the sum of $125 per annum unto my widow, Catharine, for and during the term of her natural life." In the third item real estate is devised to William Hellerman, "subject to the payment of the sum of $125 unto my widow, Catharine, for and during all the term of her natural life." In the sixth item the testator provides that in case his daughter Caroline should die before his widow, his widow shall have the rents and profits of certain land "during the term of her natural life." And in the seventh item the testator devises his homestead farm, subject to the right of his widow, Catharine, to reside on the same "during the term of her natural life," and to receive one third of the rents and profits "during her life."

After having made five annual payments of $125 to the widow, the appellant discovered that the words "per annum" had been omitted in the clause creating the charge on the land devised to him. Being interested, he naturally inferred that the words in said clause, "during all the term of her natural life," were meaningless, although so often used in their proper sense in other parts of the will where money and rents are directed to be paid to her during said period. That he did not sooner discover the omission is not surprising. It seems plain that he took the land subject to an annual payment during the life of the widow.

The testator used apt words to express his intention, and the several devises, subject to annual payments to the widow, are in similar phrase as respects the duration of the charge. Had the testator intended to charge one devise with a single small payment he would have simply directed its payment to his widow, and not have repeated that phrase, omitting a word, thereby rendering the phrase senseless. It is a fair inference from the whole will that the words "per annum" were omitted from said clause by mistake.

It is unnecessary to repeat the reference to the authorities, made by the master and court below, which establish the principle that a word may be supplied where it is a clear inference from the whole will that it was omitted by mistake.

Decree affirmed and appeal dismissed, at costs of the appellant.

D. B. KUNES *et al.*, *Plffs. in Err.*,

v.

John McCLOSKEY *et al.*

1. The rights of purchasers at a **tax sale** are fixed by the sale; the subsequent payment of the purchase money and the delivery of the deed relate back to the sale.
2. The **purchaser** has an **inchoate title** the moment the property is knocked down to him, which becomes perfect with the payment of the purchase money.
3. The **deed from** the **commissioners** is not the title; it is **merely** the **evidence of** the **title.** It is a mode of assuring and preserving such evidence. Accidental priority in the delivery of respective deeds is unimportant.
4. **During** the **period allowed** by law **for redemption from** a **tax sale,** the **equitable title** is in the owner; the **legal title** is in the county treasurer or commissioners, as the case may be, as security for the unpaid taxes and costs.
5. After the time of redemption has expired an equity remains in the owner, sufficient to warrant the commissioners in permitting **redemption** at any time before a public sale to other parties.
6. The **county commissioners** can only convey by deed what they have previously sold by public sale, excepting perhaps a **conveyance** to the owner by way of redemption.
7. When **land embraced by a junior title** is only **in part included under** an **elder warrant** and survey, and the land embraced by each warrant and survey is assessed as two distinct tracts for the same years as unseated and **sold at** the **same time to** two **different purchasers,** the purchaser of the tract assessed in the name of the person to whom the elder warrant was granted or the person claiming the land under it, will be entitled to the land embraced within the interference of the two surveys, in preference to the purchaser of the land assessed under the junior warrant. The **seniority of** the **title** must be looked to in each case, and be made the test of right between the two purchasers.

(Argued February 17, Decided March 21, 1887.)

JANUARY Term, 1886, No. 312, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Centre County, to review a judgment on a verdict directed for plaintiffs in an action of ejectment. *Reversed.*

This action was brought by John McCloskey and Matthias W. McCloskey, against D. B. Kunes and Joseph B. Poorman, to recover possession of 392 acres and 80 perches of land in Curtin Township. The contention in this case is for the alleged interference between two surveys on the warranty names of "Joseph Taylor" and "Robert Irwin," respectively, the title to which interference is based upon treasurer's sales for taxes assessed in the name of each survey, for the years 1872 and 1873.

At the trial before Simonton, P. J., the following facts appeared:

The Joseph Taylor tract of 413 acres was sold at the regular biennial sale, June 8, 1874, to the commissioners. The Robert Irwin tract, of 392 acres and 80 perches, was sold to the same commissioners at an adjourned sale, August 3, 1874.

February 12, 1884, the commissioners sold the Joseph Taylor tract to D. B. Kunes, and the Robert Irwin tract to John McCloskey. There was no positive and conclusive evidence as to which of the tracts was sold first on that day; but it appeared that McCloskey's deed was dated and delivered to him on that day. On the same day Kunes went to the commissioners, tendered the purchase money for the Joseph Taylor tract, and demanded a deed. The commissioners, being busy with other sales, stated that it would be impossible for them to make out all the deeds for tracts sold that day, and requested him to wait until he should again come to town. Kunes made another demand later in the same day, but was met with the same reply. February 23, being the next time

Kunes was in town, he went to the commissioner's office, paid the purchase money and received his deed, dated that day.

At the trial evidence was given that it was impossible for the commissioners to have made out and executed, on the day of the sale, deeds of conveyance for all the unseated lands sold on that day.

The court charged the jury, *inter alia*, as follows:

"If the taxes were paid on neither tract, and the commissioners did purchase both, they, therefore, owned the interference; they owned what was included in either of the surveys or included in both. When they sold them and made the first deed, they conveyed all that was within the interference, because they owned it at that time; when they came to make the second deed to the defendant afterwards, they had nothing to convey except what was outside of the interference. The plaintiff then, in this case, became the owner of whatever was within the interference; and, therefore, on the first point we instruct you that he got the better title from the commissioners."

"We instruct you that the plaintiff is entitled to a verdict for the lands described in the writ."

Verdict and judgment were for plaintiffs, and defendant took this, writ, assigning, *inter alia*, as error the portions of the charge given above.

Messrs. **William H. Blair, D. H. Hastings** and **Wilbur F. Reeder,** for plaintiffs in error:

County commissioners can only convey by deed what they have previously sold by public sale. This has often been decided. Their powers being derived from the statute, all acts beyond the authority conferred are *ultra vires*, and therefore void.

Hunter v. *Albright*, 5 Watts & S. 423, 425; *Fritz* v. *Brandon*, 78 Pa. 342; *Brandon* v. *Fritz*, 94 Pa. 88.

Messrs. **Orvis, Bower & Orvis,** for defendants in error:

When the commissioners made their deed to Kunes on February 23, 1884, they had no title to the interference, as they had already conveyed that to the plaintiffs below on February 12, 1884. After receiving the money of the plaintiffs and delivering to them the deed February 12, nothing which the county commissioners could do would impair or affect the title they had conveyed.

Brown v. *McCormick*, 6 Watts, 60; *Banks* v. *Ammon*, 27 Pa. 172; *Washabaugh* v. *Entriken*, 34 Pa. 74; *Miller's App.* 84 Pa. 391.

When the money is paid and the deeds delivered at different times, he who has the oldest conveyance from the common grantor has the better title.

Fritz v. *Brandon*, 78 Pa. 357; *Hunter* v. *Albright*, 5 Watts & S. 423; *Diamond Coal Co.* v. *Fisher*, 19 Pa. 267.

Mr. Justice **Paxson** delivered the opinion of the court:

The first assignment of error raises the only question of importance in this case. In that portion of the charge embraced in said assignment the learned judge below instructed the jury in substance that, inasmuch as the county owned both the Joseph Taylor and the Robert Irwin tracts, it therefore was the owner of what was included in either of the surveys or included in both; that when the commissioners sold them and made the first deed, they conveyed all that was within the interference, because they owned it at that time; that when they came to make the second deed to the defendant afterwards, they had nothing to convey except what was outside the interference. The learned judge thereupon instructed the jury that upon this branch of the case, the plaintiff got the better title from the commissioners.

Each of these tracts had been sold for taxes by the county treasurer. The Joseph Taylor, containing 415 acres, was sold by the treasurer of Centre County to the commissioners at the regular biennial sale June 8, 1874, for $89.12. The Robert Irwin, containing 392 acres and 80 perches, was sold by the same treasurer to the same commissioners, at an adjourned sale on the third of August of the same year for $45.22.

On the 12th of February, 1884, the commissioners sold both of these tracts. They sold the Robert Irwin to John McCloskey, plaintiff below, for $26, and delivered him their deeds therefor, dated the same day. They sold the Joseph Taylor to D. B. Kunes, defendant below, for $84, for which they delivered him their deed on the 25th of the same month.

The court below ruled, as has been stated, that the deed to the plaintiff, being prior in point of time, conveyed the title to the interference.

This might be so, if in point of fact there was any priority of the one deed over the other, and such deed by its terms and the understanding of the parties, conveyed such interference. The difficulty in the way of this view of the case is that both tracts were sold upon the same day; and there is no evidence in the case that points with any degree of certainty as to which tract was first sold. At most there was but a scintilla, by far too little to base thereon an adjudication as to the rights of property.

It may be that in the case of a sale by the commissioners of two tracts upon the same day, the law might regard fractions of a day in order to ascertain the relative rights of the parties. No such attempt was made in the present instance, and in its absence we must regard the accidental priority in the delivery of the respective deeds as unimportant. The rights of the parties were fixed by the sale, and the subsequent payment of the purchase money and delivery of the deed relate back to that event. The purchaser has an inchoate title the moment the property is knocked down to him, which becomes perfect with the payment of the purchase money. The deed from the commissioners was not the title itself; it was merely the evidence of the title. It is a mode of assuring and preserving such evidence which experience has shown to be the most convenient method.

If we concede, however, that the plaintiff's deed has priority as a conveyance, it by no means follows that it operates as a conveyance of the interference. That it was not intended by the parties so to operate seems clear, from the fact that so far as this evidence shows none of them knew of the interference at the time of the commissioner's sale. It was not known to either of the parties or the commissioners.

What then did the latter sell, at the sale referred to? They sold precisely what was conveyed to them by the treasurer's deed.

It was urged, however, that *Fritz* v. *Brandon*, 78 Pa. 342, is in conflict with this view of the case. It is true *Chief Justice* Agnew, after commenting upon the cases of *Hunter* v. *Albright*, 5 Watts & S. 423, and *Diamond Coal Co.* v. *Fisher*, 19 Pa. 237, said: "And irrespective of the doctrine of these cases, if the tax sale in either name be sufficient to convey the title to the actual *locus in quo*, the title of Roseberry would prevail for he was first to pay the purchase money to the commissioners and obtain his deed. *Prior in tempore potior est in jure.* But it is sufficient that the title under the Gray surveys being good, the tax sales of Troxel and Immel were good."

The language quoted indicates, what an examination of the case clearly shows, that the case referred to had already been decided upon other grounds. And when we examine the facts of which it was predicated, we find that although the two tracts had been sold by the commissioners upon the same day, to two different purchasers, one of said purchasers refused to pay the purchase money for several years, and only settled therefor after the matter had been placed in the hands of an attorney for collection, while the other purchaser paid the money and took his deed promptly. The difference between that case and the one in hand in this respect is too apparent to need comment. Here there was no delay on the part of the defendant. The evidence shows that he offered the purchase money on the day of sale and was clamorous for his deed.

This brings us to the question: What title did the commissioners sell? It is doubtless true that the title was absolute in the county, if the county chose to enforce such right. The time allowed by law for redemption had passed. It is equally clear, however, under the authority of *Jenks* v. *Wright*, 61 Pa. 410, and *Steiner* v. *Cox*, 4 Pa. 13, that the owner may redeem after the expiration of the five years, with the consent of the commissioners.

It was held in the latter case that a private sale to the owner, although the consideration was less than the amount in arrears, was valid in the absence of collusion, and that nothing but a corrupt agreement to defraud the revenue would avoid such conveyance. Such purchase was held to be a redemption; upon no other ground could such a transaction be maintained, as the commissioners have no power to make a private sale to a stranger for any price, whether more or less than the taxes in arrears.

In *Jenks* v. *Wright* the power of the commissioners to permit redemption after the term has gone by was said by Thompson, *C. J.*, to be beyond dispute and to have been exercised in hundreds of cases, while in *Steiner* v. *Cox* it is treated as a custom, proper to be proved as a matter of evidence. Not as a custom to override the statute, but to aid in its construction.

The Acts authorizing sales of land by the commissioners or treasurer, are laws for the collection of taxes, and not for the confiscation of the property of the citizen, who from any reason may be unable to pay them, when due. It would be beneath the dignity of a great Commonwealth to seek to make gain out of the misfortunes of her citizens; hence, we have provisions for redemption in case of both the treasurer and commissioner's sale. During the period allowed for redemption, the equitable title is in the owner; the legal title is in the treasurer or commissioners, as the case may be, as security for the unpaid taxes and costs.

After the five years have elapsed, and in cases of sales by the commissioners, the owner loses his legal right to redeem. This is not because his equity entirely ceases, but because there must be a time certain when the commissioners may proceed, with or without the consent of the owner, to collect the taxes due. But an equity, not enforceable it is true, remains in the owner, sufficient to warrant the commissioners in permitting redemption at any time before a public sale to other parties, as directed by Act of Assembly.

The commissioners sold these tracts precisely as they bought them at the treasurer's sale, and by the same description. The commissioners' deeds respectively describe them only by their warranted names; no courses and distances or other boundaries or marks are given. They sold what they bought from the treasurer, and nothing else, and they sold them precisely as they had bought them.

The Joseph Taylor was sold by the treasurer to the commissioners on June 8, 1874; the Robert Irwin was sold by the same treasurer to the same commissioners on August 3, 1874. Both treasurer's deeds appear to have been dated in the same day, but as before observed, it was the *sale* that fixed the rights of the parties, and not a scramble for the first deed. The commissioners therefore acquired title to the Joseph Taylor before they acquired title to the Robert Irwin. The Taylor was the older survey and paramount title; hence, when they subsequently bought the Robert Irwin, they bought what was left outside of the Joseph Taylor, conceding there to be an interference as claimed.

Holding the two titles, therefore, in the manner above stated, it is conceded that the commissioners might, had they so willed, have sold this interference by metes and bounds. But they did not do so nor attempt it. They sold both tracts as they received them without any regard to location. The purchaser of the Joseph Taylor took by his deed just what the commissioners took by the treasurer's deed; so of the Robert Irwin. Suppose, instead of making this sale of the two tracts, the commissioners had sold them to the owners at private sale. This, under the authorities cited, would have been a redemption, although after the five years. Surely no intention of passing the interference would be presumed in such case.

The county commissioners can only convey by deed what they have previously sold by public sale, excepting perhaps the single instance of a conveyance to the owner by way of redemption. The deed from the commissioners to the plaintiffs below limits their conveyance to the premises conveyed to their predecessors by the treasurer's sale of August 3, 1874. The recital is as follows:

"It being the same tract of land which J. B. Mitchell, treasurer of said county * * * sold, granted and conveyed by deed poll, dated the 20th day of November, 1874, to the commissioners of Centre County and to their successors in office," etc.

In like manner, the commissioners' deed to the defendants below refers to the sale of June 8, 1874. The sale of the Joseph Taylor having been prior to the sale of the Robert Irwin, it is difficult to see how the treasurer's deed conveyed to the county more than the residue of the Robert Irwin, that is to say what remained outside of it after the sale of the Joseph Taylor in June preceding.

Under such circumstances I see no reason why the rule laid down by *Justice* Kennedy in *Hunter* v. *Albright*, 5 Watts & S. 423, should not apply.

"But when the land embraced by the junior title is only in part included under the older warrant and survey, as in this instance, and the land embraced by each warrant and survey is assessed as two distinct tracts for the same years as unseated and sold at the same time to two different purchasers, it will scarcely be pretended that the purchaser of the tract assessed in the name of the person to whom the older warrant was granted, or the person claiming the land under it, will not be entitled to the land embraced within the interference of the two surveys, in preference to the purchaser of the land assessed under the junior warrant. The seniority of title must of necessity, be looked to in each case, and be made the test of right between the two purchasers."

The first and third assignments of error are sustained. The remaining assignments do not require discussion.

The judgment is reversed and a venire facias de novo *awarded.*

Trunkey, Sterrett and Clark, *JJ.*, dissent.

John DONOGHUE *et al.*, *Plffs. in Err.*,
v.
Michael HANLEY *et al.*, to Use, etc.*

SAME *v.* SAME.

LEHIGH VALLEY R. R. CO., as Garnishee, etc.,
v.
SAME.

A **judgment in an attachment suit** against a nonresident of the State in which defendant's **goods** were **attached** but he was **not personally served, is good** as a personal judgment against him, **where** the **record shows a general appearance** by attorneys for him in the suit without any restriction or limitation and that, by consent of counsel on both sides, a jury of inquest was awarded to assess the damages; and such judgment is sufficient upon which to enter **judgment against a garnishee.**

(Argued March 7, Decided March 21, 1887.)

JANUARY Term, 1886, Nos. 104, 107, E. D., before Mercur, *Ch. J.*, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Carbon County, to review a judgment in favor of plaintiffs in an attachment proceeding. *Affirmed.*

January 11, 1876, Michael Hanley and William F. Welch, partners, doing business as Hanley & Welch, commenced an action, in the Common Pleas of Washington County, against John Donoghue and Charles Donoghue, partners, trading as John Donoghue & Bro., to recover damages for the breach of a covenant under seal.

John Donoghue, being a nonresident, a writ of summons in covenant was issued against Charles and a writ of foreign attachment against John, "a nonresident of this State." The sheriff in whose hands the writs were placed, returned the one against Charles as personally served; and as to the one against John, the sheriff returned that he had attached the goods and chattels of John in the hands of certain officers of the Waynesburg & Washington Railroad Company, whom he summoned as garnishees, and as to John Donoghue *nihil habet*.

January 22, 1876, the narr. was filed, in which plaintiffs stated their damages at the sum of $2,000.

The record shows a general appearance by *Messrs.* Hart & Brady, as attorneys for the defendants, without any restriction or limitation. The appearance docket, also, shows the following:

"August 25, 1876, on motion judgment, in open court, against the deft. (in covenant) for want of an affidavit of defense, and sum due liquidated at $———.

J. P. Miller, Prothonotary.

Sci. fa. v. *Garnishees*, to No. 198, March Term, 1877."

The writ of inquiry of damages recites that the defendants were summoned to answer the plaintiffs "of a plea in an action of covenant," and that it was "in such manner proceeded in said court that the plaintiffs their damages, by occasion of the premises, ought to recover," etc.

The sheriff made return to this writ May 18, 1877, and then follows these entries: "June 4, judgment entered against the defendants for amount found to be due by jury in proceedings upon writ of inquiry of damages, to wit: $2,000."

"And March 20, 1877, on motion of plaintiffs' counsel, judgment, in open court on the foreign attachment, against John Donoghue, the nonresident defendant, and a jury of inquest awarded to assess the damages,—by consent of counsel on both sides. Order of court filed. Writ of inquiry issued, returnable to May Term, 1877."

The officers of the Waynesburg & Washington Railroad Company, who were summoned as garnishees, answered denying that they had under their control or that the company had under its control, at the time of the service of the writ, any goods, moneys, etc., of the defendants' in the action.

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*For report of case brought in Maryland to enforce the judgment referred to herein, reviewed by the Supreme Court of the United States on error, see Hanley v. Donoghue, 116 U. S. 1 (Bk. 29, L. ed. 535).

A transcript of the record of the judgment from the Common Pleas of Washington County was December 20, 1883, filed in Carbon County; and December 26, thereafter, an attachment in execution was issued against the Lehigh Valley R. R. Co. as garnishee and was duly served on the officers of said company.

January 14, 1884, John Donoghue presented a petition to dissolve the attachment, setting forth the proceedings in the Common Pleas of Washington County and alleging that said summons in covenant was served on Charles Donoghue alone and that the petitioner never authorized nor employed an attorney to appear for him in said proceedings; that the moneys in the hands of the Lehigh Valley Railroad Co., garnishee, is due for labor performed in the construction of a tunnel on such railroad and that Charles Donoghue is not and never has been a partner in such construction and has no interest therein.

A rule to show cause was granted and, after hearing, the court, February 23, 1884, filed an opinion in which it held that the judgment against John Donoghue, taken August 25, 1876, was irregular and erroneous, but it never having been reversed by a superior court or set aside by the Court of Common Pleas of Washington County in which it was entered, this Court of Common Pleas of Carbon County would not interfere, and continued the rule to show cause, to afford the defendant an opportunity to make application to the court in Washington County; whereupon, John Donoghue filed a petition in the Court of Common Pleas of Washington County to strike off the judgments of August 25, 1876, March 20, 1877 and June 4, 1877.

March 24, 1884, the Court of Common Pleas of Washington County granted a rule to show cause, which (after hearing, on answer and demurrer) was discharged by the court, STOWE, *P. J.*, specially presiding, in the following order:

"I have no doubt that the judgment entered against Charles and John Donoghue, August 25, 1876, for want of an affidavit of defense, was absolutely void as to John. But this does not in any wise affect or invalidate the judgment against the latter, March 20, 1877, entered (as we understand the record to say or mean) "by consent of his counsel." If I am right in interpreting the record, and I have no doubt I am, the judgment is perfectly regular and cannot be set aside.

"The rule to set aside this judgment is therefore discharged."

John Donoghue then filed a petition in the Common Pleas of Washington County for a rule to show cause why the judgment of August 25, 1876, which was held absolutely void as to John Donoghue, by STOWE, *P. J.*, should not be stricken from the record. The court after hearing, filed the following opinion:

"While I am still of the opinion that the judgment entered against petitioner, August 25, 1876, was absolutely void, I can see no necessity for ordering it to be stricken off. If the view I take of this case is correct, the judgment is a nullity, and ordering it to be stricken from the record will not in the least benefit the petitioner; for the supreme court would consider that as done which should have been done. But if, on the other hand, the judgment should by any possibility have any vitality which might benefit the plaintiff, I do not see why he should be deprived of it. There is nothing in the case to evoke the equitable interference of the court, and plaintiffs should have every possible legal advantage the record may give them. Petition refused."

Interrogatories were filed by plaintiffs' attorneys and January 17, 1885, the court granted a rule on the garnishee to answer the same. It appeared from the answers of the garnishee that there was a balance due the defendant, John Donoghue, of $4,335.37. By a supplemental answer, alleging an error in the accounting by the garnishee, there appeared to be a balance due defendant of $3,600.73. The garnishee, further answering, amended the answer stating the amount due defendant, so that it should read as follows:

"The above balance of $3,600.73 is now due absolutely as between defendant and garnishee, not being subject to any contingency as to satisfactory completion of work; but garnishee has received notice from defendants' counsel of possible outstanding assignments made prior to service of attachment, and desires to be further informed on this subject before answering fully."

After hearing, on rule on the defendants and the garnishee to show cause why judgment should not be entered against the garnishee upon the answers filed to the interrogatories, the court, DREHER, *P. J.*, filed the following opinion:

"The judgment in this court was entered on a transcript of a judgment in the Court of Common Pleas of Washington County. The defendants interpose objections to the present rule for judgment against the garnishee that the judgment against John Donoghue (the only party to whom the garnishee is indebted) is void.

"In an opinion, heretofore given, we fully considered the question raised now, and held that while we considered the judgment irregular and erroneous, we had no power over it, and that the defendant must make his application to set aside, or open the judgment, to the Court of Common Pleas of Washington County. That court, on application of John Donoghue, refused to open the judgment, and that, notwithstanding His Honor, Judge Stowe, considered the judgment void.

"I am still of opinion that the judgment is not void, but only erroneous; and as the court of Washington County has refused to disturb it, it must stand as a good judgment until reversed by the supreme court.

"While Judge Stowe held the judgment taken for want of an affidavit of defense void, he held the judgment which we treated as a judgment *in rem* to be *in personam*.

"Let judgment be entered against the garnishee on its answers to the plaintiffs' interrogatories for the amount of the plaintiffs' judgment, debt, interest and costs, in the usual form."

October 20, 1885, judgment was accordingly entered against the garnishee for the amount of plaintiffs' judgment and interest from May, 1877, to which judgment John Donoghue excepted.

The assignments of error specified the action of the court: 1, in entering judgment on the exemplified record from the Common Pleas of Washington County, so far as John Donoghue is concerned; 2, in not dissolving the attachment, as prayed for in the petition of John Donoghue; and 3, in entering judgment against the Lehigh Valley Railroad Company, on the answers filed.

Messrs. **Edward Harvey, Henry S. Drinker, Frederick Bertolette, Edward M. Mulhearn** and **Craig & Loose,** for plaintiffs in error:

The Act of April 16, 1840, P. L. 410, provides for the transfer of judgments from one court and county to another, by filing of record in said other court a certified copy of the whole record in the case. The record must contain all the essentials of a perfect transcript.

Bell v. *Murphy*, 6 Watts & S. 50.

And the transcript must show that it is a final judgment. If it be of a case developed to verdict, but not yet in judgment, no transfer can be made.

Bailey v. *Eder*, 90 Pa. 446.

Nor can an award of arbitrators be transferred before the time for an appeal has passed.

Hallman's App. 18 Pa. 310.

Such transfer does not make it a judgment of the court to which the transfer is made.

Mellon v. *Guthrie*, 51 Pa. 116.

It is only a quasi judgment for limited purposes.

Brandt's App. 16 Pa. 346.

The court where the exemplified record is filed has exclusive control of all execution process thereon.

Baker v. *King*, 2 Grant. Cas. 254; *King* v. *Nimick*, 34 Pa. 297.

If, however, the original judgment is stricken off, the transferred judgment falls with it.

Banning v. *Taylor*, 24 Pa. 297; *Knauss' App.* 49 Pa. 421; *Brandt's App.* 16 Pa. 346.

The court will examine the exemplification to see if a valid judgment was originally obtained. We do not mean to say that its regularity will be inquired into; that can only be done in the court where it was originally entered, or in some superior court whose jurisdiction requires them to examine the record on appeal, *certiorari*, or writ of error.

McDonald v. *Simcox*, 98 Pa. 619; *Tarbox* v. *Hays*, 6 Watts, 398.

Courts of co-ordinate jurisdiction cannot modify or set aside the judgments of each other.

Doyle v. *Commonwealth*, 107 Pa. 20.

If the judgment is void, then the exemplified record filed in another court is equally void.

Edward's App. 66 Pa. 90; *Quinn's App.* 86 Pa. 447.

In *Williamson's Case*, 26 Pa. 9, it was held that the court will only look at the record to see whether a judgment exists, and has no power to say whether it is right or wrong. It is conclusively pronounced to be right until it is regularly brought up for revision. But the record must show a judgment, and it must appear that the court rendering it had jurisdiction of the parties and the subject matter. A judgment entered in an action where there was no service on the parties, or on property, would be a nullity everywhere. The same would follow if it is entered in a controversy not within the jurisdiction of the court. It is essential that the subject be within the jurisdiction, to be definitive and binding.

Billings v. *Russell*, 23 Pa. 192.

"The defect," says Sergeant, *J.*, "which the Act of June 13, 1836, § 70, P. L. 585, seems to have intended to remedy was, that in a suit against two joint debtors, of whom one was absent, if a summons or capias were served on the other, and judgment rendered against him, the separate property of the debtor not served, could not, by our ordinary mode of proceeding, be levied by execution; nor could it originally have been levied on by attachment, because, one defendant being resident, attachment would not lie in the joint suit."

White & Schnebly's Case, 10 Watts, 221.

The effect of the service of the summons on Charles was to bring him into court, where, if a recovery was had, a general judgment could be obtained against him; as to him the action proceeded as an ordinary action of covenant. The effect of the attachment against John was to bring his individual property attached within the bailiwick within the grasp of the law to answer any judgment that might be recovered against him and his codefendant in the action; as to him the action proceeded as a pure proceeding *in rem.*

It is clear that the entry of "Judgment against deft. (in covenant) for want of an affidavit of defense," was to be made against Charles, for he was the only defendant served, and for the additional reason that no judgment can be taken in foreign attachment for want of an affidavit of defense, even where an appearance has been entered.

Grant v. *Hickox*, 64 Pa. 334.

The judgment of March 20, 1877, is either absolutely void as to John or is only a judgment *in rem.* In either aspect of the case, the attachment in execution is void and should have been dissolved, and the judgment should have been stricken from the record. If the judgment was void, or is only a judgment *in rem*, that matter is inquirable in the courts of Carbon County, as it would have been in the County of Washington; for if it is void in the court where it was entered, it is void everywhere. And if it was a judgment *in rem*, its only force and effect is upon the property attached and upon which it is a lien. Beyond that it has no grasp. It remains, therefore, to consider this record under the proposed analysis.

The precipe and writ was in foreign attachment; there was no personal service; the writ was returned *nihil habet;* and the record shows that the judgment was taken in open court against John in the foreign attachment at the third term after the issuing of the writ. Section 53 of the Act of June 13, 1836, P.L. 584, provides:

"It shall be lawful for the plaintiff, at the third term of the court after the execution of the writ aforesaid, if he shall have filed his declaration, to take judgment thereon against the defendant, for default of appearance, unless the attachment before that time be dissolved."

The judgment against John, taken March 20, 1877, was interlocutory. As there was no affidavit of claim and the damages demanded were not liquidated, a jury of inquiry was necessary. Accordingly a writ of inquiry was directed to the sheriff as required by the rules of practice.

Thornton v. *Bonham*, 2 Pa. 102; *O'Neal* v. *O'Neal*, 4 Watts & S. 130.

And in the case just cited above, this court says that in default of assessment of damages the writ abates. The assessment may also be made by the prothonotary under section 1 of the Act of April 9, 1870, P. L. 60. We have here all the essentials of a proceeding in foreign attachment. The maxim *Omnia præsumuntur rite esse acta* is certainly applicable to this record.

"The rule may be stated to be, that, where it appears upon the face of the proceedings that the inferior court has jurisdiction, it will be intended that the proceedings are regular; but that, unless it so appears—that is, if it appear affirmatively that the inferior court has no jurisdiction, or if it be left in doubt whether it has jurisdiction or not—no such intendment will be made.

Broom, Legal Maxims, *915.

The presumption is that everything that was done was done rightly and according to law.

Brown v. *Ridgway*, 10 Pa. 42; *Gidding's App.* 82 Pa. 72.

In *Fox* v. *Commonwealth*, 82 Pa. 516, it appeared of record that the recognizance was forfeited. This was considered as proof that all the steps necessary to complete the forfeiture had been taken upon the principle of *rite esse acta*.

If the opinion of the court below is examined it will appear that the learned judge regarded the judgment of March 20, 1877, as a judgment *in rem*. He uses this language: "It is not stated on what ground the judgment was taken. The only judgment, where there is no appearance in foreign attachment provided for by the statute, is for default of appearance. The judgment was entered on motion of plaintiffs' counsel, as is the usual practice where there is no appearance for defendants. * * * The plaintiffs, however, on their motion, took judgment against him in the foreign attachment, thus seeming to ignore the general appearance of Hart & Brady."

It is contended, however, that because the names of Hart & Brady appear as attorneys on the margin of the record opposite the names of the defendants, the judgment became a general one. The suit was against John and Charles Donoghue as partners, trading as John Donoghue & Bro. The writ was in covenant against one, and in foreign attachment against the other. One was served and the other was not. Charles was liable to a personal judgment, but John was not. All that was bound by the writ against him was his individual property actually attached; that is, his separate property, not firm property.

White & Schnebly's Case, 10 Watts, 217.

The appearance of the attorneys was for Charles.

He was the party named, and it is to be presumed that he was only represented by counsel.

Brown v. *Kelso*, 2 Penr. & W. 427; *Barlow* v. *Beall*, 26 Pa. 180.

From the record it is evident that this appearance was intended for the defendant served, and this is also clear from the fact that it was so regarded by all parties in the court below and by the court itself. No judgment could have been taken in the foreign attachment, but by default of an appearance. The judgment entered March 20, 1876, was obviously taken for default of an appearance. And it would be preposterous to say that the court entered judgment because there was no appearance, and when that judgment is attacked to say that it must be sustained because there was an appearance.

It was also contended that the judgment of March 20, 1877, was by consent. If it is meant that it was by confession the judgment fails to show it. The word consent is used in the record entry; but it is evidently used in connection with the awarding of an inquest. The judgment was taken by default of an appearance, and the inquest was awarded by consent of counsel on both sides—that is, by consent of the counsel for the plaintiffs and Charles Donoghue. Why do we say for Charles? Because the jury awarded damages against both and no formal judgment was entered against Charles until the award of the inquest was filed. The use of the word "consent" is of no significance. A somewhat similar entry was made by the clerk in *Hall* v. *Williams*, 6 Pick. 232, viz.: "W. & F. came by their said attorney." As F. was a nonresident and no process had been served on him it was held that the entry made by the clerk could not be taken to be an assertion of record that F. appeared to the action.

It may also be remarked that nothing on the record shows when the appearance was entered. Presumably it was not there when judgment was taken by default against John, for if it had been no such judgment would have been entered.

The judgment of May 25, 1876, is void and of no effect as to John. It does not pretend to be a judgment against him; it is not docketed as a judgment against him. It is expressly limited and confined to the action in covenant. Then again the record shows that he was a nonresident and was not served with process. He was regarded as not served and a nonresident down to the entry of final judgment after the third term, to wit: March 20, 1877. There was no jurisdiction over the person of John in August, 1876. The court could not enter a judgment against him. Such a judgment would be void; "If it act without authority, its judgments and actions are regarded as nullities. They are not voidable, but simply void."

Elliott v. *Peirsol*, 1 Pet. 340 (26 U. S. bk. 7, L. ed. 170); *Pennoyer* v. *Neff*, 95 U. S. 714 (Bk. 24, L. ed. 565).

We refer to the record as made up in Washington County, to show that this judgment was treated as void, so far as John is concerned. And we refer to the case of *Hanley* v. *Donoghue*, in the Supreme Court of the United States, error to the Supreme Court of Maryland, 116 U. S. 1 (Bk. 29, L. ed. 535), where the plaintiffs declare on this very judgment as good as to Charles and void as to John.

Under the rule as laid down in *Donnelly* v. *Graham*, 77 Pa. 274, the whole judgment is void.

Lastly, we call attention to the answers of the garnishee. Upon the supplemental answer no judgment could have been entered. There is a reservation in the answer "to be further informed." Before the answer could be regarded as final and conclusive a rule should have been taken for a more specific answer. The case was not ripe for judgment, and the court erred in entering it.

Messrs. **R. E. Wright's Sons,** for defendants in error:

This court cannot interfere with the judgment in Washington County on the ground of irregularity or error.

King v. *Nimick*, 34 Pa. 298; *Wilkinson* v. *Conrad*, 10 W. N. C. 23; *McDonald* v. *Simcox*, 98 Pa. 623.

The judgment of August 26, 1876, is not void; at most it is but erroneous and irregular and cannot be attacked collaterally but only on appeal to a higher court, or by the court that entered it.

Hauer's App. 5 Watts & S. 473; *Wall* v. *Fife*, 37 Pa. 398; *Tarbox* v. *Hays*, 6 Watts, 398; *Drexel's App.* 6 Pa. 272; *Lewis* v. *Smith*, 2 Serg. & R. 142; *Stewart* v. *Stocker*, 1 Watts, 139; *S. C.* 13 Serg. & R. 199; *Lowber's App.* 8 Watts & S. 390; *Ulrich* v. *Voneida*, 1 Penr. & W. 251; *Share* v. *Becker*, 8 Serg. & R. 241; *McDonald* v. *Simcox*, 98 Pa. 623; *Boyd* v. *Miller*, 52 Pa. 431; *Miltimore* v. *Miltimore*, 40 Pa. 151-155; Purd. Dig. p. 721, pl. 28; *Hatch* v. *Stitt*, 66 Pa. 264; *Reber* v. *Wright*, 68 Pa. 471.

The judgment of March 20, 1877, was not a judgment *in rem*, but a general judgment by consent.

The record reads as follows: "And now March 20, 1877, on motion of plaintiffs' counsel judgment in open court on the foreign attachment against John Donoghue (the nonresident defendant) and a jury of inquest awarded to assess the damages—by consent of counsel on both sides."

It will be noticed that as to Charles a valid judgment had already been entered for want of an affidavit of defense, but the amount of damages had not been ascertained.

The judgment heretofore standing against John Donoghue may have been erroneous under the doctrine of *Grant* v. *Hickox*, 64 Pa. 334.

Although the suit as against John was still a proceeding by attachment, and had some of the incidents of an attachment (to wit: a lien on property attached), yet the defendant having appeared by counsel, the effect of the judgment was different. There could no longer be a judgment *in rem* merely; but it became a general judgment—entered by confession after appearance.

The judgment thus entered was a general judgment.

See *Blyler* v. *Kline*, 64 Pa. 130; *Hatch* v. *Stitt*, 66 Pa. 264.

There is nothing in the supplemental answer of the garnishee to prevent judgment. It is based upon a letter or notice that has no reference to this attachment, but solely to one issued long subsequent thereto by another party.

Per Curiam:

These three cases were argued together. The facts are somewhat blended. We discover no error in the judgment of the court in any of the cases. The effect of the general appearance in the original judgment, and the subsequent proceedings in liquidating the amount gave to it the effect of a personal judgment. Such being the case there is on error in the action of the court in the County of Carbon, and the judgment against the garnishee is correct.

Judgment in each case affirmed.

Samuel JOHNSON, *Plff. in Err.*,
v.
COMMONWEALTH of Pennsylvania.

1. It is never irrelevant to give in **evidence** any circumstance which tends to make the proposition at issue more or less probable. Nor is it necessary to offer at once all the circumstances necessary to prove such proposition. The party seeking to prove or disprove it may proceed step by step, offering link by link. Whatever is a condition, either of the existence or nonexistence of a relevant hypothesis, may be thus shown.

2. In the trial of an **indictment for murder** where the **identity of** the **prisoner and** the **person who committed the crime is in question,** no matter how slight may be the inference of identity to be drawn from any single fact, it is admissible as a fragment of the material from which the induction is to be made.

3. Where it is in **evidence** that the man who committed the crime wore a long, dark, frock coat, evidence is **admissible** to prove that such a coat was given to the prisoner before the crime and was afterwards found in a house which he robbed, taking instead a coat belonging to the owner of the house.

4. The **right of** the **supreme court to review proceedings** of the court below upon writ of error **on an indictment for murder, is limited to** such rulings on points of law or evidence as are excepted to at the time, and made **matter of record.**

5. **Where,** therefore, the **prisoner is told by** the **district attorney to** stand up and open his mouth and **repeat** the **sentences** used by the one who committed the murder, **and he does so without objection** on his part or by his counsel, the purpose being to afford a witness then on the stand an opportunity of seeing the prisoner and hearing the sound of his voice so as to testify more intelligently whether he was or was not the man who used those words at the time of the murder, **this court has no power to review** the action of the court below.

6. *Not decided but doubted* **whether** if objection had been made and exception taken it would be held that such a proceeding was **a violation of** the **constitutional provision** that the **accused can not** be **compelled** to **give evidence against himself.**

7. A mere **expression of opinion as to the prisoner's guilt, by** the **judge in his charge** to the jury, is not, if manifestly warranted by the evidence and accompanied by distinct instructions that the question is entirely for the jury, **ground for reversal.**

8. **Where** the **prisoner's doings are accounted for except** during **a few hours before and after the murder** and the evidence, although circumstantial, points unmistakably to his guilt, and there is direct evidence which tends to locate him in the vicinity of the murder at the time it was committed, without any plausible excuse on his part, it is **not error to say to** the **jury:** "He has not been able to tell us where he was that night; that is the unfortunate part of his case."

9. A **mistake** of the clerk, **in consequence of which** the **record** does **not show** that the **prisoner** was **present** when the jury was sworn or the verdict was entered, **may be corrected by** an amendment of the record by direction of the court, **during** the **term** at which the **motion for a new trial is overruled.**

(Argued Feb. 7, Decided March 21, 1887.)

JANUARY Term, 1887, No. 165, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to Oyer and Terminer of Delaware County, to review a judgment on a verdict convicting the defendant of murder in the first degree. *Affirmed.*

The facts, as they appeared at the trial before Clayton, *P. J.*, are stated in his charge to the jury and in the opinion of the supreme court.

The charge was as follows:

As the learned district attorney has well said, we are engaged in the performance of a very disagreeable duty. Unpleasant as it is, however, we must perform it conscientiously and to the best of our ability. Let me warn you against permitting yourselves to be influenced, while in the consideration of this case, by any supposed outside clamor; you have nothing to do with public opinion. You should not even harbor the thought of rendering a verdict that will be pleasant and acceptable to the people. You are to decide this case according to the evidence before you, under the rules of law; and you are to say, on your oaths and affirmations, whether Samuel Johnson is guilty or not guilty of the crime for which he is indicted and for which he is now on trial. He is charged in this bill of indictment with having willfully and maliciously killed and murdered a very reputable citizen of this county, John Sharpless. The question for you to decide is whether he is guilty or not guilty of that crime. To satisfactorily solve this question, it is necessary that you shall know what the ingredients of murder are.

Murder, as defined at common law, is the willful killing of any reasonable creature in being and in the peace of the Commonwealth, with malice aforethought, either expressed or implied. Our law has wisely modified the common-law definition of murder, by dividing it into two degrees, and leaving with the jury who try the defendant the power to determine, when they find him guilty, whether the murder was in the first or in the second degree. Murder in the first degree is any willful and deliberate killing of another, or any killing of another, by poisoning or lying in wait, or while perpetrating, or attempting to perpetrate, any robbery, arson, burglary or rape. All such killing is declared to be murder in the first degree, the punishment of which is death. All other murder is declared to be murder in the second degree.

If, therefore, you come to the conclusion that the defendant is the murderer of John Sharpless, and that he killed him while attempting to commit the crime of robbery, then, when he struck the fatal blow, whether he intended to kill him or not, the offense is murder in the first degree. If you find, however, that the killing was for some other purpose than that of the perpetration of the crime of robbery, and that there was, at the time, no intent to kill, but only to do great bodily harm, then the offense is murder in the second degree. This distinction is very important to keep in your minds.

Let me repeat: if you find first, that the defendant is the murderer, and that John Sharpless came to his death from a blow inflicted at the hands of this man; if, at that time, he was actually attempting to commit robbery, not merely intending, but attempting to rob, then, whether he actually intended to kill him when he struck the blow or not, the offense is murder in the first degree; but if you find that he had any other object than that of robbery, or arson, or burglary, or rape in view when he struck the fatal blow, and that he only intended to do the man great bodily harm, but that the blow resulted in death, then the offense is murder in the second degree.

All homicide that is not justifiable or excusable is either murder in the first or in the second degree or manslaughter. Manslaughter is the unwillful killing of another without malice. Under the evidence in this case, I suppose it is hardly necessary to consider the question of manslaughter; it seems to me the defendant is either entitled to an acquittal or to conviction of murder in the first or second degree; and let me say to you that the question of degree is always for the jury. There is no case where the court is authorized to take from the jury the power of saying what the degree is. You have the absolute power to say, under all the evidence, first, whether the defendant is guilty of murder, and then to determine whether it is murder in the first or second degree; and sometimes where the jury are in doubt as to the intent at the time the fatal blow was inflicted, it is proper that they should convict of murder in the second degree. That is, when they are in doubt as to whether the man, when he struck the fatal blow, intended to kill or only to do great bodily harm.

Now, in considering the evidence, there are three questions to which you must direct your attention and around which all the testimony centers: first, Was there an actual killing? If there was, then was the defendant the slayer? If you find that he was, then what was his intent? All these questions are to be settled by the evidence, not by the testimony of any one witness, but by a general and intelligent and comprehensive view of all the evidence in the cause.

To make out the crime of murder, three things are necessary: first, malicious killing, or, in other words, willful or felonious killing; second, malice at the time the crime is committed; and third, premeditation; but the law presumes, wherever there is a homicide and the evidence shows that the accused is the slayer, that the killing was willful, and that it was felonious. That presumption of law does not rise, however, higher than murder in the second degree. Malice, in law, has not the meaning generally given to that word in common parlance. Malice, in law, simply means an intention to do a wrong; it does not mean spite, previous ill will, or malevolence; it simply means an intention at the time the injury is inflicted to commit the injury. The premeditation necessary to support an indictment for murder need not necessarily have occupied the mind of the slayer any particular length of time. It is only necessary that at the time the fatal blow is struck the intention is in the mind of the man who strikes the blow to kill, or to do great bodily harm, which would probably result in death.

Men, as a rule, are to be judged as intending to do what their acts would probably result in. For instance, to strike a babe with the fist of a strong man. The fist is not a deadly weapon; but to strike a babe in the head with the fist would be evidence that the man doing it intended to kill the babe.

Where a deadly weapon is used, the law presumes that the man using the weapon intended to inflict the injury which the weapon was made to inflict. Sometimes, where a weapon is not in itself deadly, the manner of its use raises the presumption that the man intended death,—as to strike one upon a vital part of the body with a bludgeon, club, or a dangerous tool. If the blow is sufficient, and directed to such vital part of the body as to probably cause death, the law presumes that that is what he intended when he struck the blow.

If, therefore, you find that Samuel Johnson is the man who killed John Sharpless, you will then inquire whether he intended at the time to kill him, or only to do him great bodily harm; and this intent will be found, of course, from all the surrounding circumstances; then you may find him guilty of murder either in the first or second degree, according as you shall look upon the crime being committed and the intention in the mind of the man who committed it. If you find that he intended at the time to kill him, then it is murder in the first degree; and if you find he did not intend to kill him, but only to do him great bodily harm, it is murder in the second degree. Now it appears to me that you are sufficiently informed as to what is necessary to sustain an indictment for murder in the first or second degree.

Let me say to you that you have nothing to do with the punishment; remember, it is not the jury that hangs the man, if you find him guilty of murder in the first degree; nor is it the jury that imprisons him, if you find him guilty of murder in the second degree; and it was not your fault if the evidence produced is not sufficient to warrant you in convicting at all. You are to deal simply with the question of fact; it is the duty of the court to instruct you in the law; but after the court has so instructed you, you are the sole judges of the law, as well as the fact, and there is no power in the Commonwealth that can control that judgment. It is for you. You ought, however, to decide a fact, and leave the consequences where they belong. If you find from the evidence that the definition I have given you of murder in the first degree has been sustained, it is your duty to say that this man is guilty of murder in the first degree, and leave to the law all that follows; you have no concern with the consequences except as a general part of the community in which you live, which community has made the law and fixed the penalty. So, if you are satisfied that the offense was only murder in the second degree, you have nothing to do with the consequences. Just find the fact; and if, after all your best efforts to arrive at some satisfactory conclusion, you are still in doubt, then it is my duty to say to you that the prisoner is entitled to that doubt, and you should acquit him.

It is proper, however, that I should give you some instructions as to the kind of doubt which inures to the benefit of one accused of crime. It is not a mere speculative doubt; you are not permitted to seek for doubt; you are neither allowed to nourish a doubt for the mere purpose of acquittal, nor to find something to hang a doubt on. It is your duty to make an earnest effort to come to a satisfactory conclusion. The law does not require that you should find a fact to be absolutely certain; reasonable certainty is all that the law requires. There are no subjects worthy of investigation that are not surrounded with some doubt. Very many questions are more or less doubtful; but it is the reasonable, the fair, the honest doubt that inures to the benefit of the defendant. That is to say, if, after you have heard and carefully considered all the evidence with all your best efforts to overcome the difficulties that arise in your minds, you still find yourselves unable to do it, honestly unable to do it, then the prisoner is entitled to the benefit of such doubt as that, and he goes free.

The jury ought not to expect the Commonwealth to prove impossibilities, as on of the jurors, when called to take the place that one of you now occupies, said that he would require to see the murder committed, or to hear the testimony of one that he could trust that did see it, before he would be satisfied. The law does not permit such a man to sit upon a jury, for the law does not require that kind of evidence. You must not therefore say: "I doubt because I did not see the crime committed," or because the Commonwealth has not produced somebody who saw the blow struck; that is not the point. You must take all the evidence; and if it points with unerring certainty to the defendant, then you may come to the conclusion that it was he that struck the fatal blow, without having positive and unqualified and absolute proof upon that subject.

In considering the evidence you ought, as far as you can, to endeavor to harmonize it; you should start out with the fair determination to carefully consider all that has been said upon each side, and attribute to the witnesses the credence they are entitled to receive. Of course you will judge of the manner of the witness; you will judge of the motive of the witness, and you will consider whether there are any conflicts between the witnesses; and if you find there are no real conflicts in their testimony, then they are entitled to credence. When you find a conflict in the testimony, one witness testifying one way and another witness testifying another way, then it is for you to say which witness you will believe, finding it impossible to harmonize them. You must not, because one witness swears to one state of facts and another witness when called up testifies to another, and because there is a seeming conflict, say there is a doubt. The law does not permit you to say that; the law requires you to say which witness is entitled to credence, which had the better opportunity to know the facts of which he testifies, which testifies with the most candor; and if you then come to a conclusion that one witness is entitled to more credence than another, you ought to adopt the testimony of that witness and not come to the conclusion, simply because there is an apparent conflict, that the case is too doubtful for you to decide. The law does not permit you to escape the responsibilities of settling disputed facts that way.

It is your duty to arrive at a just conclusion with reasonable certainty from all the evidence. The jury, therefore, should take up the testimony and consider it in an orderly, calm, systematic manner. A little system is necessary in all cases where an important matter is to be performed. You should therefore first direct your attention to the primary question in the case, Was John Sharpless murdered? or was his death the result of accident? That is the first question. I will advise you when you go out to take up that question first. It seems to me that you may find, without doing violence to your conscience, that John Sharpless was murdered.

Now, while speaking upon the subject of doubts, there is a possibility, perhaps, that he was not murdered. There is a possibility that he may have fallen in a fit, that he may have struck his head, and that the horse may have trodden upon him, or kicked him, while down; but you see it will not do for the jury to indulge in these speculative doubts; the law does not recognize them; you are to decide according to the weight of the evidence. It seems to me, therefore, that you may find that John Sharpless was murdered. You will remember, while considering this question, that he was inveigled from his house; that he was taken from his fireside at night for some purpose, and that he was never seen alive afterward by any of the members of his family; that he was, when last seen, in the company of a person, the one who induced him to leave his house, and that he was found in his stable, where he started to go to get a rope, dead, with two wounds on his head, one of which had fractured the skull; that he was found lying upon his back, not with his head from the horses, where it would probably have been if he had been kicked, but with his head toward the horses, his feet the other way and his hands lying at rest upon his body, with one leg a little raised. The evidence, therefore, it seems to me—but the evidence is for you—is sufficient for you to settle the first question, that John Sharpless was murdered.

Then comes the second question, By whom was he murdered? Here is where, perhaps, you will have your greatest difficulty. The Commonwealth says: "By the prisoner." The defendant denies it. That is the great issue for the jury. If you find on the first question that he was murdered, you have gotten over one difficulty; but the great one will be, By whom was the deed committed?

[You have heard the evidence of the Commonwealth, and it seems to point to this defendant as the man who committed the crime; but it will be for you to say whether the index is sufficiently certain to warrant you in a conviction. I say, the evidence seems to point to this defendant as the murderer; it undoubtedly does.] *Fifth assignment of error.*

Whether the evidence is sufficient to satisfy you beyond a reasonable doubt that he is the guilty man is a question entirely for the jury. I do not intend, if I can avoid it, to give you the slightest intimation of my own judgment, after hearing the testimony, as to what your verdict should be; and if I did, you would not be bound by it. If I were to tell you that I believed the man innocent, you would have no right to take that as having any weight upon you whatever; and if I were to say to you that he was guilty, it ought not to have any effect upon your minds. You are the ones to take the responsibility of settling that question. I have not been sworn to decide that; you have.

In considering, therefore, the evidence adduced by the Commonwealth, and the answering of that evidence by the defendant, if you shall come to the conclusion that this man is the murderer, then your next great question will be, What is the degree? Is the man guilty of murder in the first or in the second degree? And as I said to you a moment ago, if you find that the killing was committed, not in an attempt to perpetrate a robbery, and that when the blow was struck only great bodily harm or some other ulterior object was in view, then it is murder in the second degree; but if the blow was struck in an attempt to rob, then, whether the intention was to absolutely kill the man or only to do him great bodily harm, the offense is murder in the first degree.

Now, was the man killed in an attempt to rob? Here is one of the weak points in the Commonwealth's case; there is no evidence of any robbery; there is no evidence that the dead man's clothing was interfered with; there is no evidence that any money was in his pockets or that any money was taken from him. I confess I was somewhat surprised at this lack of testimony. No one has been called to state whether John Sharpless had any money with him when he left the house or that any money was found upon his person after he was murdered. This fact will have an important bearing upon the question of the degree of the murder, and it is proper you should understand it; for I say to you, you have the power either to find this man guilty of murder in the first or in the second degree; but of course you ought not to exercise this power of finding him guilty in the second degree unless his offense does not rise higher than murder in the second degree. If you find that when that blow was struck he was making an attempt to rob, it does not matter what his intentions were when he went there. He may have intended to rob; but at the time that the blow was struck, was it struck for the purpose of robbing the man? Robbery in law is a personal attack upon a man to deprive him of property then upon his person, by actual violence or putting him in fear. That is robbery in law. I think I have said enough upon this subject for the jury to understand it, therefore we will go on to the next question.

If you find, as I stated before, that the man was killed and that the defendant killed him, and that he killed him while attempting to rob him, then he is guilty of murder in the first degree. If you find that the man was killed, and that the defendant killed him for any other purpose than that of robbing him, and that at the time the blow was struck it was struck without any intention to kill, but only to do him great personal harm, then the offense would be murder in the second degree, and, as I before stated, the question of degree is for the jury. Therefore, I say to you that under all the evidence you may either convict this man of murder in the first degree or in the second degree, or you may find him not guilty.

Now, to assist you in grappling with the important facts in this case, but without making a close analysis of the testimony, I will call your attention briefly to the testimony of the several witnesses who have been called and examined before you. I will give you a mere synopsis of their testimony. I do this more for the purpose of assisting your memories than for any other object. You are required by law to find the facts from the testimony, and you are not permitted to have the notes of the court or of the phonographer before you; and it is therefore proper that your memories should be assisted as far as possible by the court, as to what the witnesses said when examined.

Courts are in the habit of grappling with difficulties, and we get into a natural habit of associating ideas to assist memory; not from any innate power, but from the habit of constantly dealing with these questions, we can remember important points better than jurors, and to a certain extent this is the result as before mentioned of an association of ideas. If you see the man before and after he has testified, you naturally remember what was said; but if you can't remember the witness' name or appearance, you will probably not remember anything the witness has said. Therefore, I shall merely give you a list of the witnesses and a brief review of what they said:

No doubt you remember the first witness who was called, Mr. Hall; now merely naming the witness will probably be enough to recall to you what he testified to; he was called simply to prove the map and the plan. That plan you may take out.

The next witness called was the warden or keeper of the jail, Mr. Baker; he testified that the defendant's personal appearance now is not what it was when he first came to jail; he says that his beard was more stubby; he also testified that prisoners have the opportunity once a week to shave; at a subsequent stage of the proceedings he was called again, and testified as to the mumbling manner in which the defendant spoke, and said it was no uncommon thing for the defendant to show his teeth while speaking, and that they had the appearance of being somewhat prominent; that is the substance of Mr. Baker's testimony.

The next witness called was Joseph E. Mickle; no doubt you remember him; he was the neighbor who was sent for by Jane Pratt; he tells you what took place when he arrived and what he found; he is corroborated by the fourth witness, his brother, William Mickle.

The principal witness in the case, and one perhaps without whose testimony this defendant could not be convicted, was Alexander Pritchett, and to his testimony your closest attention ought to be directed. You should examine it well, because, if you believe Alexander Pritchett, then the defendant may be found guilty of the crime of murder; it would not be a conviction upon circumstantial evidence at all; it would be positive, upon the confession of the defendant. You will remember what the testimony of this man Pritchett was; he says he was a fellow prisoner in Moyamensing with the defendant; that he was at that time in jail for assault and battery; that he was constantly in contact during the day with the prisoner; that they were both runners; that they became rather familiar and talked about what they intended to do when they got out; that the prisoner said he wanted to have a good time after he got out of jail, and Pritchett says he told him that New York was the place to have a good time, but that it cost a good deal of money to have it there; he says the defendant told him he knew where he could get a stake of $200 or $300, and said that as soon as he got out he was going to get it, and that they would go to New York and have a good time together. Pritchett tells you he was discharged on the 22d of October, and that the prisoner at the bar was not discharged until the 20th of the following November; he tells you that shortly after his discharge—I think it was on the same day, that will be for you—he met him upon Lombard Street; he tells you how he was dressed, and that he then told him he could get that stake down near Chester and that he was going after it; he says he saw him the next day, Saturday, which would be the 21st of November, in the evening about 6 o'clock, at Seventh and Lombard, and that the next Thursday he saw him again. Upon the next Thursday he says the defendant told him that he did not succeed in getting the stake, and he told him that he had to knock an old fellow in the head about two miles from Chester. Pritchett says he said to him "Did you?" He says that he answered "Yes," but that he only got $6. Pritchett then said: "Are you the man that went to ask for the rope?" and he said "Yes." "You were the man with the white handkerchief around your neck?" and he said "Yes. Did you read that in the papers?" and he said he did. Afterward, when asked about it, he said he heard it from those that had read it. Pritchett then said, "Do you know you killed that man?" and the prisoner replied, "Yes, but don't say anything about it." He said, "Then don't say anything more to me about it." Pritchett said the prisoner told him he only got $6, and then had $2 in his pocket. The third Saturday after this he says he met him again and asked the name of the man that he knocked in the head, and he told him it was Sharpless; that on the 28th of November, Pritchett says he informed the police.

Now that is the substance of Pritchett's testimony.

Of course I have not given all the details, but that is the substance of it. Now, you saw the witness, you heard the cross examination, and you have heard the other corroborating testimony, and it will be for you to say whether you believe him. If it is true, then the evidence is sufficient to convict this man; but if you do not believe it, you may acquit him. No witness has been called who has said upon his oath that Pritchett is a man unworthy of belief. In law every man who testifies under the sanction of an oath is *prima facie* entitled to credence. There are several ways, permitted by the law, to discredit a witness. The most familiar way is to call those acquainted with him, and let them say whether they know the man, and whether they know others who know him, and what his reputation is for truth and veracity. The mere fact that he has been convicted of assault and battery is not sufficient to throw discredit upon him as a witness. If a witness is convicted of a felony, it sometimes is sufficient; but the mere fact that he is now under arrest for robbery is not in itself sufficient to discredit him; for the law presumes him to be innocent until he is proven guilty. You may, however, consider all the facts—the fact that he was in jail, the fact that he is now under arrest—as that may influence you with the other testimony in the case in rejecting his story. So you may believe or disbelieve him; but as a rule a witness is entitled to belief unless some good reason be given for discrediting him.

Now, of course, you will give the defendant credit for his inability to procure witnesses; you will remember that he has been in jail, and that he is poor and friendless, to a certain extent, and that while no witness has been called to discredit the credibility of Pritchett, it may be that if the prisoner had the means, he could, perhaps, have procured some witnesses upon that subject. I only call your attention to the fact that it has not been done; and at the same time that the defendant was in actual custody, and, of course, could not procure witnesses with the same ease that the Commonwealth could.

If you believe the testimony of Pritchett, it would seem that the defendant is guilty of the murder of John Sharpless. If you do not believe the testimony of Pritchett, then there is sufficient, it seems to me, to warrant you in saying he is not. And you will, of course, endeavor to ascertain whether Pritchett has been corroborated; whether he has been contradicted in any material misstatement, whether he has prevaricated. You will call to your mind his manner of testifying, and upon this most vital testimony you ought to carefully deliberate. He certainly has been corroborated as to all that he has testified to as having taken place while they were both in Moyamensing, except as to the conversations. He was what he testified to, a runner, and the defendant was a runner; they were frequently together; they occupied the same cell during their leisure hours; that has been proved by Mr. — (Mr. Baker: "Mr. Livingstone,") Mr. Livingstone. To a certain extent he is corroborated as to what took place after he got out of prison also. He tells you where he went and where the defendant went; that they visited the girls and went to different places together; and this does not seem to be contradicted by the defendant's witnesses and is to a certain extent corroborated.

The next witness called was George Yorke; he tells you that the defendant came to his place on Friday evening at 7 o'clock (and he describes his dress) and that the defendant told him he was going into the country to hunt work; and that he slept upon his floor that night and left next morning at 8 o'clock; that was Saturday morning; he says he saw him the next Wednesday, and that he said he had been husking corn, and said that he had heard a touch of the murder, and that people were mean enough now to do anything. That is the substance of Yorke's testimony.

[The defendant has been able to account satisfactorily for where he was from the time he got out of jail up to 10 o'clock on Saturday morning—(Mr. Baker: "Sunday morning"). And up to 2 o'clock the next morning. Between those two periods there is a bad break, and it was between these two periods of time that John Sharpless was killed. He has not been able to tell us where he was that night. That is the unfortunate part of his case.] *Sixth assignment of error.*

The next witness is Annie Yorke. She was the wife of George Yorke and simply corroborated him as far as she could. The Commonwealth then called the reputed wife of the defendant, and the judge felt it to be his duty, under the law and under the evidence, to exclude that witness. Now I want to warn you against giving any weight to any intimations made as to what that witness would have testified to. You must banish it from your minds. She was the wife of the defendant, and she could not testify against him; the law prohibits it; and you must not allow your minds to be in the slightest degree affected by the reference which has been made to the affidavit by Mr. Norris; he tells you that he procured the affidavit, read it to the defendant and asked him to explain it. You must not allow yourselves to give any weight whatever to what the woman swore to in her affidavit, or what she would have testified to. Nor are you to supply in your minds what you suppose the woman would have sworn to; her testimony is ruled out, and it is to have no weight whatever in settling this issue.

[The next witness called was Charles Stephens. His testimony was important. You will remember the witness. He tells you that between 1 and 2 o'clock on Monday morning, the murder having been committed between 9 and 10 o'clock on Sunday night, some five or six hours after the commission of this terrible crime, that this defendant came to his house, cold, shivering and muddy, and desired shelter.] *Seventh assignment of error.*

He says he let him in and gave him a quilt, and that he set him in a chair by the fire. He says that the man shivered and shook and groaned all night. He also says that the defendant told his wife in his hearing that he had been sleeping in barns and outbuildings, and that he had caught a terrible cold, and that he had seen Sharpless' barn burned. He called it Sharpless' barn; he said that it lighted up the whole country round. Now that is very important testimony, and when compared with Pritchett's, it has an undoubted bearing upon the case. If it is true, it would indicate that this defendant was in the vicinity of this murdered man's house at that time, for, at a quarter to 11, Mr. Lindsay tells you he was awakened because of his burning barn; and if the witness, Stephens, tells the truth, the defendant saw the light of the flames of that burning barn. Now, remember, I do not pretend to give every word these witnesses say. I am only recalling to your minds the important parts of their testimony; and if I leave anything unsaid, and you remember anything that the witnesses have said having a bearing upon the case, give it due weight.

The next witness called was Daniel Livingstone, the keeper of the jail, who tells you that Pritchett and the prisoner were friends, that they were in the same cell together in the daytime; and he tells you the kind of clothes the prisoner had on when he left the jail on Friday, and that is about all he knows of the case; he tells you that he was dressed in a dark suit, frock coat, and he recognized the coat so far as to say that it looks like the coat he gave him.

The next most important witness in the case, important for the defendant, as well as for the plaintiff, is Susan Sharpless, the widow of the murdered man; and to my mind her testimony is inclined to cast more doubt upon the Commonwealth's case than that of any other witness. She was present when the alleged murderer entered the house; she was in a state of excitement and fear, lest something had happened to her husband; and one would think that she would never forget the face of the man she supposed was his murderer, as she saw it that night. She tells you she was near enough to put her hands on him. After closely examining this man she is in doubt. She says she cannot say that this is the man that was in her house that night. She tells you that his voice is similar, but that he has not got the nose and teeth. The nose she says is something like his, but the teeth she says are not the same as she saw them that night, and she says she will never forget those teeth. You will take her testimony with the other testimony in the case, and if its effect is to cause you to fairly doubt whether this is the man who murdered John Sharpless, he is entitled to the benefit of it. She gives you a description of the knock at her husband's door at half past 8 in the evening; she tells you how the man stood with his arms close to his side, of his stealthy entrance, of his mumbling voice, and, what she particularly noticed, his teeth. The district attorney alleges that this man has prominent teeth; but it seems to me that the evidence upon that subject does not comport with Mrs. Sharpless' description of the appearance of the man. Unless, therefore, there was some attempt to disguise, her testimony, as I before stated, is the most important, to my mind, for the defendant.

Jane Pratt was called next. She said that John Sharpless told her that the man who called him out was a white man; but she says when she went out to talk to the man she found he was a black man. You will remember that the man was not in the full rays of the light from the house; as I understand it he was on the porch, or the vestibule, and when she spoke to him she had the impression that he was a white man from what John Sharpless had told her, but his appearance was sufficient to overcome that impression, and she found he was a black man; and her testimony as to his color has great weight, especially when Mrs. Sharpless tells you that the man who entered the house was a black man, and she says he was about the color of this man. Now you will give to that expression of John Sharpless whatever weight it is entitled to. He said, undoubtedly, that the man who called him out was a white man, and you have the evidence of his wife and that of Jane Pratt that he was a black man. Mrs. Sharpless also fixes the time when Jane Pratt left the house to hunt for her husband; it was 9.04. It appears that one of the windows was open, and Jane tells you that after she had been down to the road, which took her perhaps four or five minutes, she looked in at the window and saw Mrs. Sharpless walking around the table; so you may find that that was the time that the man was confronting Mrs. Sharpless, about 9.04; that was about the time the man left the house. The theory of the district attorney is that when the murderer came from the barn he looked in at the window and saw that one of the women was missing; he supposes that the defendant also looked in at the window before, and that he had taken Jane Pratt to be a girl; she was small and had something of the appearance of a girl; and when he came into the house and found that the one he had previously seen through the window was not there, he thought she had gone to give the alarm, and that is the reason he asked: "Where is the girl?" That is the theory of the district attorney, that when the man demanded, "Where is the girl?" he meant Jane Pratt; and when he found she was not there, he supposed she had left for the purpose of giving the alarm, and that that is the reason that no further felony was perpetrated. Take that for what it is worth. But it is somewhat singular that a man should be murdered, and his person not robbed and no attempt made to rob the house, if that was the intention of the murderer. Now give this theory of the district attorney whatever weight it is entitled to, as applied to the evidence. If it is reasonably consistent with the evidence, adopt it; if not, reject it.

Lydia Reynolds says that her eyesight is not good; her testimony corroborates Jane Pratt and Mrs. Sharpless. She says she thinks there is a similarity between the voice of the defendant and the voice of the man as she heard it that night.

John Lindsay's testimony is important. It is important for the defendant as well as for the Commonwealth. He tells you that his barn was burned that night; that he went to bed at 10 o'clock, and that at a quarter of 11 he was awakened by his barn burning, and that he supposes the barn had been burning for some time. He also tells you that he knew the defendant, and that he believes that John Sharpless knew him, as he had sent this defendant over there upon errands. Now you can take that testimony, and if it has caused you to doubt whether this man was the man that murdered John Sharpless, he is entitled to the benefit of it. Unless he disguised himself, the presumption is that John Sharpless would know him. This may have been his reason for calling the man out, so that he might rob him there, out in the dark, and enter the house afterward. But the presumption is that he would not go to the house of a man that he knew without being disguised; and there is no evidence that he was disguised. The fact that he had a white handkerchief around his neck is not evidence that he was disguised. Neither Susan Sharpless nor Jane Pratt says that he was disguised. If he knew John Sharpless, and Mr. Lindsay says that he thinks that he did, you should give that due weight in considering the case.

Walter Lindsay's testimony merely corroborates his father.

[Then comes the testimony of another very important witness—to my mind one of the most important witnesses in the case—Mr. Lewis Morris Lewis. He lives in Upper Darby. One week after this murder, his house was entered by somebody, and among other things taken he missed a coat, and found a coat which was left there. The coat he missed was found in the apartment of the defendant, and the coat he found is identified as looking like the coat that Mr. Livingstone gave to the defendant when discharged from jail a week or so before; and it is also identified as looking like the coat that Mrs. Sharpless says the man had upon his back the night of the murder. I look upon this testimony of Lewis M. Lewis as very important. Undoubtedly, if the coat that is produced is the coat that was worn by the man who stood in the presence of Mrs. Sharpless, then that coat would seem to be sufficiently traced to the defendant The defendant, when asked to explain this difficulty, said that he had bought the coat that had been taken from Mr. Lewis from a tramp; and when he was asked how he came to be possessed of the spirit level, he said he had found it upon the street. He was not asked how he came to be possessed of the other articles, but that excuse is too flimsy to be believed; it is not sufficient, to my mind, to raise a reasonable doubt. It seems to me there is evidence from which you may find that this defendant left the coat which is produced here, and identified by Mr. Livingstone and by Mrs. Sharpless, at Mr. Lewis', and took Mr. Lewis' coat with him, and at the same time took the other articles found in his room]. *Ninth assignment of error.*

I say to you, that in my opinion Mr. Lewis' testimony has a bearing upon the general question as well as upon this particular part. It is very important, and it ought to be given due weight.

The next witness was Dr. Frank Rowland. He made the *post mortem* examination, and has described to you the character of the wounds upon the murdered man. He tells you that either might have produced death, but that the one upon the side of the head was the immediate cause of the death of John Sharpless, and was produced by some heavy, blunt instrument, like a hatchet. In his judgment, the one upon the top of the head, on the occipital bone, was made by a sharp instrument, looking as if the one was made by the sharp part of the hatchet, and the second by the poll; but no hatchet has been found, and there is no positive evidence how or with what instrument the blow was inflicted; it might have been done with the heel of a boot.

[Next comes the testimony of William Hahn. If the jury believe this witness, and I can see no reason why they should not, they will come to the conclusion that the negro man who called at his stand early on Monday morning, before it was known in Philadelphia that this murder had been committed, because the details were not telegraphed to Philadelphia until 10.30, was the murderer of John Sharpless; for at 8 or 8.30 in the morning, two hours before the associated press received the news from Chester, a colored man came to his stand and asked for a paper giving an account of the murder near Chester. I say to you that the jury may come to the conclusion, without much hesitation, that the man who asked for that paper, whoever he was, was the murderer of John Sharpless]. *Eighth assignment of error.*

He was, in all probability, the man who committed the deed. That would seem to indicate that it was a colored man and not a white man. As to the identity of this man, it is not by any means satisfactory. He says that in general appearance the prisoner looks like him; he tells you how he was dressed; but he says he thinks the man had broader shoulders; he says he was the same color. He looked at the coat and said it was similar. You can take the testimony of that witness and fit it with the other testimony, and then form your conclusions from the whole.

The next witness called tells you that he is the agent for the associated press in Chester. By this association all the newspapers, he says, have an arrangement among themselves by which any item of news is distributed among all the papers belonging to the association, and most of the papers belong to it. He says that he is the agent in Chester and that it was 10.30 Monday morning when he sent the dispatch.

Morris Landauer, a reporter, says it did not appear in the Philadelphia morning papers, and that it was not known to the press.

Chief of Police Williamson, however, says that he telegraphed to Philadelphia at 2.13 in the morning that a murder had been committed, but it appears that it did not get into the papers.

Then comes Thomas Alexander. His testimony is only important as bearing upon the manner in which the man was dressed. He corroborates the other witnesses as to his dress and the finding of the spirit level, and as to what was said by the defendant about the coat. It is very important as bearing upon that point.

Chief Williamson's testimony was directed to the time he sent the despatch. My recollection is that it was 2.20 in the morning.

The testimony of James McKniff is not important.

The testimony of Carrie Lane has a considerable bearing upon the case. She tells you that she has rooms to let, and that the wife, or the alleged wife, of the defendant, secured a room there for herself and her husband, and that the coat found there and the other articles were the property of the defendant, and in that respect her testimony is important.

Then comes the testimony of John Norris, one of the editors of The Philadelphia *Record*, who is evidently a gentleman of more than ordinary intelligence and of apparent candor. He seems to have exercised more than ordinary energy in endeavoring to ferret out this murder. He is to be commended for that, not condemned. He tells you that the press gave, after the details of the murder had been worked up as far as they could, $125 to Detective Alexander to defray the actual expenses incurred. There was nothing wrong in that. That money was paid; it was not demanded. It was given to cover incidental expenses incurred in working up the case. He also tells you that he had several conversations with this defendant, which he recounted here yesterday. He tells you that some of the efforts of the defendant to explain away inconsistencies were failures. He tells you that after a long conversation, calling the defendant's attention to inaccuracies and inconsistencies, the defendant finally said when his attention was called to what his wife had said (to this you will, of course, pay no attention except so far as the answers are concerned), he said it was only a pack of lies, and that he supposed he would be tried and reckoned he would be hung for it. That is what he said. You can say what bearing that might have upon the case. Witness also states that he walked over the ground from the place where the defendant arrived at Stephens' house to the Sharpless barn, and he says he walked it in three hours and forty minutes. In this he is corroborated by Lieutenant Roche and Mr. Curley, and this is all the testimony of the Commonwealth.

I have called your attention to the witnesses now, and given you a synopsis of their testimony. If I have left untouched any material point, the jury can remember it, and, of course, supply it. My object in calling your attention to these witnesses is to strengthen your memory, because upon the testimony you are to decide the case. I have no doubt you will now remember sufficiently all the important points in the case.

Now as to the defense. The defendant alleges that there is a mistaken identity here, and that the witnesses that have been produced against him, Pritchett and Stephens, are actuated by a malicious desire to get him out of the way. He says that Pritchett is anxious to get him out of the way in order to get the reward, and that is the object he has. He says his wife is anxious to get rid of him that she may live with another man, and that she may not be liable for prosecution for adultery while she is with him; and that Stephens wishes it so that he may live with his wife. That is the defense. He also relies upon the failure of Mrs. Sharpless to identify him, and lays great stress upon the fact that John Sharpless said that it was a white man, and it is apparent that the defendant is not a white man. The testimony of Elijah Yorke, Mrs. Simmons, Lydia Fitzgerald, and Benjamin White are not important, except to corroborate some of his statements, and to explain some inconsistencies in what he had said to Mr. Norris. But upon the whole, their testimony corroborates one side about as much as the other.

I have no doubt the girls all tell the truth. There is nothing inconsistent with their testimony and that of the Commonwealth. You can easily harmonize all the testimony produced upon the part of the defendant with that on the part of the Commonwealth, without perjury in any witness.

We have also John C. Lindsay; as I before stated, he informed you that in his judgment John Sharpless knew this man; and that is an important part of the case. Now I am about to leave the case with you, and I have no doubt that after you have carefully considered all the evidence, you will be able to come to a satisfactory conclusion. As I before stated, you must not try to please the people; you must not find the defendant guilty because you think it will be acceptable and agreeable to a great majority of the people of Delaware County to see some victim suffer for this crime. If the defendant is found guilty, it must be because from all the evidence you consider him guilty; and it seems to me under all the evidence that you may find him guilty or you may find him not guilty; you may find him guilty of murder in the first degree, or you may find him guilty of murder in the second degree. With these remarks I leave the case with you entirely. We have done our part and you must now do yours. Do it conscientiously, and the court will be satisfied with your verdict.

The jury found the defendant guilty of murder in the first degree. A motion for a new trial was overruled, and the defendant was sentenced to be hanged.

Messrs. **John B. Robinson** and **James S. Cummins,** for plaintiff in error:

It was error to admit testimony that a spirit level and a coat were taken from Mr. Lewis' house, and another coat left there, by the person who took the coat, because it was not shown by any witness that the coat found there belonged to Samuel Johnson; nor was it proven that it was the same coat that the man had on that was at John Sharpless' on the night of the murder.

To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other.

Shaffner v. *Commonwealth*, 72 Pa. 60; *Goersen* v. *Commonwealth*, 99 Pa. 398.

This evidence should not have been admitted until it was first shown that the coat was the one the man had on who stood in the presence of Mrs. Sharpless on the night of this murder.

Zell v. *Commonwealth*, 94 Pa. 258.

The district attorney ordered the prisoner to stand up. "Johnson, stand up." "The prisoner is asked to open his mouth," "to repeat certain words and sentences."

No person shall be compelled in any criminal case to be a witness against himself.

Sec. 9, Declaration of Rights, Constitution of Pennsylvania.

The identification of the prisoner did not follow, but the evidence had that trend, and was prejudicial and unlawful.

The constitutional guarantee "closes the mouth" of a prisoner in a criminal case, unless when under the sanctions of the Act of 1885, P. L. 23, he chooses to open it; and it is error, we respectfully contend, even in the absence of objection by counsel. This point is one never reviewed before, we believe, in the supreme court of this State, but is covered in the following authorities:

State v. *Jacobs*, 5 Jones, Law (N. C.) 259; *Day* v. *State*, 63 Ga. 669; *People* v. *Mead*, 50 Mich. 228; 6 Am. Crim. Law Mag. 810.

A defendant in a criminal charge cannot be compelled to produce a private paper which would be evidence against him on his trial.

There is no difference in the principle between this protection and the shield of the Constitution, which protects his person from being indecorously inspected.

People v. *McCoy*, 45 How. Pr. (N. Y.) 216.

The true intent of the constitutional guarantee, which we invoke, is that the accused in a criminal trial should not only have the right to close his mouth, but he could fold his arms and refuse to be a witness against himself in any sense, or to any extent, by furnishing or giving evidence against himself, whether by testimony under oath or affirmation, or confessions or admissions without either, or by proof of a physical nature.

No consent of the prisoner in the extremity of his need ought to bind him.

Prine v. *Commonwealth*, 18 Pa. 103; *Peiffer* v. *Commonwealth*, 15 Pa. 470; *Rex* v. *Woolf*, 1 Chitty, Rep. 401.

In *Stokes* v. *State*, 30 Am. Rep. 72, the court held that an accused person, in the presence of the jury, should not be asked to make evidence against himself. This is a case where a criminal defendant was called on to make tracks in court in a pan of soft mud brought in for the purpose and in the presence of the jury.

The prohibition of the Act of 1885 does not apply merely to the address made in summing up. The law strictly enjoins against any comment or reference during the trial. There would be no force or benefit in the very stringent prohibitory words used, if it only applied to the summing up by counsel.

Commonwealth v. *Brown*, 16 W. N. C. 557.

When the court said, "I say the evidence seems to point to this defendant as the murderer; it undoubtedly does," the court went a step farther than is warranted by any decision that we have been able to find. If this were a civil case, this language would come almost up to the point of a binding instruction, and is, in fact, deciding on the weight of the evidence, which the court must not do.

Elkins v. *McKean*, 79 Pa. 493.

The court erred in charging the jury: "The defendant has been able to account satisfactorily for where he was from the time he got out of jail up to 10 o'clock Saturday morning (Mr. Baker: "Sunday morning") and up to 2 o'clock the next morning. Between those two periods there is a bad break, and it is between those two periods of time that John Sharpless was killed. He has not been able to tell us where he was that night; that is the unfortunate part of his case." The expression of the opinion of the learned court to the jury, that there is a bad break in the prisoner's case, when the burden was upon the Commonwealth to show where he was, deprived the defendant of his only defense. The burden of proof never shifts, but rests upon the prosecution throughout.

Turner v. *Commonwealth*, 86 Pa. 54.

As to the effect of unfriendly comment destroying defendant's defense, see:

Pannell v. *Commonwealth*, 86 Pa. 266; *Commonwealth* v. *Brown*, 16 W. N. C. 557; *State* v. *O'Connor*, 27 Am. Rep. 291.

A misstatement by the judge in his charge, of any of the evidence, is error.

Goersen v. *Commonwealth*, 99 Pa. 388.

Where the language of the charge as to the true character of testimony tends to mislead the jury, it is error.

Fawcett v. *Fawcett*, 95 Pa. 376; *Elkins* v. *McKean*, 29 Pa. 493.

In *Velott* v. *Lewis*, 102 Pa. 334, *Mr. Justice* Gordon says, in commenting upon irrelevant testimony: "The case ought not to have been incumbered by evidence of this kind. But its very admission by the court gave it an appearance of importance to the jury."

In capital felonies it must appear by the record that the prisoner was present at the trial, verdict, and passing of sentence; his presence cannot be presumed.

Dougherty v. *Commonwealth*, 69 Pa. 286; *Hamilton* v. *Commonwealth*, 16 Pa. 129; *Prine* v. *Commonwealth*, 18 Pa. 104.

The Act of 1718 is the groundwork of our criminal law, and is still in force.

Dunn v. *Commonwealth*, 6 Pa. 384.

Mr. **Jesse M. Baker**, *Dist. Atty.*, for the Commonwealth, defendant in error:

Evidence, however slight, which tends to corroborate the testimony as to the *res gestæ* will not be considered incompetent.

Moyer v. *Commonwealth*, 39 Legal Int. 160; *McConkey* v. *Commonwealth*, 40 Legal Int. 102.

This court must look at the real competency of the evidence and not at the order of its reception. When it is found that the evidence is all finally competent, it will not reverse because of the time or order of its introduction.

Curley v. *Commonwealth*, 84 Pa. 152.

The permission of the court to call on the prisoner to stand up, etc., was not error. The prisoner voluntarily exhibited himself to the witness for identification. After carefully examining him, the witness failed to identify him. His counsel then considered it a strong point in his favor. The jury were so instructed by the court. As he did not see proper to object then it is too late to object now.

Fife v. *Commonwealth*, 29 Pa. 429; *People* v. *Thompson*, 41 N.Y. 6; *People* v. *Casey*, 72 N.Y. 399; *Connors* v. *People*, 50 N.Y. 240; *Brotherton* v. *People*, 75 N. Y. 159; *People* v. *Guidice*, (N.Y.) 1 Cent. Rep. 721.

It is enough if the court respond to all objections to testimony taken by either party and give the proper instructions to the jury. A verdict will not be set aside because improper evidence was admitted, if no objection to its admission was made at the trial.

1 Whart. C. L. *Motions for New Trial; Wait* v. *Maxwell*, 5 Pick. 217; *Den* v. *Geiger*, 4

Halst. Law, 225; *Worford* v. *Isbel*, 1 Bibb, 247; *Cannon* v. *Alsbury*, 1 A. K. Marsh. 76; *Rice* v. *Bancroft*, 11 Pick. 469.

The naked question is now presented whether the defendant can waive an objection, take the chances of a favorable result, and in the event of an adverse verdict secure a new trial.

An error not apparent on the face of the recorded proceedings, however gross and improper it may have been, is not a subject of review here; and the prisoner has no right to expect relief on account of such irregularities.

Jewel v. *Commonwealth*, 22 Pa. 99; *Cathcart* v. *Commonwealth*, 37 Pa. 110.

The right of review is limited by law to points of evidence or law excepted to by the defendants and noted and filed of record by the court.

Fife v. *Commonwealth*, 29 Pa. 429; *Hopkins* v. *Commonwealth*, 50 Pa. 9.

After the admission of evidence without objection, there can be no bill of exceptions to its admission *nunc pro tunc*.

Robinson v. *Snyder*, 25 Pa. 207.

Whether the evidence received on part of the plaintiff be legal or not, it was heard without objection, and the court was not asked to say anything about it in the charge.

Robinson v. *Snyder*, 25 Pa. 207.

The defendant permitted the case to close, and argued upon the effect of what the witness had stated both to the court and to the jury. Having used it for his own purpose, and having taken the chance of influencing the jury by it favorably to himself, he thereby waived his objection and passed his time.

Rees v. *Livingston*, 41 Pa. 119; *McInroy* v. *Dyer*, 47 Pa. 120.

The defendant cannot permit answers which he may now choose to call irregular to go to the jury without objection, and to suit his own purpose at the time of trial, and then claim a new trial upon the ground of its admission.

Commonwealth v. *Sullivan*, 13 Phila. 418.

A judge may rightfully express his opinion respecting the evidence, and it may sometimes be his duty to do it, yet not so as to withdraw it from the consideration and decision of the jury.

Johnston v. *Commonwealth*, 85 Pa. 65; *Kilpatrick* v. *Commonwealth*, 31 Pa. 216.

If the case were in the least doubtful upon this part of the evidence, or if there had been anything for the jury to hesitate about, there might have been more force in this assignment of error. As it stands, the defendant could not have been injured by that portion of the charge complained of. The charge of the court must be considered as a whole.

Kilpatrick v. *Commonwealth*, 31 Pa. 216.

The burden was on the prisoner to explain his absence.

In a similar case to this, *Commonwealth* v. *Sheidler*, 12 Phila. 590, *Judge* Ludlow said: "When it is remembered that where an explanation is clearly demanded by the Commonwealth's case, and is not furnished by the defendant, the law raises a presumption against him, how can it be contended that the Act of Assembly destroys the right to refer to this condition of the cause even in figurative language?"

Mr. Justice **Sterrett** delivered the opinion of the court:

In view of the evidence before the jury, it may be safely assumed they had no difficulty in reaching the conclusion that the killing of John Sharpless was a willful, deliberate and premeditated murder, and also that the perpetrator of the crime was the person who enticed him from the house and shortly afterwards returned thither and demanded money from Mrs. Sharpless.

All the facts and circumstances testified to by those who were present at the time, together with those disclosed by the *post mortem* examination, point with reasonable certainty to these conclusions. The verdict, based upon such evidence, may therefore be regarded as conclusively establishing the *corpus delicti*. But, of course, it was incumbent on the Commonwealth to go farther and prove to the satisfaction of the jury that the prisoner was the guilty man. Testimony was accordingly introduced for the purpose of identifying the prisoner, locating him near the scene of the murder about the time it was committed, and proving his own admissions of guilt.

On the subject of identity, the testimony tended to prove that, in general appearance, prominence of front teeth, tone of voice, character of dress, etc., the prisoner resembled the assassin as seen by members of deceased's family on the night of the murder. They represent him as being clad in dark clothing, soft felt hat, long frock coat, white handkerchief around his neck, no overcoat, etc. The hat and coat, as described by them, correspond with those that the keeper of Moyamensing Prison says he gave Johnson upon his discharge therefrom on the preceding Friday morning, and those worn by him during the two next succeeding days.

According to the testimony of Charles Stephens, the prisoner came to his house between 1 and 2 o'clock in the morning, three or four hours after the murder—clad in a dark suit of clothes, slouch hat, long coat, and handkerchief around his neck. After remaining a few hours, and warming himself, he left before daylight the same morning; but before leaving he said to Stephens that he had been husking corn down the country and had stopped at places "where he generally lodged and could not get in, and had been recommended to come over to my (his) house to warm himself;" also said "he had seen Sharpless' barn on fire and it lighted up all the woods around; * * * had seen it burning that night when he came past it to come up here." Speaking of the prisoner's condition at that time, the witness says "he was foot sore and sick, and it appeared to me the man had chills; he was shivering and groaning as a sick man would."

The evidence of self criminating admissions is found in the testimony of Alexander Pritchett, who says in substance that he and Johnson, as fellow prisoners in Moyamensing, talked familiarly about what they would do when their respective terms of imprisonment expired. A trip to New York and the expense attending same being suggested, Johnson said he knew where he could get $200 or $300, and when they both got out he would "go down and get that stake, and then" they would go over to New York.

Pritchett was discharged from Moyamensing in October, 1885, and Johnson on Friday, November 20, following. They met that morning, and in course of conversation Johnson said: "I think I can get $200 or $300, about two miles from Chester. * * * I am going down to get it." After remaining together about two hours at that time they separated and met again next evening. Johnson then said "I am going down to get that stake, * * * I don't want to go down before Sunday night and I am going to walk."

Pritchett also testified that at their next interview on following Thursday, Johnson said, "I didn't get what I went for, and I had to knock an old fellow in the head down here about two miles from Chester, * * * and I got only $6." At a subsequent interview, three weeks afterwards, Johnson said the name of the man he had knocked in the head was Sharpless.

All the evidence, direct and circumstantial, bearing on the subjects thus briefly adverted to, was competent and proper for the consideration of the jury. It was fairly submitted to them in a clear and comprehensive charge, of which the prisoner has no reason to complain. The credibility of the witnesses was solely for the jury. If they believed that Pritchett testified truthfully as to the prisoner's self criminating admissions, and that those admissions were not a tissue of willful falsehoods uttered by the latter, they were warranted, especially in view of other corroborating evidence, in rendering the verdict they did.

The case of the Commonwealth did not rest upon the testimony of Pritchett alone. The evidence as to the prisoner's identity, his whereabouts at the time of the murder, etc., tended in no small degree to corroborate the truth of the admissions testified to by Pritchett. One of the most damaging circumstances in the case was the fact referred to by the learned judge in his charge, viz.: that while the prisoner's whereabouts was satisfactorily accounted for from the time he left Moyamensing on Friday morning until about 10 o'clock Sunday morning, and then from between 1 and 2 o'clock that night until he was arrested, the gap between Sunday forenoon and midnight was not accounted for, except by his own admission to Stephens, and that tended to locate him at or near the scene of the murder about the time it was committed. One of his own witnesses, Benjamin White, testified he saw him at 10 o'clock Sunday morning, and that night shortly after midnight, he went to Stephens' house for shelter and told the story of his having been down the country husking corn and having seen the burning barn on his way up.

The theory of the Commonwealth was that the prisoner set out on a mission of robbery Sunday forenoon, went to the house of Mr. Sharpless that night, enticed him therefrom and murdered him, and went thence to the house of Charles Stephens where he arrived between 1 and 2 o'clock in the morning. The evidence in support of this theory was both direct and circumstantial. If the jury believed, as they doubtless did, that all the facts and circumstances, as they found them, pointed clearly and satisfactorily to that conclusion, and were at the same time irreconcilable with any other reasonable hypothesis, arising out of the evidence, they could not consistently do otherwise than find him guilty; and their verdict should not be disturbed, unless the learned judge erred in one or more of the particulars specified in the assignments of error.

The first and fourth specifications, relating to the testimony of Lewis Morris Lewis, may be considered together. The evidence therein complained of was not introduced for the purpose of showing that the prisoner was guilty of a distinct and independent crime, but as a link in the chain of evidence tending to prove his identity. It is never irrelevant to give in evidence any circumstance which tends to make the proposition at issue more or less probable; nor is it necessary to offer at once all the circumstances necessary to prove such proposition. The party seeking to prove or disprove it may proceed step by step, offering link by link. Whatever is a condition, either of the existence or nonexistence of a relevant hypothesis, may be thus shown. No matter how slight may be the inference of identity to be drawn from any single fact, it is admissible as a fragment of the material from which the induction is to be made. Whart. Ev. §§ 21, 24, and authorities there cited.

Mrs. Sharpless had testified, *inter alia*, that the man she confronted, on the night of the murder, wore a dark frock coat, "of pretty good length," etc., corresponding to the one exhibited in court. The testimony of the keeper of Moyamensing Prison was that when Johnson was discharged on November 20, he gave him "a pair of black pants, a long dark coat," similar to the coat shown him in court and referred to by Mrs. Sharpless. It was important, therefore, for the Commonwealth to show where the coat thus exhibited to these witnesses came from, and if possible connect the prisoner with its possession. For that purpose the testimony of Lewis, in connection with that of officer Anderson was relevant. The latter testified that in the house where prisoner lived when arrested he found two coats, claimed by him, one of which he said he had bought from a tramp in West Philadelphia; also a spirit level which he said he had found on the street. The coat, which he alleged he had bought from the tramp, spirit level, and other articles, found in his possession, were identified by Lewis as his property, taken by some one from his house shortly after the murder. He also identified the coat—exhibited in court and referred to by Mrs. Sharpless and Livingstone, the keeper of Moyamensing—as the coat left at his house at the time his own coat, spirit level, and other articles, were taken.

The tendency of this evidence was to trace into the prisoner's possession the coat thus identified by Lewis. In the absence of satisfactory explanation as to how he acquired Lewis' property, the fact that these articles were found in his possession, and were claimed by him, warranted the inference that he probably took them away, and at the same time left the long frock coat in question. The evidence, it is true, was purely circumstantial, and in itself perhaps not very strong; but it was nevertheless relevant and proper for the consideration of the jury in connection with other facts and circumstances tending to prove the identity of the prisoner, and connect him with the commission of the felony charged in the indictment.

The second and third specifications, relating to the action of the district attorney in calling upon the prisoner to stand up and repeat certain words, etc., in the presence of Mrs. Sharpless, may be dismissed with the remark that no objection was made or exception taken thereto in the court below. So far as the record shows, the request was promptly acceded to without any objection either by the prisoner himself or his counsel. Having thus waived the right of objection and taken the chances of a favorable result, it would be contrary to every rule of practice to permit him to take advantage of what was done, even if it was erroneous.

Our right to review proceedings of the court below, in cases like this, is limited to such rulings on points of law or evidence, as are excepted to at the time, and made matter of record. *Fife* v. *Commonwealth*, 29 Pa. 429; *Hopkins* v. *Commonwealth*, 50 Pa. 9.

It does not appear that the silence of the record, as to any objection or exception to the action complained of, is the result of accident or mere oversight. If such had been the case, the court on application would have so corrected the record as to show what actually occurred on the trial. But, assuming for the sake of argument that timely objection was made and exception taken, we are not prepared to say it would be of any avail to the prisoner. He was not asked, much less compelled, "to give evidence against himself." The sole object of the request was to afford the witness, Mrs. Sharpless, then on the stand, an opportunity of seeing the prisoner and hearing the sound of his voice, so that she might the more intelligently testify whether he was or was not the man by whom she was confronted on the night in question. To hold that this was a violation of the clause in section 9 of the Declaration of Rights, which declares that the accused "cannot be compelled to give evidence against himself," would in my judgment be a strained construction of that instrument. If it should be sanctioned, what would prevent a person accused of having stolen property in his possession from successfully interposing a like plea of constitutional immunity, and thus thwarting any attempt to search for and recover the property? While the constitutional rights of those accused should never be violated, care must be taken not to deprive the Commonwealth of any legitimate means of detecting and punishing crime. It is not our purpose, however, to pass upon the question, intended to be raised by these specifications, until it is properly presented. If it should ever arise and be deemed worthy of serious consideration, it will then be definitively settled.

The subject of complaint in the fifth specification is that part of the charge wherein the learned judge says: "You have heard the evidence of the Commonwealth, and it seems to point to this defendant as the man who committed the crime; but it will be for you to say whether the index is sufficiently certain to warrant you in a conviction. I say the evidence *seems* to point to this defendant as the murderer; it undoubtedly does."

This is merely an expression of opinion that was manifestly warranted by the evidence. In immediate connection therewith, as well as in other portions of the charge, the jury was distinctly instructed that the question of the prisoner's guilt was one of fact, exclusively for their consideration and determination. In the very next sentence the learned judge proceeds to say:

"Whether the evidence is sufficient to satisfy you beyond a reasonable doubt that he is the guilty man is a question entirely for the jury. I do not intend, if I can avoid it, to give you the slightest intimation of my own judgment, after hearing the testimony, as to what your verdict should be; and if I did, you would not be bound by it."

Indeed, throughout the entire charge, which contains a full, clear and accurate exposition of the law applicable to the case, he appears to have been especially careful to impress upon the minds of the jury the fact that the burden of establishing the prisoner's guilt, beyond a reasonable doubt, was on the Commonwealth, and that the question at issue was exclusively for their determination, under all the evidence before them.

There is nothing erroneous or improper in those portions of the charge recited in the sixth and seventh specifications respectively. In a certain sense the former may have been "prejudicial" to the prisoner; but that was not the fault of the court. It was the logical sequence of evidence which, if believed by the jury, had a criminating tendency, especially when considered in connection with other evidence in the case. We have already adverted briefly to that part of the charge referred to in both of these specifications. The whereabouts of the prisoner, from Friday morning until Sunday forenoon, and then again from 1 or 2 o'clock the same night and afterwards, was satisfactorily accounted for by the testimony of the Commonwealth; but, as to where he was from Sunday forenoon until after midnight, the only evidence we have is contained in the testimony of Stephens, to which the learned judge refers; and that tends to locate him in the vicinity of the murder at the time it was committed, without furnishing any plausible reason for his being there. It was for the jury to say, from all the evidence before them, whether he was there or not, and if there, whether the reason he gave for being in the neighborhood at the time was true or false. In view of the evidence as to his whereabouts from the time he was discharged from Moyamensing until the following Monday morning, the story of his having being down the country husking corn would appear to be wholly improbable. All that was said by the court on the subject complained of was fully warranted by the testimony of Stephens and other witnesses.

There is no error in portions of the charge quoted in the eighth and ninth specifications. What is there said by the court relative to the testimony of William Hahn and Lewis Morris Lewis, is neither improper nor unwarranted. At most the former is nothing more than a mere expression of opinion; and the latter is an explanation of Lewis' testimony, calculated to assist the jury in understanding its proper application and bearing.

The subject of complaint in the remaining three specifications is the alleged defect of the record in not showing the presence of the prisoner in court, either "when the jury was sworn," or "when the verdict was rendered," or "during the time of trial." By mere mistake of the clerk these essential facts were omitted from the record, as at first made up, but attention having been called to the omission, the court, during the same term at which the motion for new trial was overruled and sentence pronounced, ordered the necessary correction to be made, so that the record would conform to the facts as they actually occurred; and this was accordingly done. If the correction had not been made, the defect would have been fatal.

The presumption of regularity, etc., which prevails in other cases, does not apply to records of conviction in capital felonies. During the term at which the trial was concluded and while the record is presumed to be in the breast of the court, the power to supply clerical omissions, and so correct the record that it will conform to the facts, cannot be doubted.

The trial throughout appears to have been conducted with due regard to the rights of the prisoner; and we find nothing in the record that would justify a reversal of the judgment.

Judgment affirmed; and it is ordered that the record be remitted for the purpose of carrying the sentence into execution.

Moses THOMPSON *et al.*, *Plffs. in Err.*,
v.
John B. MATTERN *et al.*

1. In an **action of ejectment in** the **nature of an appeal from** the decision of the **board of property,** under the Act of April 3, 1792, § 11; *held*, **that although** the **board wrongly awarded** the **patent to** the **defendants,** yet **there was** an **error in directing** a **general verdict for** the **plaintiffs, without** a **reservation of** the **defendants' ore right, reserved** to them, **in** the following language in the **deed:** "They also reserve the entire privilege of all ore on said premises. To have permission to enter on said premises to mine, clean and take away the same, without let or hindrance from the parties of the second part, their heirs or assigns."
2. Such general verdict and judgment would cut off defendants' rights in the land, one of which is the **right of entry for** the purpose of **removing** the **ore.**
3. *Held further*, that, as this court has the power to amend verdicts in ejectments, especially those of an equitable kind, and as it would be to no purpose to send the case back for retrial, the **verdict** should be **amended** so as to reserve said rights of defendant.

(Argued Feb. 18, Decided March 14, 1887.)

JANUARY Term, 1887, No. 185, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Centre County, to review a judgment on a verdict for plaintiffs in an action of ejectment. *Modified.*

This was an action of ejectment in the nature of an appeal from the decision of the board of property under the provisions of the Act of April 3, 1792, § 11, brought by John B. Mattern and George Mattern, against Moses Thompson and John I. Thompson.

At the trial before SIMONTON, *P. J.*, the following facts appeared:

On September 24, 1792, the Commonwealth granted to Josiah Lambourn a warrant for a tract of 400 acres of land in Franklin Township, Huntingdon County, which was subsequently surveyed, and a patent granted. October 27, 1835, the title to this land became vested in Roland Curtin. Some time prior to 1820, Robert Shaw made an improvement on land adjoining this Lambourn survey, and after Shaw's death, his executor, September 19, 1831, sold and conveyed this improvement, containing 226 acres and 77 perches and allowance, to Roland Curtin.

About the year 1820, Andrew Hunter also made an improvement and acquired title to another tract of about 127 acres, adjoining the Lambourn survey and the Shaw improvement, which was likewise purchased by Roland Curtin, by articles of agreement dated September, 27, 1831. On March 17, 1854, Curtin's sons, in whom his title vested, by articles of agreement, sold to Moses Thompson, Jno. I. Thompson, James M. Thompson certain property which included the three tracts. No deed was made by the Curtins in pursuance of this agreement until May 15, 1865, the Thompsons and one Irvin, composing the firm of Irvin & Thompson, holding the property in the meantime under the agreement.

On December 17, 1856, an article of agreement was entered into by the firm of Irvin & Thompson to sell and convey to John Mattern, John B. Mattern, and George Mattern a portion of the above described tracts, supposed to contain about 300 acres, at $25 per acre, amounting to about $7,500, and in this agreement it was expressly stipulated "Irvin & Thompson to make the same title to Mattern that the Messrs. Curtins make them, but reserve to themselves, their heirs and assigns, the privilege to enter upon the land for the purpose of making search for iron ore, with the privilege to take the same away, and ground sufficient for roads and screening floors and all other uses about the banks, but agree to fill up all the shafts they sink where no ore is got, and to pay at the rate of 12½ cents per ton of 2,240 lbs. of good clean ore as a compensation for any damage that may be done the land * * * And it is further understood that said Irvin & Thompson reserve to themselves, their heirs and assigns, the entire ore right on ten acres of land lying between the Desert Houses and Richards and Chambers, with the privilege to enter upon the same to make search for iron ore and ground sufficient for roads and screening floors and all other uses about the banks, and not to pay anything for that privilege."

Under this agreement the Matterns became entitled to a deed on April 3, 1857, before Irvin & Thompson had received their deed from the Curtins. On the 22d of August, 1857, a deed was executed by Irvin and the Thompsons to the Matterns, in pursuance of the agreement, for a consideration of $7,862.75, on which was indorsed a release by the Curtins, for a consideration of $1, of "all their interest in the land mentioned and described in the within deed." By this deed Irvin and the Thompsons convey to the Matterns by metes and bounds a tract "containing 314 acres and 82 perches net measure, being originally part of the Andrew Hunter, R. Shaw and Josiah Lambourn's surveys which became vested in Roland Curtin, and sold by Austin, James, Roland, John, Andrew, and Constans Curtin to the parties of the first part, as their release to the same, executed on this deed, fully shows. The said parties of the first part make the following reservations, to wit: the right to mine and take away ore from ten acres of land contained in" certain fixed boundaries. "Also, all the ore on the remaining part of the tract, by paying said parties of the second part at the rate of 12½ cents per ton of 2,240 lbs. for every ton mined and taken away by them off the said tract, excepting on the ten acres, which said parties are to have without charge; they also reserve the entire privilege of all ore on said premises. To have permission to enter upon said premises to mine, clean and take away the same without let or hindrance from the said parties of the second part, their heirs or assigns. It is understood that the above reservation is to the parties of the first part, their heirs or assigns. It is understood that the parties of the first part bind themselves to fill up any holes made on the premises in searching for ore where ore is not found. The clear understanding as regards the above named reservation is to extend to the parties of the second part, their heirs and assigns, and to give full privilege to enter upon the ground with teams, wagons, etc., to haul said ore away, with privilege of ground for roads, etc., and to embrace the exclusive right to all the ore on both the ten acres and the balance of tract."

Under the title so acquired by the agreement and deed from Irvin and the Thompsons, the Matterns entered into possession of the land conveyed, erected buildings, improved the property, and have continued in undisturbed possession ever since. For over twenty-one years they remained in undisputed possession of the property without any misgivings on their own part as to their title, or molestation from others, and without doubt as to the rights of the grantors under the reservation contained in their deed. During all this time both the Thompsons and Matterns took it for granted that the entire tract was surveyed and patented. Their first information to the contrary was when a certain James Cross, in June, 1878, filed an application for sixty acres of land, evidently located on part of the Shaw improvement; and as soon as Moses Thompson, after investigation, could find no evidence that the Shaw tract had ever been surveyed or patented, he also filed an application for a tract of 280 acres to cover the Shaw tract, and at the same time entered a *caveat* against the Cross application. Cross likewise *caveated* against Thompson's application. Both parties entered citations, and depositions were taken; but on the 17th of May, 1879, the dispute between Thompson and Cross was finally settled by the latter assigning his rights under his application to Moses Thompson and John I. Thompson. On the day this settlement was made some of the Matterns were present and notified the Thompsons that they would now expect them to take the necessary steps to have the lands included in the deed from the Thompsons to the Matterns patented. In the proceedings on the Cross application it was also discovered that the Andrew Hunter tract had never been patented.

After consultation among the parties and their attorneys it was then decided to withdraw both the Cross and the Moses Thompson applications and to substitute a new one, in the names of Moses and John I. Thompson, for 400 acres that would cover both the Shaw and Hunter tracts, setting forth in the application that it was made "for the use, benefit and protection of applicants and of those claiming under them, according to their respective interests and titles, and not otherwise."

Until this time the Matterns and Thompsons acted in harmony, both desirous of securing a patent such as would protect their respective interests in the property. This application was not filed immediately. It was, however, filed between August 15 and 20, 1880, accompanied with the following affidavits:

"Centre County, *ss.*:

"Before me, the subscriber, a justice of the peace in and for the Township of Half Moon and county aforesaid, personally came William Reed, a disinterested witness, who, being sworn according to law, did depose and say that to his certain knowledge the land above described has been improved, and that it was first permanently improved about the year 1857, and not before; that the improvements thereon in the main consist of three farms, or parts thereof, opened and improved by Mattern Bros. and Wm. H. Blair, with farm buildings erected thereon, and that David Mattern, George Mattern and Jeremiah Ewing are the parties now settled and residing on said land.

his
Wm. X Reed."
mark

"Centre County, *ss.*

"Before me, the subscriber, a justice of the peace in and for the Township of Half Moon and county aforesaid, personally came Moses Thompson and John I. Thompson, the above named applicants, who, being duly sworn according to law, did depose and say that they verily believe that no warrant or other office right has been issued for the land above described, either in their own names or in the name or names of any other person or persons under whom they claim the same, and that they have an equitable right in themselves and those claiming under them, to wit: the parties named as settled on said land, to the said land and the improvements thereon in manner following, to wit: As far back as can be traced this land was known as two tracts, respectively as the Robert Shaw and the Andrew Hunter, and until recently it was supposed that warrants had been regularly issued in these names, but quite lately the contrary has been ascertained.

Slight improvements seem at one time to have been made thereon by these men, the evidence of which appears in finding the tracts on the seated list at an early day, but said improvements, if such they could be called, were abandoned over thirty years ago. In 1854 your applicants purchased both tracts, with others, from Curtin's heirs, in whom they had become vested, the Robert Shaw by deed from J. B. Shugert, executor of Robert Shaw, deceased, to Roland Curtin, Sr., bearing date January 2, '33, and the Andrew Hunter through divers conveyances; and on May 15, 1865, the deed of Curtin's to your petitioners or applicants was delivered. Meantime your applicants had sold parts of said lands to settlers hereinbefore named and those under whom they claim, and they had entered upon and improved the land as before stated.

"This application is made for the use, benefit and protection of your applicants and those claiming under them according to their respective interests and titles, and not otherwise.

Moses Thompson,
John I. Thompson."

These affidavits were duly sworn to and subscribed by a justice of the peace.

On September 25, 1880, William Blair, in right of William Cross, entered a *caveat* against this application. Nearly a year afterwards the Matterns also entered a *caveat* to the Thompson application, and on August 23, 1882, applied for 200 acres in their own name, covering the ground conveyed to them in the Thompson deed,—actuated, as defendants allege, by the belief that if they procured the patents in their own names they would devest Thompson's ore right, which had become quite valuable. William Blair, who also had acquired from the Thompsons a part of the Shaw improvement, entered a similar application for the portion held by him.

From this time the contest before the board of property became animated; the parties and their attorneys appeared frequently, until finally, at the hearing on March 24, 1882, at the suggestion of the board, it was agreed to postpone a further contest until the granting of the patent, with the understanding that the board would protect the rights of all parties when the patent should be issued. On that day the attorneys of both parties entered into a formal agreement "that the party obtaining the warrant in the above case shall give the other party thirty days' notice before applying for a patent." On April 13, 1882, the board then granted a warrant to the Matterns, and on April 19, 1882, the survey was returned. On August 16, 1882, an application for a patent was filed by the Matterns, to which John I. Thompson entered a *caveat* on August 23, 1882, praying the patent to be "issued to himself and Moses Thompson, for themselves and in trust for those claiming under them, according to their respective interests, or, if granted to applicants, that the rights of said Moses Thompson and the *caveator* may be preserved;" and on September 21, 1882, the said John I. Thompson filed an additional *caveat* for the reason that the survey, as returned, "covers at its northwestern end about seventy-three acres of a tract already warranted and patented in the name of Josiah Lambourn, in which your *caveator* still owns the iron ore."

On this same day, September 21, 1882, the board of property made the following order: "After hearing depositions and arguments of counsel, the board sustained the *caveat* and directed patent to issue to Moses Thompson and John I. Thompson." The defendants in error thereupon brought this ejectment on October 2, 1882, in the nature of an appeal from the decision of the board.

At the trial defendants offered the application of Josiah Lambourn, dated the 25th of August, 1792, for 400 acres of land adjoining the Petit and Lewis claim in the southeast side of Franklin Township, Huntingdon County, Pa., while on the same paper there is an application for another survey.

Mr. Beaver: We propose to follow this with the warrant, survey, and patent of the Josiah Lambourn tract to show that a portion of the land covered by the Mattern survey has already been surveyed and patented by the Commonwealth; and they having granted a patent, the Commonwealth has no right to grant a patent for this land the second time; and, after that, the fact that this was known to the plaintiffs at the time their application was made.

Plaintiffs' counsel object:

1. Because the defendants, having joined with the plaintiffs in the application for a patent upon this survey, or rather have made an independent application for a patent upon this survey, are concluded by that application, and cannot impeach the validity or regularity of a survey upon which they have asked a patent, and which patent the board of property has awarded to them; that, in asking for a patent, they have asked the Commonwealth to ratify that survey, and they have ratified it themselves by receiving from the board of property the patent, who awarded to them an *allocatur* upon this survey; 2, that it is irrelevant and immaterial, because the parties have made up this issue of the board of property under the eleventh section of the Act of the 3d of April, 1792.

By the Court: The objection is sustained and the evidence is excluded; we don't understand that the Lambourn title enters into this case at all. The issuing of this patent cannot affect the rights previously granted by the Commonwealth, and those rights are not in question in this case; therefore we think the evidence is irrelevant.

Defendants except.

Defendants offered next the warrant of the Commonwealth of Pennsylvania to William B. Henderson, dated March 12, 1841. Surveyed August 2, 1841. Purchase money paid. Sold by William B. Henderson to Roland Curtin; that conveyance, however, is not found. It is hardly proper to offer that alone, but we offer in connection with that the patent of the Commonwealth for the William B. Henderson tract of land to John I. Thompson, made on the 22d of November, 1883.

Plaintiffs objected because it was made since the institution of the suit.

By the Court: Objection sustained, exception noted.

Defendants offered to prove, by the witness, James Caldwell and other witnesses, that the survey in the name of Josiah Lambourn, and the survey in the name of William B. Henderson cover portions of the land included in the survey in the name of John B. and George Mattern, the patent to which is in controversy in this case, for the purpose of showing that the Commonwealth cannot grant, and ought not to grant, to the plaintiffs a patent for any greater amount than what is included within the Mattern survey, outside of the lines of the Lambourn and Henderson surveys.

Plaintiffs objected that the offer is immaterial, incompetent and irrelevant, and not responsive to the issue.

By the Court: We think that this evidence is immaterial and irrelevant. The whole case shows that the plaintiffs have a legal title, with the exception of whatever rights the defendants have under the reservation in the deed to the land which the defendants claim is covered by the prior two surveys and patents; therefore the fact that the plaintiffs acquired a second title to that which they already have a title, cannot injure the defendants; this is said without expressing any judgment as to the rights of the defendants under their reservation; to which defendants except.

The court charged the jury, *inter alia*, as follows:

"The plaintiffs came then with their action of ejectment in the nature of an appeal from the board of property, and claim in this action that they ought to have the patent, and that your verdict ought to be for them, for the land in controversy. The defendants say that ought not to be the case, and one reason they give is that the plaintiffs, by their action, while the proceedings were pending in the office of the secretary of internal affairs with reference to this warrant, survey, and patent, estopped themselves from now claiming to have the right to an absolute patent for this land.

"The question of estoppel is one for the court. The evidence upon which the estoppel is claimed to be founded has been taken and is on record; and, without further commenting upon it, for the purpose of this case, we instruct you that it does not establish an estoppel. The plaintiffs are not estopped by what was done, as shown by the evidence, from claiming this patent."

"Another ground upon which the defendants claim that an absolute patent should not be issued to the plaintiffs is because of this reservation of the ore right, set forth in their deed to the plaintiffs. For the purposes of this case, we instruct you that this reservation is an incorporeal hereditament. That it is not a reservation of the land, but simply a right or privilege to go upon the land if they choose, and to take out the iron ore, with an obligation to pay the price agreed upon for so much as they take out; that it is not such a substantial thing as may be made the subject of an action of ejectment; therefore, its existence cannot be set up as a defense in an action of ejectment. Therefore, we think the reservation does not stand in the way of a recovery in this case."

"The defendants also offered to introduce evidence to show that part of the land in controversy here was previously patented to other parties, under the warrant of Josiah Lambourn, and we excluded that evidence. We say to you now, to put it on the record so that defendants may have the benefit of an exception; whether the land was previously patented or not, does not enter into the case. The evidence was excluded on an objection by the plaintiffs; they asked us to exclude that question from your consideration. It was done at their request, and we make it a part of the record. We do not think that is one of the questions arising in this case. The question whether there was a prior patent for a part of this land does not enter into the case, for, if there were, the rights under that patent cannot be affected by the result of this trial. If the Commonwealth had granted this land at a prior time to another person who was entitled to receive it, the rights of that person or those who claim under him cannot be taken away in this proceeding."

"We also instruct you that the question of the rights which the defendants claim, under this reservation, have not been raised or passed upon in this case. We simply decide and instruct you that this ore right is an incorporeal hereditament, and that, therefore, in the very nature of things, the right to it cannot be passed upon in an action of ejectment. When the parties come in conflict with respect to that right, whatever it may be, under that reservation, it will then be a question to be decided between them."

"But it does not enter into this case, and we instruct you, as matter of law, that the plaintiffs under their warrant, survey and return of survey, have the legal title from the Commonwealth to the land in controversy here, as against the defendants, and that, therefore, your verdict must be for the plaintiffs."

Verdict and judgment for plaintiffs.

The assignment of error specified the rejection of the evidence as above noted and the portions of the charge quoted.

Messrs. **Beaver & Gephart,** for plaintiffs in error:

I. The court erred in its construction of the rights of defendants in an ejectment under the Act of April 3, 1792, § 11, and excluded evidence offered which should have been admitted, and which if admitted, and believed by the jury, would have compelled them to render a verdict for the defendants below.

It was the proper province and duty of the board of property to inquire whether any survey, patent, improvement or other inceptive right had been acquired by anyone else before the survey was made on the Mattern warrant; and if they so found, then it was within their discretion and their duty to refuse a patent to the Matterns.

Act April 3, 1792, Purd. Dig. p. 1026, pl. 9; *White* v. *Kyle*, 6 Serg. & R. 112; *Galbraith* v. *Elder*, 8 Watts, 93; *Chew* v. *Morton*, 10 Watts, 323; *Foster* v. *Shaw*, 7 Serg. & R. 161.

The effect of the decision of the board, unappealed from, was to vest in the successful party any and all rights of every description which the losing party ever had in the land.

Shoenburger v. *Becht*, 5 Watts, 194; *French* v. *Seely*, 6 Watts, 292; *Ege* v. *Sidle*, 3 Pa. 115.

It was the duty of the court upon appeal from the decision of the board of property to hear the same evidence which had been offered before the board and decide whether or not the latter's decision was unwarranted. The plaintiff must recover on the strength of his own title; and the issue in this case was whether he was entitled to the patent in any event.

Galbraith v. *Elder*, 8 Watts, 93; *Schoenberger* v. *Baker*, 22 Pa. 400; *King* v. *Baker*, 29 Pa. 200.

II. The court erred in instructing the jury that the plaintiffs below, under their relations to the defendants and by their agreements, deeds and declarations, were not estopped from denying the right of the defendants below to the patent. The plaintiffs below went into possession of the land under an agreement with the defendants, afterwards followed by a deed which expressly reserved certain rights and interests in the property. They were estopped from acquiring a title adverse to their grantors without first making a *bona fide* surrender of the possession under the agreement.

Caufman v. *Presb. Cong. of Cedar Springs*, 6 Binn. 59; *Naglee* v. *Ingersoll*, 7 Pa. 185; 2 Smith, L. Cas. 456, 470; *Cleavinger* v. *Reimer*, 3 Watts & S. 486; *Greeno* v. *Munson*, 31 Am. Dec. 605; *Tutile* v. *Reynolds*, 1 Vt. 80; *Bowker* v. *Walker*, 1 Vt. 19; 18 Am. Dec. 670; *Blight* v. *Rochester*, 7 Wheat. 535 (20 U. S. bk. 5, L. ed. 516); *Willison* v. *Watkins*, 3 Pet. 43 (28 U. S. bk. 7, L. ed. 526).

III. The court erred in its construction of the reservation contained in the deed from Irvin and the Thompsons to the Matterns and the rights of defendants thereunder. Such reservation was not an incorporeal hereditament.

Shoenberger v. *Lyon*, 7 Watts & S. 192; *Caldwell* v. *Fulton*, 31 Pa. 478.

The cases of *Johnstown Iron Co.* v. *Cambria Iron Co.* 32 Pa. 245; *Clement* v. *Youngman*, 40 Pa. 345; *Funk* v. *Haldeman*, 53 Pa. 242; *Gloninger* v. *Franklin Coal Co.* 55 Pa. 9; *Neumoyer* v. *Andreas*, 57 Pa. 450; *Carnahan* v. *Brown*, 60 Pa. 23; *Union Petroleum Co.* v. *Bliven Petroleum Co.* 72 Pa. 173; *Grubb* v. *Grubb*, 74 Pa. 33, were all grants out of and not reservations retained in the land; and in none of them was the grant in terms as strong, comprehensive and exclusive as is the reservation in this case. Nor would this question ever have been raised, or the grantees have interfered with the grantors procuring the patent, had it not been for their desire to devest this exclusive right reserved.

Another distinction made by the courts in these cases last mentioned is that no consideration was paid for an entire interest in or part of the land, only a royalty to be paid as the right was exercised. But in our case, and in every reservation like this, the full price for the right is paid in advance by the grantor accepting so much less for the consideration money. The 12½ cents royalty to be paid in this reservation, outside of the ten acres, is fully explained by the article of agreement preceding this deed "as a compensation for any damage that may be done the land."

Messrs. **W. H. Blair** and **John G. Love**, for defendants in error:

One very important link in plaintiffs' claim of title is omitted, viz.: the conveyance of these "Curtin heirs" of all their interest in the land described in the writ, directly to John Mattern, John Mattern, Jr., and George Mattern, the last two being the plaintiffs below. As this conveyance contains all the requisites of a good and sufficient deed of bargain and sale, and was executed nearly eight years prior to 1865, and confessedly at their instance and by their authority, it manifestly devested them of any previously acquired estate legal or equitable in this Curtin title.

Barber v. *Sayers*, 107 Pa. 246.

The Thompson *caveat* was a virtual attempt to appeal from the former decision of the same board, instead of the Common Pleas of Centre County. This cannot be done.

Shoenberger v. *Baker*, 22 Pa. 398; *French* v. *Seely*, 6 Watts, 292.

If we rightly apprehend the learned counsel of plaintiffs in error, they ground the authority of the board to subrogate the *caveators* to the rights of the warrantees, upon the doctrine of equitable estoppel. "But," as was said by *Justice* Field, when delivering the opinion in *Brant* v. *Virginia Coal etc. Co.* 93 U. S. 326 (Bk. 23, L. ed. 927), "it is essential to the application of the principal of equitable estoppel to the title to real property that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the titles but also of any convenient means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel;" citing *Crest* v. *Jack*, 3 Watts, 240, and *Knouff* v. *Thompson*, 16 Pa. 361, as Pennsylvania cases sustaining the text.

Dungan v. *Am. Life Ins. Co.* 52 Pa. 255, illustrates the folly of an attempt to base an equitable estoppel upon an erroneous opinion upon a legal question of the opposing counsel, by acting upon which, the party setting up the estoppel was injured. "The law," says the court, "was equally open to both parties."

Mr. Justice **Gordon** delivered the opinion of the court:

We are entirely satisfied with the rulings of the learned judge of the court below, on the main points involved in this case. That the board of property made a mistake in awarding the patent to the defendants we have no doubt, for the fee to the body of the land in controversy was clearly in the plaintiffs. Nevertheless, we think there was an error in directing a general verdict for the plaintiffs without a reservation of the defendants' ore right. That right is found in the deed of Irvin and the Thompsons to the Matterns, dated August 22, 1857.

The language of the reservation is, *inter alia*, as follows: "They also reserve the entire privilege of all ore on said premises. To have permission to enter upon said premises to mine, clean and take away the same without let or hindrance from the said parties of the second part, their heirs or assigns."

The learned president of the common pleas held that the reservation left in the vendors an incorporeal hereditament only, and that the verdict, although general, would have no effect upon it. But, without passing positively upon this question, we very much doubt the incorporeal character of the reservation.

In the case of *Whitaker* v. *Brown*, 46 Pa. 197, where a reservation very nearly like the one before us was considered, it was held that it must be construed as an exception, and that, as a consequence, the fee in the reserved mineral remained in the vendor.

Moreover, according to the case of *French* v. *Seely*, 6 Watts, 292, the issuing of the patent, the necessary result of the present verdict and judgment, will cut off all rights which the defendants heretofore may have had in the land, one of which undoubtedly is the right of entry for the purpose of removing the ore. We are of opinion, therefore, that the defendants' right should have been reserved by the verdict, for thus only can it be recognized in the patent. As this court, as well as the common pleas, has the power to amend verdicts in ejectments, especially those of an equitable kind, such as the one before us, and as it would be to no purpose to send the case back for retrial, we direct an amendment of the verdict as follows:

After the words, "they find for the plaintiffs the land described in the writ," add: "Reserving to the defendants their rights to the ore that may be in and upon said land, together with the right of entry as described and limited in the deed of James Irvin, Moses Thompson and Mary his wife, and John I. Thompson and Mary, his wife, to John Mattern, John Mattern, Jr., and George Mattern, dated 23d of August, 1857."

With this amendment the judgment is affirmed.

Priscilla GRANT *et al.*, Admrs. of Bertolette Grant, Deceased, *Plffs. in Err.*,
v.
Jacob KLINE.

1. The sum insured by a policy of **insurance on the life of a debtor** must not be disproportionate to the interest the holder of the policy has in the life insured. No more **definite rule** on the subject has yet been laid down by the Supreme Court of Pennsylvania.

2. *Per Paxson, J.:* A **policy** taken out by a creditor on the life of his debtor **ought to be limited to** the **amount of** the **debt, with interest,** and the amount of the premiums with interest thereon during the expectancy of life as shown by the Carlisle Tables.

3. A **creditor for $302 took out a policy** for $3,000 **on** the **life of** his **debtor** who was sixty-five years old. He had insured the debtor's life twice before and had paid the premiums, but abandoned the policies on account of the insolvency of the companies. He paid premiums on the last policy, to the amount of $293. The insured died within a year; the creditor received the full insurance from the company, and the **administrators of** the **insured brought assumpsit against** the **creditor for** the **difference between** the **insurance and** the **debt** which the insured owed him. *Held*, that under the circumstances there was **no disproportion** of which the plaintiffs could take advantage.

(Argued March 3, Decided March 21, 1887.)

JULY Term, 1886, No. 97, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Berks County, to review a judgment on a verdict for the defendant in an action of assumpsit to recover the amount of a policy of life insurance. *Affirmed.*

The facts as they appeared at the trial are stated in the opinion.

Defendant proposed to ask a witness whether as an officer and agent of the U. B. Mutual Aid Insurance Company a policy of insurance was taken out by Bertolette Grant and transferred to Jacob Kline as his creditor, whereon divers sums of money as premiums were paid by Jacob Kline for a number of years; also a like policy taken out by the said Bertolette Grant and transferred to Jacob Kline as his creditor in the Prudential Mutual Aid Society of America, the premiums upon which insurance were likewise paid by the defendant; that subsequently both of these policies were abandoned and the policy in suit was taken out in their place. This for the purpose of showing the expenditure of large sums of money by the defendant, in order to secure the payment of his indebtedness, and for the further purpose of showing that he had an insurable interest; and this to be followed by receipts showing such payments of premiums.

Plaintiffs object: 1, because payments made by the defendant upon any other policies of insurance at any other time, in which he was the beneficiary, and which were therefore made for his benefit, would not be allowed as credits upon the policy for the proceeds of which this suit was brought; 2, that any such payments made by the defendant were voluntary payments, and did not constitute an indebtedness of Bertolette Grant to the defendant, and are no evidence of indebtedness; and 3, that it is inadmissible, immaterial and irrelevant.

Evidence admitted. Exception. *Seventh assignment of error.*

The plaintiffs asked the court to charge, *inter alia:*

"6. John Zerbe, the witness called by the defendant, to prove the declarations of Grant, October 7, 1882, having testified that Grant said he owed money to Kline and gave Kline a policy of life insurance: 'I gave Kline a policy of life insurance on my life, and after my death, why of course he can realize what I got from him;' and this evidence, being uncontradicted, establishes the fact that the understanding was that Kline should have his debt, and the balance to the estate of Grant."

Ans. If the jury from the evidence find that there was an agreement between Grant and Kline at the time the policy of insurance was effected, that Kline was only to receive the amount of his debt at Grant's death, this point is affirmed. Now the evidence upon that point is found in the testimony of Zerbe:

"Q. Come right down to what he said about money."

A. He said that he (meaning Kline) never refused any favor whatever: that he gave him considerable money: but he says, "I gave Kline a policy of insurance" on his life, "and after my death, why of course he can realize what I got from him."

Now this is the only evidence that there is upon that point. It is not necessary for the court to say anything further to you about it. The evidence discloses the fact that Kline was a brother-in-law of Grant, and that Grant recognized Kline as one of the best friends he had; and if the jury find in regard to these various sums to which I have referred, that they were paid by Mr. Kline at that time prior to the taking out of this policy on the 22d of March, 1882, then Kline had an insurable interest in the life of Bertolette Grant, and the money realized on that policy belonged to Mr. Kline, and your verdict will be for the defendant. On the other hand, if you find that those payments were not made by Kline, and there was no such indebtedness, then your verdict would be in favor of the plaintiffs, deducting the premiums which had been paid, amounting to $293.40, and for the balance they will be entitled to a verdict, after deducting from the amount of the policy received by Kline, the premiums which he paid. *Sixth assignment of error.*

Verdict and judgment were for the defendant.

Messrs. **Adam H. Schmehl** and **Richmond L. Jones,** for plaintiffs in error:

The disproportion between the real interest of the creditor and the amount to be received by him, deprives it of all pretense to be a *bona fide* effort to secure the debt.

Cammack v. *Lewis*, 15 Wall. 643 (82 U. S. bk. 21, L. ed. 244).

It would be an affront to the court to pretend that Kline had a reasonable ground to expect any benefit or advantage from the continuance of the life of Grant. The contract is a mere wager, by which the party taking the policy is directly interested in the early death of the insured.

Warnock v. *Davis*, 104 U. S. 775 (Bk. 26, L. ed. 924).

The indebtedness was about 10 per cent of the amount of the policy, and it is simply absurd to contend that this was a *bona fide* effort to secure that debt. The reasoning and conclusions in both *Warnock* v. *Davis*, and *Cammack* v. *Lewis*, were adopted by the Supreme Court of Pennsylvania, in *Gilbert* v. *Moose*, 104 Pa. 74, and the uniform line of cases following.

In *Scott* v. *Dickson*, 16 W. N. C. 181, the premiums were paid by Dickson, who took out the policy on his own life and made Scott the beneficiary without his knowledge, thus exonerating him from any possible suspicion of any purpose of speculation and taking the case out of this class. It was under the facts of that case, tantamount to a testamentary disposition by Dickson of the proceeds of his own policy.

In *Corson's Appeal*, 4 Cent. Rep. 307, the facts and circumstances clearly rebutted any presumption of speculation. There was a legitimate business undertaking, contemplating present and future advances, with uncertainty as to what might be their extent, "with reasonable ground to expect benefit and advantage from the continuance of the life" of the aunt, which was indeed realized by the successful results of the business in reimbursing Corson for all the advances made. The court held, under the facts of that case, that it was not a speculative policy, and therefore did not belong to this class, but by no means receded from the advanced position taken in the other cases, nor decided that once a creditor always a creditor and always entitled to the benefits of a policy, without regard to the disproportion of the debt to the insurance. The court clearly did not intend to overrule *Cammack* v. *Lewis.*

Messrs. **H. P. Keiser, J. H. Jacobs** and **Henry C. G. Reber,** for defendant in error:

Justice Allen, in passing upon a similar point in *Mutual Life Ins. Co.* v. *Allen*, 138 Mass. 30, says: "The other objection urged is that such transactions may lead to gaming contracts. * * * Most contracts have an element of gambling in them; there is uncertainty in the value of any contract to deliver property at a future day, and great uncertainty in the present value of an annuity for a particular life, or of a sum payable in the event of a particular death." Again; p. 36, "The value and permanency of the interest is material only as being on the question whether the policy is taken out in good faith and not as a gambling transaction."

Mr. Justice Clark says, in *Corson's Appeal*, 4 Cent. Rep. 307, 113 Pa. 438, citing *Dalby* v. *India etc. Life Ins. Co.* 15 C. B. 365: "The law seems to be well settled that it is wholly unnecessary to prove an insurable interest in the life of the assured, at the maturity of the policy, if it was valid at its inception; and in the absence of express stipulation to the contrary, the sum expressed on the face of the policy is the measure of recovery."

Mr. Justice Paxson, in *Scott* v. *Dickson*, 108 Pa. 6, a case in many respects analogous to ours said: "Policies of this nature are in no sense wagering. It would be denying a man's right to do what he will with his own, to say that he could not in any form insure his life for the benefit of an indigent relative, or a friend to whom he felt under obligations."

The facts in the case cited for the plaintiffs in error are not the same as those in ours.

Mr. Justice **Paxson** delivered the opinion of the court:

The second assignment presents the controlling point in this case. It alleges that the court below erred in not affirming the plaintiffs' first point. The point was as follows: the disproportion of the debts of $214 alleged to have been owing by Grant to Kline at the time of the insurance, and the amount of the insurance, viz.: $3,000, is so great as to make it merely a wagering policy; and such policy being void in law, the defendant is not entitled to hold the proceeds of the policy, and the verdict must be for the plaintiffs for the amount received by the defendant, less the assessments paid and the debt proved.

This point assumes the amount of the debts due Kline from Grant; but as the plaintiffs' fourth point, which is free from this objection and was also declined, raises the same question, we will consider it as if no such defect existed.

It is very clear, if the testimony in the case is to be believed, that the policy in question was taken out by Mr. Grant, and assigned to Kline in entire good faith. There is nothing to cast suspicion upon the integrity of the transaction. I will refer to the disproportion of the debt to the amount insured hereafter. I am now alluding to the good faith of the parties as distinguished from the gambling policies in *Gil-*

bert v. *Moose*, 104 Pa. 74, and that line of cases.

Kline and Grant were brothers-in-law and it appears that Kline had befriended Grant in various ways, and had from time to time loaned him money. The latter said when he applied for the policy that "he was greatly indebted to Mr. Kline; that he had favored him considerably;" also that Grant said that Jacob Kline was a brother-in-law of his, and he owed him a debt, a considerable amount of a debt; and he said he wanted to pay him, and this was the only way, the only remedy which he had, otherwise he could never pay him. For this reason he took out the policy in favor of Mr. Kline to pay his debt. See testimony of Joseph Deysher.

Another witness, John Zerbe, also states that Grant told him that Kline was the best friend he ever had; had never refused him any favors whatever; had given him considerable money; that he (Grant) had given Kline a policy of insurance on his life, etc.

After the death of Mr. Grant, the company paid over the money to Mr. Kline, and this suit was brought by the administrators of Grant to recover it back, less the amount of the actual debt, and the premiums paid on this policy by Kline. There was no evidence to submit to the jury that the policy was given as collateral security; the premiums were all paid by Kline; hence, if the plaintiff can recover at all, it can only be because the policy in question is a gambling or wagering policy.

It was not disputed at the trial below that there was a *bona fide* indebtedness of Grant to Kline at the time the policy was taken out of something over $300. It was also in evidence that one or more policies had been taken out on Grant's life for Kline's benefit, prior to the policy in question. These policies had been abandoned because of the insolvency of the companies, or for other sufficient reason. Kline had paid in premiums thereon several hundred dollars.

While the money thus fruitlessly paid in premiums may not have amounted to an insurable interest in the life of Grant, for the reason that such payments did not make him a creditor for their amount, we think they show good faith in the transaction. This case is to be determined upon the facts as they existed at the time the last policy was taken out, and if both Grant and Kline saw proper to treat the premiums paid as an insurable interest, Grant's administrators have no standing to say they were not. The company could have defended upon this ground, but it did not. It paid the money over to Kline without question.

This brings us to the main question: Was the amount of insurance so disproportioned to Kline's interest in the life of Grant as to make this a wagering policy? We approach this question with caution, the more so that this court has not yet laid down a rule upon this subject. That we shall be compelled some day to do so is possible.

We have said that the sum insured must not be disproportioned to the interest the holder of the policy has in the life insured. To take out a policy of $5,000 to secure a debt of $5 would be such a palpable wager that no court would hesitate to declare it so as a matter of law. Care must be taken, also, that a debt shall not be collusively contracted for the mere purpose of creating an insurable interest. Mr. Dickens in his inimitable "Pickwick Papers" has shown how a debt may be created for the purpose of lodging the debtor in prison by collusion with the creditor. Speaking for myself, it may be that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest, and the amount of premiums with interest thereon during the expectancy of life as shown by the Carlisle tables. This view, however, has never yet been adopted by this court in any adjudicated case, nor do we feel compelled to define the disproportion now, in view of the particular facts of the case in hand. We do not regard it as either immoral or wagering for Kline to attempt to secure the sums he had already fruitlessly paid in premiums on Grant's life; and if Grant had no objection thereto, and assisted him therein, I do not see that anyone could object to this but the company.

Again, we have the declarations of Grant that he owed Kline a considerable sum of money, the precise amount not stated; that Kline had aided him in various ways; had never refused him a favor, etc. In view of their connection by marriage and of their admitted relations, it is at least probable that Kline had aided him at many times, and in various ways, pecuniarily, that are not represented by any evidences of debt. And if the sum insured was regarded by Grant as a reasonable amount to indemnify Kline, with what grace can Grant's administrators come in and allege that it was not? They have no possible equity; Grant never paid $1 of the premiums; and if they are allowed now to recover, it is not by virtue of any equity, but by force of an inexorable rule of public policy which treats it as a wagering policy and declares the policy holder a trustee for the person insured as to the entire proceeds save only the money actually loaned, with the premiums paid.

Assuming, then, that Kline might with Grant's consent and as against his administrators, lawfully seek to indemnify himself for the premiums paid and lost, we have the sum of $743.56 as the amount which Kline was out of pocket. We do not know what Grant's expectation of life was when the policy was taken out, and there is nothing before us upon which we could base any reliable opinion. But it appears he was sixty-five years of age, and was an unusually good risk. While we do not know what the amount of the annual premium was, we do know that it must have been a considerable sum on $3,000 for a man of sixty-five years, and with the annual interest would roll up rapidly. That Grant died within a year is not to the purpose; he might have lived long enough for the debt and premiums at compound interest to have exceeded the amount of the policy. Surely, in such case we cannot say as a matter of law that the disproportion was so great as to make it a wagering policy.

We see no error in refusing to affirm the point referred to in the sixth assignment. We do not think the declarations of Grant embodied in the point are conclusive that the policy was intended as collateral security merely, and that the amount of the policy, less debt and premiums, was to be paid over to Grant. On the contrary, they would not have justified such finding by the jury. Everything in this case indicated that this was intended as a creditor's policy in which Grant had no interest. As before observed, the latter paid no premiums.

The evidence referred to in the seventh assignment was properly admitted, if for no other reason, to show good faith. But, as has been already said, it was competent to show these payments of premiums, for other purposes.

Judgment affirmed.

John A. OTTO *et al.*, Assignees of Knapp & Thompson, *Piffs. in Err.*,

v.

E. D. TRUMP, Indorser of A. T. Nichols & Co.

1. **Where the production of a paper cannot be compelled,** because beyond the jurisdiction of the court, **secondary evidence may be given,** without proof of the loss or destruction of the original.
2. The **Act of Congress** of 1790, prescribing a mode for the **authentication of** the **records** of the courts of any State for the purpose of evidence in any other State, **does not exclude any other evidence,** good according to established principles, which the courts of a particular State may adopt.
3. An **assignment of a judgment** of a court **of another State,** on file with the records of the case, may be **proved by an examined copy** sworn to by a competent witness.
4. **Parol evidence** is **not admissible to prove** the subject of an assignment when it appears that the assignment is the **claim in a suit in a court of record** of another State; a copy of the record, properly certified or examined, is the best evidence of what was involved in the suit.
5. The **credibility of witnesses,** although uncontradicted, **is for the jury.**

(Argued Feb. 15, Decided March 28, 1887.)

JANUARY Term, 1886, No. 157, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Lycoming County, to review a judgment on a verdict for defendant in a *scire facias* to revive a judgment. *Reversed.*

The facts are stated by the charge of the court to the jury, by Cummin, *P. J.*, as follows:

[I think there is no fact to go to the jury.] The issue which you have been sworn to try arises in an action of *scire facias* brought to revive a judgment. There was a judgment entered in this court in favor of Knapp & Thompson against E. D. Trump. Afterwards Knapp & Thompson failed and made an assignment to John A. Otto & John R. Hazelet, and they are now the plaintiffs seeking to revive this judgment. That original judgment was entered June 7, 1876, in favor of Knapp & Thompson and against E. D. Trump, for $8,523.44. This *scire facias* is brought to revive that judgment. When the plaintiff had shown this record—that there was such a judgment he had a right to revive—if there had been nothing else your verdict would have been for the plaintiff.

The defendant, Trump, sets up as a defense that this judgment ought not to be revived against him, and by the witnesses and papers produced makes out this state of facts as a defense: Knapp & Thompson were dry goods merchants in 1876 in this city, and Nichols & Co. were founders and machinists; and there were transactions between them whereby there occurred an indebtedness of Nichols & Co. to Knapp & Thompson of this sum. This firm of Nichols & Co. was composed of Frank Trump and A. T. Nichols. When they went to settle this account they gave two notes—both were made by Frank Trump, one of the firm, to the order of Nichols & Co., indorsed by them and then by E. D. Trump. One of these notes was for $8,000 and the other for $500. It was upon these notes that this suit was brought, upon which Knapp & Thompson obtained the original judgment.

[The defendants claim that afterwards Knapp & Thompson proceeded against A. T. Nichols, who had removed to Norfolk, Virginia. They proceeded against him on this same claim. He, you will remember, was one of the firm of Nichols & Co., and they were the first indorsers. They proceeded against A. T. Nichols in the courts of that State, and before this litigation was assigned the assignees of Knapp & Thompson came into this court and obtained permission, with the consent of creditors, to settle and compromise that claim. Leave was granted by the court to make that settlement, and the assignees of Knapp & Thompson then transferred by an assignment all their claim against A. T. Nichols to Robert M. Foresman, and he afterwards settled with Nichols. So the claim of Knapp & Thompson against Nichols was thereby wiped out. Now E. D. Trump sets this up as a defense, because, you see, he is the second indorser, and where the second indorser pays he has a right to go back along the line. He has a right to sue everybody above him on the paper. If Knapp & Thompson have settled with Nichols so it will prevent Trump from having any claim against him, then they have deprived him of his remedy. By satisfying the claim against A. T. Nichols they have settled the claim against everybody below him. The action of Knapp & Thompson's assignees and themselves prevents E. D. Trump from the remedy he was entitled to and passes the right to sue E. D. Trump and to subrogation to the person to whom they assigned. For that reason this defense seems to be a good one. Therefore, let your verdict be for the defendant] and counsel for the plaintiff may file a motion for a new trial; and if there is any error it can be remedied.

The assignments of error specified the action of the court in receiving in evidence, as set forth in the opinion of the supreme court: 1, the records of the Common Pleas of Lycoming County; 2, the copy of the assignment; and 3, the parol evidence; also the portions of the charge inclosed in brackets.

Messrs. **H. T. Ames** and **J. C. Hill,** for plaintiffs in error:

The only defense in the trial of *scire facias* on a judgment is a denial of the existence of the judgment or proof of a subsequent satisfaction or discharge therefor. For none of these purposes was this petition evidence.

Dowling v. *McGregor,* 91 Pa. 410.

In written documents, the instrument itself is regarded as the primary or best possible evidence of its existence and contents.

Greenl. Ev. § 84; *Hart* v. *Yunt,* 1 Watts, 253.

When a record is a gist of the issue, if it is not in the same court, it should be proved by an exemplification.

1 Greenl. Ev. § 501.

The record must be made up and settled as a whole.

Susquehanna etc. R. R. Co. v. *Quick,* 68 Pa. 189; *Eberts* v. *Eberts,* 55 Pa. 116; *Commonwealth* v. *Trout,* 70 Pa. 379; *Edmiston* v. *Schwartz,* 13 Serg. & R. 135; *Voris* v. *Smith,* 13 Serg. & R. 334; *Harper* v. *Bank,* 7 Watts & S. 204.

Am. Life Ins. etc. Co. v. *Rosenagle,* 77 Pa. 507; and Greenl. Ev. § 485, refer to cases of parish registers, of marriages, births and deaths, which the courts have always held could be proved by an examined copy.

An assignment by the plaintiff of a suit in equity against A. T. Nichols individually did not operate as a discharge of the defendant as indorser of the firm of A. T. Nichols & Co. The primary fund for the payment of the debts of a co-partnership is the firm property, and it must be first exhausted.

Black's App. 44 Pa. 503; *Houseal's App.* 45 Pa. 484; *Hartman's App.* 107 Pa. 327.

But this case pending in Virginia, which was assigned, was only a suit. No lien had been secured, which the assignment and subsequent settlement released.

The mere dismissal by the creditor of a suit, which he has commenced against the principal and by which, if prosecuted, the money could have been collected, will not discharge the surety. In such cases no lien is lost, and the transaction amounts to simple forbearance without consideration.

Brandt, Sur. § 381, p. 515; *Summerville* v. *Marbury,* 7 Gill & J. 275; *McVeigh* v. *Bank of the Old Dominion,* 26 Gratt. (Va.) 785; *Barney* v. *Clark,* 46 N. H. 514; *Concord Bank* v. *Rogers,* 16 N. H. 9; *Baker* v. *Marshall,* 16 Vt. 522.

All that the defendant could ask was that the plaintiffs should give him credit for the amount realized by the compromise of the claim against Nichols. In equity he was entitled to that and nothing more. The discharge does not extend to the whole claim, if the means of payment was only of part.

Everly v. *Rice,* 20 Pa. 299.

The credibility of the witness, although uncontradicted, is for the jury.

Pa. R. R. Co. v. *Werner,* 89 Pa. 59; *Madara* v. *Eversole,* 62 Pa. 160.

Messrs. **R. P. Allen** and **John G. Reading, Jr.,** for defendant in error:

The settlement of the claim with A. T. Nichols, one of the principals, by Mr. Foresman, would discharge Mr. Trump as surety, because it destroyed the right of Mr. Trump to be subrogated to the rights of Knapp & Thompson as against A. T. Nichols or A. T. Nichols & Co.

Redf. & B. Lead. Cas. Bills & Notes, p. 568; 2 Pars. Notes & Bills, p. 241; 2 Dan. Neg. Inst. p. 287; *Klopp etc.* v. *Lebanon Bank,* 46 Pa. 88; *Mehaffy* v. *Share,* 2 Penr. & W. 361; *Smith* v. *Rice,* 27 Mo. 505.

(The counsel for defendant in error, on the question of the effect of the Act of Congress for the authentication of record, cited the cases collected in the opinion of the supreme court.)

Mr. Justice **Clark** delivered the opinion of the court:

It is conceded that E. D. Trump was an accommodation indorser of the note on which the original judgment against him was obtained in favor of Knapp & Thompson; he therefore occupied the relation of surety, and in the event of his being obliged to pay the debt, was entitled to subrogation to the rights of Knapp & Thompson, as against A. T. Nichols & Company, the principal debtors.

His defense upon the *scire facias* was that the plaintiffs had compromised their claim against A. T. Nichols & Company; that they had with the leave of and under the authority of the Court of Common Pleas of Lycoming County, which had jurisdiction of their accounts, assigned their claims against A. T. Nichols & Company, to one Robert M. Foresman, with whom A. T. Nichols & Company had subsequently effected a settlement and compromise, and that the debt, for which the defendant was simply a surety, was thereby extinguished. The defendant, therefore, maintained that as by the compromise the original and principal debtors were discharged, he was in like manner discharged; for, in the event of his being compelled in this action to pay the balance of the debt, he has by the act of plaintiffs been deprived of his equitable right and remedy of subrogation.

To maintain the issue on his part, the defendant first offered the record of the proceedings of the Common Pleas of Lycoming County, in which authority was given to the assignees to effect a compromise. The petition set forth, in substance, that a suit in equity was pending in the Hustings Court in the City of Portsmouth, Va., brought by Knapp & Thompson, against A. T. Nichols, to set aside a conveyance made by A. T. Nichols to Eliza Nichols, his sister, in fraud of creditors, which suit was still pending in the court of appeals, etc.; that the assignees had received an offer of $1,500 in cash, for a compromise of the "Knapp claim," as set forth in a telegram annexed thereto, and praying the court to authorize them to accept the terms of compromise offered.

Upon due consideration, on January 22, 1881, a rule to show cause was granted, which rule was afterwards made absolute.

The relevancy of this offer did not perhaps fully appear at the time it was made, but it could not be said to be wholly irrelevant; the subject matter of the proceeding was a claim of Knapp & Thompson against Nichols; whether it was the same claim for which Thompson was surety did not certainly appear, but the defendant was not bound to exhibit his whole case in a single offer; the identity of the debt was the subject of further proof, and the order of the evidence is a matter largely in the discretion of the court. The subsequent proofs, however, fully justified the admission of the offer.

The defendant's next offer was a copy of an assignment, dated November 25, 1881, made by Otto and Hazelet, the assignees, and Knapp & Thompson to Robert M. Foresman, of a certain case entitled "Daniel B. Knapp and William F. Thompson against Albert T. Nichols" transferring all their right, title and interest "in and to the claim of plaintiff in the above entitled case, debt, interest and costs, with full power to prosecute, settle or discontinue the said suit now pending in the court of appeals in the State of Virginia, as to the said Foresman may seem proper."

To this it was objected, first, that copy was not receivable in evidence, excepting upon proof of the loss or destruction of the original; and second, that if admissible at all, it could only be by an exemplification of the record under the Act of Congress of 1790.

It was conceded that the original was on file and constituted part of the record in the Court of Appeals of Virginia; it was, therefore, out of the power of the defendant to produce it; and secondary evidence in some form was necessarily resorted to, to establish its existence, execution and contents. Secondary evidence is admissible to establish the execution of a paper where the subscribing witness is out of the jurisdiction of the court, as if he were dead. *Truby* v. *Byers*, 6 Pa. 347.

The original entries of a tradesman or merchant may be given in evidence, when the clerk who made them is out of the State, on proof of his handwriting. *Crouse* v. *Miller*, 10 Serg. & R. 155.

His absence from the State has the same effect as his death. *Alter* v. *Berghaus*, 8 Watts, 77.

Upon the same general principle in *Ralph* v. *Brown*, 3 Watts & S. 399, where the question was upon the admissibility of a copy of a release, it was said that as the original paper was in the hands of a person who could not be reached by the process of the court, it was as much beyond the defendant's power to compel the production of it as if it had been destroyed, and it was therefore held that the contents might be established by parol.

So, in *Rhodes* v. *Seibert*, 2 Pa. 18, it was distinctly decided that where the production of papers cannot be compelled, because beyond the jurisdiction of the court, secondary evidence may be given. The first ground of objection cannot, therefore, be maintained.

The second ground is, we think, equally untenable. It was shown that after the original had been executed and delivered to Foresman he left it in custody of Seth T. McCormick, who, prior to sending it to Virginia, prepared a copy: and he states that the copy of the assignment in evidence is an accurate, exact and examined copy of the original. It is doubtless true that the record of the proceedings in the courts of Virginia might have been certified under the Act of Congress, and if so it would have been receivable in evidence in any proceeding in Pennsylvania where it was relevant to the issue, to show what was involved in and what was determined by the suit which was certified; but we greatly doubt whether the copy of the assignment, as such, embraced therein would be proper evidence in a suit between other parties, at least until the execution of the original was established by common-law proofs.

But let this be as it may, the Act of Congress of 1790 only prescribes a general mode of authentication of records; it does not exclude any other evidence which the courts of a particular State may deem expedient. *Ohio* v. *Hinchman*, 27 Pa. 485.

Other evidence, good according to established principles, independently of the Act of Congress, may be admitted. *Kean* v. *Rice*, 12 Serg. & R. 208.

As the Act of Congress has no negative words, even the records of a sister State may be established by any competent proof known to the common law. *Baker* v. *Field*, 2 Yeates, 532. See also *Snyder* v. *Wise*, 10 Pa. 157.

Where proof is by a copy, an examined copy duly made and sworn to by a competent witness is always admissible. *Am. Life Ins. etc. Co.* v. *Rosenagle*, 77 Pa. 515; 1 Greenl. Ev. § 485.

The copy was not offered as a detached portion of the record; it was, strictly speaking, perhaps, not a part of the record; it was filed with the record for the benefit of all parties in interest, for safe keeping, and for the convenience and information of those who for any purpose might have occasion to refer to the record. The offer was of the assignment, as such, by a copy thereof, duly examined and proved independently of the record. It was the assignment in terms of the Knapp & Johnson claim against Nichols, "debt, interest and costs."

But it was not competent, we think, by the introduction of parol evidence, to show what the subject of the assignment was, when it plainly appeared that it was the assignment of a suit at law, the debt, interest and costs of a claim designated only as a claim in suit in a certain court; a copy of the record, properly certified or examined, was undoubtedly the best evidence of what was involved in that suit. The parol evidence of Trump and of Nichols, in merely negative form, that they knew of no other indebtedness of A. T. Nichols, or of A. T. Nichols & Company, which could properly be embraced in the suit, was, we think, incompetent, when the record would have shown affirmatively and exactly what the claim was which was assigned.

Moreover, the effect of the parol proof, even if it had been admissible for the purpose, was for the jury, not for the court; for although the testimony on the question of identification was wholly one sided, and to the same effect, the veracity of the witnesses and the truth or accuracy of their testimony was certainly for the jury.

The judgment is reversed and a venire facias de novo *awarded.*

George H. SCHWEITZER'S APPEAL.

Road in Bethlehem Township.

The **report of re-reviewers** in a proceeding to open a road was **confirmed nisi** by the court of quarter sessions **and at** a subsequent term, after hearing and dismissing exceptions, was **referred back to** them to **annex** a **draft** of the proposed road. Thereafter the **report** of re-reviewers **to order** of court **to annex draft** was filed and **confirmed nisi, and on** the **same day a decree** was filed **opening** the **road.** *Affirmed on certiorari.*

(Argued March 9, Decided March 21, 1887.)

JULY Term, 1886, No. 192, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Certiorari to the Quarter Sessions of Northampton County, to review proceedings laying out a public road. *Affirmed.*

The record discloses the following proceedings:

On petition, presented September 22, 1884, by divers inhabitants of the Township of Bethlehem, for the laying out of a public road from Easton to Freemansburg (through lands of one George H. Schweitzer) the court, October 3, 1884, appointed viewers. October 17, 1884, the report of these viewers was presented, filed and confirmed *nisi* and an opening order was granted. November 3, 1884, a petition for review was presented and on November 17, 1884, an order to review was issued. Reviewers were appointed whose report was presented and filed December 11, 1884, and confirmed *nisi*.

January 5, 1885, a petition for re-review was presented, and January 9, 1885, an order was issued, and re-reviewers were appointed, whose report, February 9, 1885, was filed and confirmed *nisi*.

The report, *inter alia*, set out: "And after locating said road we were unable to procure releases from the persons over whose premises the proposed road is to pass; we therefore proceeded to and do now assess the damages occasioned by the locating and laying out of said road as follows, viz.: The damages to George H. Schweitzer we assess at" etc.

February 11, 1885, the appellant, George H. Schweitzer, filed exceptions to the latter report, alleging that certain of said re-reviewers were related to one Abram D. Stauffer, the most active of the petitioners for re-reviewers, and that the justice of the peace who swore in the jury and accompanied them during the whole of the view was one of the petitioners for the jury of re-reviewers; that the jury were entertained on the day of the view at the house of said Stauffer and were by him supplied with intoxicating liquor and unduly influenced before they signed the report in favor of the road; that the report contains no draft as required by the order of the court, and no endeavor was made by said viewers to procure from exceptant a release for damages from the opening of the road as required by the order of the court.

Depositions were taken by the parties and, after hearing, the court, June 3, 1885, dismissed the exceptions and referred the report back to the re-reviewers, with directions for them to annex a plot or draft of the proposed road and to return their report so amended.

The opinion of the court was filed June 7, 1886. On June 14, thereafter, "report of re-reviewers to order of court to annex draft, filed and on motion of P. M. Gernet, Esq., confirmed, *nisi*." On the same day was filed a decree of the court opening said road.

June 16 the appellant, Schweitzer, filed the following exception to the order of the court opening the road:

"Said order was prematurely granted, the report of re-reviewers annexing draft filed, having been same day filed and confirmed *nisi*, but not confirmed absolutely, as appears on record."

June 20, 1886, this exception was dismissed by the court and exceptant took this writ of *certiorari*, *assigning as error* the action of the court in confirming the report of re-reviewers and dismissing appellant's exceptions thereto, and in directing the road to be opened at the same time when the draft was filed, instead of waiting until the next term for the confirmation of the amended report containing the draft, and in overruling and dismissing Schweitzer's exception thereto.

Mr. **W. E. Dorster,** for appellant:

On June 3, 1886, the report was sent back for a draft. June 12, 1886, the report was filed with draft annexed. This, as we understand it, was the first moment when the report was complete, and the first time the draft could be seen by us, and made the subject of an exception if it fell below the requirement of the law. No doubt the court so understood it, for in the opinion of June 3, it does not confirm the report, merely referring the report back to be amended by a draft. But two days after the amended report came in, June 14, 1886, the report was confirmed and the road ordered opened. The draft is objectionable, but we have had no chance to have it corrected. This we think was an error. "An entire term must intervene between the confirmation and the order to open."

Boyer's Road, 37 Pa. 257; *Ewing's Mill Road*, 32 Pa. 282; *McConnell's Mill Road*, 32 Pa. 285.

An order to open cannot be made until the term succeeding that at which the width of the road has been determined by the court.

Middle Creek Road, 9 Pa. 69.

It will be noticed that the petition for reviewers was filed January Term, 1885. This should have been returned to April Term, 1885. Owing to exceptions being filed it was not passed on by the court until June Term, 1886, when the report was referred back, and confirmed June 14, without any continuing order. This was irregular.

"If for any reason the report cannot be made to the next term, the proper course is to apply to the court to continue the order, and make it returnable to the next succeeding term; a report made and confirmed at a succeeding term or at an adjourned court without such previous order is irregular and may be set aside."

Stauffer's App. 1 Am. Law Reg. 441; *Charlotte Street*, 23 Pa. 286; *McConnell's Mill Road*, *supra; Chartier's Township Road*, 48 Pa. 314; *Baldwin and Snowden Road*, 3 Grant, 62.

That court, therefore, erred in dismissing our last exception, which claimed that the order to open was premature.

Messrs. **Edward J. Fox, Preston M. Gernet** and **Edward J. Fox, Jr.,** for appellees:

"It is presumed that viewers endeavored to procure releases." *Road in South Abington*, 16 W. N. C. 404.

This court cannot consider the depositions in this case or review the questions of fact, but can only consider questions as to the jurisdiction of the court, or the regularity of proceedings, as it appears from the record, of which the depositions form no part.

Re Germantown Ave. 99 Pa. 479; *Re Road in Palmer Township*, 11 W. N. C. 429; *Re Road in Drumore Township*, 4 Cent. Rep. 88.

Per Curiam:

On this *certiorari*, we can review the record only. In this there is no error. As the evidence does not constitute a part of the record we cannot review it.

Judgment affirmed.

William H. MANEELY, Trustee, etc., *Plff. in Err.*,
v.
KNIGHTS OF BIRMINGHAM OF PENNSYLVANIA.

The **by-laws** of a **corporation** chartered "**for** the purpose of benefiting and **aiding** the **widows and orphns** of deceased members," provided that the sum of $1,000 should, at the death of each member, "be paid to such person or persons as the deceased may have designated to receive the same as appears on the books of the lodge of which he is a member; if no designation has been made, then to his widow, if no widow survives, then to his child or children;" etc. A member having a wife and children, borrowed $1,000 from his sister who was designated as beneficiary on the books of the lodge. She paid his dues until his death. *Held*, that she was entitled to recover the amount of his interest, $1,000, from the corporation, as there was in the charter no prohibitory or restrictive language excluding from the powers of the **corporation** the **right** to **contract specially with** the **members** for the payments of benefits to other persons than his widow and orphans. Nor was such a contract to be held void by reason of any necessary implication from the language of the charter.

(Argued Jan. 27, Decided March 28, 1887.*)

JANUARY Term, 1887, No. 87, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Green, *JJ.*

Error to Common Pleas No. 4 of Philadelphia County, to review a judgment for the defendant in a case stated. *Reversed.*

Reported below, 2 Pa. C. C. Rep. 339.

The case stated was as follows:

The defendant is a Corporation duly chartered under the Act of Assembly, approved the 29th day of April, 1874, and the supplements and amendments thereto. By section 5 of its charter, membership is limited to Master Masons in good standing in the fraternity of Free Masons.

The second section of the charter of the defendant is as follows:

"The purposes of this Corporation shall be the maintenance of a society for the purpose of benefiting and aiding the widows and orphans of deceased members."

This object is repeated in the first article of the constitution.

By section 1, of article 19, of its constitution, it is provided that the sum of $1,000 "shall be paid to such person or persons as the deceased may have designated to receive the same, as appears on the books of the lodge of which he is a member; if no designation has been made, then to his widow; if no widow survives, then to his child or children; in default of the foregoing, then to the mother of the deceased or other legal heirs, and in case there is no widow, children, mother, or legal heirs, the lodge may appropriate toward the expenses of the last sickness and funeral of the deceased, the amount not to exceed the sum to which such recipient would have been entitled."

On October 17, 1878, Joseph M. Maneely became a member of the Corporation, to wit: Kensington Lodge, No. 5, of the Knights of Birmingham, of Pennsylvania, and subsequently, on July 24, 1884, he died, being at that time a member of the Masonic Order, and of the corporation defendant in good standing.

The said Joseph M. Maneely, on the 7th day of February, 1881, desiring to borrow from his sister, Mary A. Lamon (on whose behalf this suit is brought by her trustee), the said sum of $1,000, agreed to assign to her as security therefor, all his estate, right, title and interest in and to the said sum of $1,000, to which his legal representatives would become entitled upon his decease, from the said corporation defendant, and for the purpose of ascertaining whether said security would be sufficient, the said Mary A. Lamon sent her agent and trustee, the said William H. Maneely, to the secretary of the said subordinate lodge of the corporation defendant, one Ebenezer Cobb, to ascertain whether such an assignment could be made for her protection; whereupon, the said secretary of the said corporation defendant, being apprised of all the facts aforesaid, and also of the fact that the said Joseph M. Maneely had then a wife and children living, answered the said plaintiff that if the said Joseph M. Maneely would designate the said Mary A. Lamon as the person entitled to receive the said sum of $1,000, in accordance with article 19, of the said constitution, then the said benefit would be paid as designated to the said Mary A. Lamon; whereupon, the said Mary A. Lamon, by the said William H. Maneely, her trustee, loaned to the said Joseph M. Maneely, the sum of $1,000, and the said Joseph M. Maneely, in accordance with said article 19 of the constitution, made and executed upon page 8, of a book authorized by the said corporation defendant for the purpose, the following designation, to wit:

"I, Joseph M. Maneely, being a member of Kensington Lodge, No. 5, K. of B., do hereby authorize and direct the payments allowed to me by the constitution and by-laws of the grand lodge thereof, to be made to William H. Maneely, trustee for Mary A. Lemen, and upon such payment being made, I, for myself, my heirs, administrators and assigns, hereby release said grand lodge from any liability or claim whatever.

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*Reargument refused, May 9, 1887.

Witness my hand and seal this 8th day of February, 1881. Joseph M. Maneely. [L. S.]
Louis D. Belair. [L. S.]
Ebenezer Cobb. [L. S.]"

And said assignment and designation was witnessed by the said Ebenezer Cobb, as the secretary of said subordinate lodge of the said corporation defendant. The person therein named as "Mary A. Lemen," being the said Mary A. Lamon.

Subsequently the said Joseph M. Maneely became ill, and after so continuing for five months he died.

The said sum of $1,000, loaned as aforesaid, is still due and owing to the plaintiff by the said Joseph M. Maneely.

During the five months mentioned, in order that Joseph M. Maneely should not fall in arrears in the payments which he was required to make to the corporation defendant, and in order to be entitled to the $1,000 aforesaid upon his decease, the said Mary A. Lamon paid his dues to the St. Paul's Lodge, No. 481, of the Masonic Fraternity, of which he was a member, amounting to $13, and also paid his dues and assessments to the said subordinate lodge of the corporation defendant in the following sums, and upon the following dates, to wit: February 21, 1884, $7, March 20, 1884, $1, April 17, 1884, $2, May 5, 1884, $1, June 19, 1884, $1, July 17, 1884, $1; whereby the said Joseph M. Maneely remained up to the time of his death, a member in good standing of the said corporation defendant, and the said corporation defendant upon his death became bound to pay the sum of $1,000.

Upon the death of the said Joseph M. Maneely, the said plaintiff made demand of the said corporation defendant for the payment of the said sum of $1,000, in accordance with the said designation on its said books, which payment was refused.

The said Joseph M. Maneely left surviving him a widow, Caroline, and four minor children, to wit: Joseph L., aged 16 (born of a former marriage), Sarah, aged 12, Samuel, aged 10, and Martha, aged 8, children of said Caroline; and his said widow, Caroline, also made demand of the corporation defendant for the payment of the said sum, claiming that as widow she was entitled thereto, notwithstanding said designation, which payment was also refused.

Defendant is, however, ready and willing to pay the said sum to the person legally entitled to receive the same.

If, upon these facts, the court be of opinion that the said plaintiff is entitled in law to receive the said sum, then judgment to be entered in favor of the plaintiff, as against the corporation defendant, in the amount of $1,000 with interest from the 24th day of July, 1884. But if the court should be of opinion that the said plaintiff is not entitled to receive said sum, and that the said Caroline Maneely is entitled to receive the same, then judgment to be entered in favor of the said Caroline Maneely against the corporation defendant, for the said sum, with interest as aforesaid.

Judgment was entered for defendant on the facts in the case stated, and at the same time the following opinion was delivered, by ARNOLD, *J.*:

This is a hard case for the equitable plaintiff. She has bought and paid for a thing to which her vendor could not give her a good title. The charter of the defendant corporation declares its purpose to be the benefiting and aiding of the widows and orphans of deceased members.

The constitution (it had better have been called the by-laws) of the Society provides that the benefits shall be paid to such person or persons as the deceased may have designated to have received the same as appears by the books of the lodge, etc. Here is a direct conflict between the charter and the constitution. In such a case the charter must prevail; and under the charter the widow and orphans are entitled to the benefit as against an assignee of a deceased member. An amendment to the charter must be made if the members wish to have the power to assign their benefits for money to keep them in sickness, as Joseph M. Maneely did.

But we cannot give judgment for the widow in this suit, although the case stated provides that we may do so. She is not a party to the suit. How could an execution be issued in her favor? The judgment must be for the defendant corporation, not against it. It cannot be required to pay the money twice.

Supplee v. *Knights of Birmingham*, 18 W. N. C. 280, may be referred to, if authority is required for so plain a proposition.

A *fi. fa.* against a party in whose favor the judgment was given would be an anomaly. Judgment for the defendant in the case stated.

The assignments of error specified the action of the court in entering judgment for the defendant and in not entering judgment for the plaintiff.

Messrs. **Ellis Ames Ballard** and **Rufus E. Shapley,** for plaintiff in error:

This court decided in *Supplee* v. *Knights of Birmingham*, 18 W. N. C. 280, that, under the constitution, a member by a designation of one not the widow can deprive the latter of the death benefit which would otherwise belong to her.

The section of the Corporation Act of 1874, under which this Corporation's charter was granted, provides that charters may be granted for the "maintenance of a society for beneficial or protective purposes to its members from funds collected therein." The constitution was, therefore, in accordance with the Act under which the Association was incorporated; and it was only the restriction (if there was one) in the articles of association which the lower court supposed to limit benefits to widows and orphans that is not in harmony with the Act. Besides, the view of the lower court would preclude unmarried men from the benefits of such associations.

Even if there can be any question as to the right of the widow, there can be none under the facts of this case as to the right of the plaintiff; and this on the ground of an express contract entered into by the company defendant with Joseph M. Maneely, and subsequently ratified and confirmed by the Company with the plaintiff.

It is plain that in two cases the Company is bound to pay twice: 1, where it has paid first to the wrong party; and 2, where it has bound itself to pay to the wrong party.

Mr. **John S. McKinlay,** for defendant in error:

Under the power conferred upon the District Court of Philadelphia County, by the Act of Assembly of March 11, 1836, in regard to interpleading, and by further legislation, upon the courts of common pleas of said county, it seems apparent that the court below could have treated the case stated as an interpleader between Mrs. Caroline Maneely and the plaintiff in error, and by its order have made her a party to the suit, after her voluntary appearance as a party to the case stated, if that did not of itself have that effect.

Some provision should be made in disposing of this suit, to carry out, if possible, the intent of the parties to the case stated, so as to free the defendant in error from the embarrassment of further litigation.

Mr. Justice **Green** delivered the opinion of the court:

It is not, and of course cannot be, questioned, that, under the nineteenth article of the defendant's constitution, the contract in question in this case imposed a legal obligation upon the defendant to pay the money in controversy to the present plaintiff. The contract was made and performed by the deceased and this plaintiff, in strict conformity with all the requirements of the constitution and by-laws of the defendant, and the defendant is willing, to pay the money called for by the contract, but wishes to be protected against a possible wrong payment, and for that purpose only makes defense.

The learned court below was of opinion that there was a fatal conflict between the charter and the constitution, in respect of the persons who may receive benefits from the defendant company, and for that reason alone refused judgment to the plaintiff. The second section of the charter upon which this conclusion is based is in the following words:

"The purposes of this Corporation shall be the maintenance of a society for the purpose of benefiting and aiding the widows and orphans of deceased members."

Construing these words the learned court below held that it was not within the power of the defendant to stipulate for the payment of the benefits to any person other than the widow and orphans, who might be designated as the recipient by the deceased under article 19 of the constitution. We think this is too narrow and strained a view to take of the second section of the charter quoted above. While it is true that the general purpose of the Corporation is there stated to be the maintenance of a society for benefiting and aiding widows and orphans of deceased members, it must be observed that this is only the statement of a general purpose. It is only the recital of an object sought to be accomplished and which doubtless is accomplished in the great majority of cases, even though in exceptional cases the benefits may, by special contract, be paid to other persons than the widow or orphans.

There is no prohibitory or restrictive language, excluding from the powers of the Corporation the right to contract specially with the member for the payment of benefits to other persons than his widow or orphans. Nor is such a contract to be held void by reason of any necessary implication from the language of the charter; for the widow and orphans may be much benefited, and in many ways, by a contract designating another beneficiary—as, for instance, if the member, in his lifetime, desiring to establish a home for his wife and children, which they might hold after his death, borrowed money for that purpose, and so used it, and, to secure the loan, designated the lender as the beneficiary of his membership. Certainly his widow and orphans would be most materially benefited by such an arrangement. Or if, having a home, he met with disaster and was about to lose it by a judicial sale, and should save it by a similar provision, his widow and orphans would be thereby benefited. Or if, having property and also debts, but not to the point of insolvency, he could borrow money by means of a membership with such an association and he should become a member for that very purpose, the creditor possibly also paying the dues, and he could to that extent diminish his indebtedness during his life, and thus leave that much more of his property to his widow and orphans, undoubtedly they would be thereby benefited. Or he might borrow the money and give it directly to his wife or children during his life, pledging his membership to the lender as above; and then also they would receive the full advantage of the transaction without waiting until his death. Many more illustrations of a similar character might easily be suggested, but it is unnecessary. They all prove the same proposition, to wit: that it is entirely possible to benefit the widow or orphan by means of such a membership, although neither of them is the designated beneficiary; and hence, there is no necessary conflict between the second section of the charter and the nineteenth article of the constitution.

But again, the member may be unmarried, or he may have become a widower and without children during his life, although at the time his membership commenced he may have had both a wife and children. Surely, in such a case it would not be contended that the company would resist payment if the action were brought by an administrator, even though the money was needed only for the payment of debts, or if brought by a designated beneficiary who had loaned money on the faith of the membership. Further discussion does not seem to be required. We are of opinion that the plaintiff is entitled to judgment on the case stated.

Judgment reversed and judgment is now entered in favor of the plaintiff and against the defendant for the sum of $1,000, with interest from the 24th day of July, A. D. 1884, and costs.

PASSENGER CONDUCTORS' LIFE INS. CO. OF THE U. S., *Plff. in Err.*,

v.

Sarah F. BIRNBAUM.

1. **Assumpsit lies,** where the contract is not under seal, **against an assessment life insurance corporation for** the amount of **assessments** upon mem-

bers of the corporation due to a deceased member's widow.

2. Alleged **rulings** of the court below, **not the subject of a bill of exceptions,** will **not** be **reversed** by the supreme court.

(Argued Jan. 14, Decided March 21, 1887.)

JULY Term, 1886, No. 178, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, and Green, *JJ.*

Error to Common Pleas No. 3 of Philadelphia County, to review a judgment on a verdict for the plaintiff in an action of assumpsit. *Affirmed.*

Reported below: *Birnbaum* v. *Pass. Cond. Life Ins. Co. of the U. S.* 2 Pa. C. C. R. 179.

The declaration was as follows:

The Passenger Conductors' Life Insurance Company of the United States was summoned to answer Sarah F. Birnbaum of a plea of trespass on the case on promises; and thereupon the said plaintiff by *W. R. McAdam, Jr.*, her attorney, complains:

For that, whereas, heretofore, to wit: on the 18th day of February, A. D. 1882, Charles N. Birnbaum was a member of the Passenger Conductors' Life Insurance Company of the United States, the defendant, a Corporation incorporated under and by virtue of an Act of the Legislature of the Commonwealth of Pennsylvania, approved March 14, 1871, and he, the said Charles N. Birnbaum, being a member as aforesaid, to wit: a member of the first series of membership, the said defendant did agree, promise and undertake to and with the said Charles N. Birnbaum, for a sufficient consideration, to wit: the undertaking of the said Charles N. Birnbaum, that he should and would fulfill all duties due and owing to the said defendant company by reason of or arising out of his membership in the said defendant company, which said duties he has fulfilled, that if he, the said Charles N. Birnbaum, should die being still a member of the corporation defendant aforesaid, and intestate, that then and in such case the said corporation defendant, should and would pay unto the widow of the said Charles N. Birnbaum, a certain sum of money, to wit: the sum of $3,200; and the said plaintiff alleges that the said Charles N. Birnbaum died intestate on the 12th day of May, 1883; that he was at the time of his death a member of the said corporation defendant, entitled to all the privileges, immunities, rights and benefits of such membership, and that she, the said plaintiff, was at the time of the death of the said Charles N. Birnbaum, and still is the widow of the said Charles N. Birnbaum; that she has made due proof of the death of the said Charles N. Birnbaum, and done all other things required by the bylaws of the said defendant to be done by the said plaintiff, and that she is entitled to have and receive from the said defendant a certain large sum of money, to wit: the sum of $3,200; nevertheless, the said defendant disregarding its promises, agreement and undertaking, hath not paid to the said plaintiff the said sum of money, nor any part thereof, although often requested so to do; but the said defendant to pay the same hath hitherto wholly neglected and refused, and still doth neglect and refuse, to wit: at the county aforesaid, to the the damage of the said plaintiff $10,000; and therefore she brings this suit.

And also, for that, whereas, heretofore, to wit: on the 18th day of February, 1882, the said defendant, a Corporation incorporated under and by virtue of an Act of the Legislature of the Commonwealth of Pennsylvania, approved March 14, 1871, did agree, promise and undertake in conformity with the constitution and by-laws of the said defendant corporation, to and with Charles N. Birnbaum, the then husband of the said plaintiff, for a sufficient consideration, that if he, the said Charles N. Birnbaum, should die without having disposed, by his last will and testament, of the money, which money, to wit: the sum of $3,200, was to be paid upon the death of the said Charles N. Birnbaum, as hereinafter appears, that then the said defendant should and would pay or cause to be paid unto the said plaintiff the said sum of money, to wit: the sum of $3,200; provided the said Charles N. Birnbaum had performed during his lifetime certain duties by him to be performed according to the said agreement, promise and undertaking as set forth in the said constitution and by-laws of the said defendant corporation, which said constitution and by-laws are in the words following, to wit:

[Here follows a copy of constitution and by-laws.]

Which said constitution and by-laws the plaintiff brings here into court.

The plaintiff avers that the said defendant while in the exercise of its powers entered into said agreement, promise and undertaking to and with the said Charles N. Birnbaum, and executed and delivered to him, the said Charles N. Birnbaum, the following certificate in manner and words following, that is to say:

"No. 2521. Incorporated by the Legislature of Pennsylvania, March 14th, 1871.

Passenger Conductors' Life Insurance Co. of the United States.

This is to certify that Mr. C. N. Birnbaum, Conductor on North Penna. R. R., is a member of the Passenger Conductors' Life Insurance Company of the United States.

Given under my hand and corporate seal of the Company affixed this 18th day of February, A. D. 1882.

[Signed] A. H. Catlin,
President.
[Signed] Walter Lackey,
Sec'y and Treas."

[Countersigned by the Corresponding Member of the Road or Division.]

Which said certificate the said plaintiff here brings into court.

And the said plaintiff also avers that all the duties concerning or relating to the said agreement, promise and undertaking, necessary on the part of the said Charles N. Birnbaum and of the said plaintiff, to be complied with and performed according to the said agreement, promise and undertaking, have been well and truly complied with and performed at all times by the said Charles N. Birnbaum and the said plaintiff.

And the said plaintiff also avers that, to wit: on May 12, 1883, at the county aforesaid, the said Charles N. Birnbaum being the husband of the said plaintiff departed this life intestate, leaving surviving him his widow, the said plaintiff.

And the said plaintiff also avers that afterwards, to wit: at the county aforesaid, within sixty days after the death of the said Charles N. Birnbaum, reasonable and satisfactory proof of the death of the said Charles N. Birnbaum was made by the said plaintiff to the said defendant, and received by the said defendant. And the said plaintiff and the said Charles N. Birnbaum have always from the time of the said promise, agreement and undertaking, performed and fulfilled all things on their part to be performed and fulfilled according to said agreement, promise and undertaking; and the said plaintiff in fact saith that the said defendant not regarding its said agreement, promise and undertaking, although often requested so to do, did not nor would, after said defendant had received reasonable and satisfactory proof of the death of the said Charles N. Birnbaum, as aforesaid, nor at any time thereafter, pay or cause to be paid unto the said plaintiff, and belonging to the said plaintiff, to wit: the sum of $3,200, or any part thereof, but has wholly neglected and refused so to do, and still neglects and refuses so to do, contrary to its said agreement, promise and undertaking, to wit: at the county aforesaid, to the damage of the said plaintiff, $10,000, and therefore she brings this suit.

And also for that, whereas, heretofore, to wit: on the 18th day of February, 1882, Charles N. Birnbaum was a member of the Passenger Conductors' Life Insurance Company of the United States, the defendant, a Corporation incorporated under and by virtue of an Act of the Legislature of the Commonwealth of Pennsylvania, approved March 14, 1871. And he, the said Charles N. Birnbaum, being a member as aforesaid, to wit: a member of the first series of membership, the said defendant did agree, promise and undertake to and with the said Charles N. Birnbaum for a sufficient consideration, to wit: the undertaking of the said Charles N. Birnbaum, that he should and would fulfill all the duties due and owing to the said defendant company by reason of or arising out of his membership in the said defendant company, which said duties he has fulfilled; that if he, the said Charles N. Birnbaum, should die, being still a member of the corporation defendant, aforesaid, and intestate, that then and in such case the said corporation defendant should and would pay unto the widow of the said Charles N. Birnbaum a certain sum of money, to wit: the sum of $3,200.

And the said plaintiff alleges that the said Charles N. Birnbaum, died intestate on the 12th day of May, 1883; that he was at the time of his death a member of the said corporation defendant, entitled to all the privileges, immunities, rights and benefits of such membership, and that she, the said plaintiff, was, at the time of the death of the said Charles N. Birnbaum, and still is, the widow of the said Charles N. Birnbaum; that she has made due proof of the death of the said Charles N. Birnbaum, and done all other things required by the by-laws of the said defendant to be done by the said plaintiff, and that she is entitled to have and receive from the said defendant a certain large sum of money, to wit: the sum of $3,200.

And the plaintiff avers that the said Charles N. Birnbaum has always been, up to the time of his death, ready and willing to perform all the duties to be performed by him, according to the said agreement, promise and understanding; and that he, the said Charles N. Birnbaum, has always performed his said duties under said agreement, promise and undertaking; and that the said Charles N. Birnbaum did repeatedly, to wit: on the third day of March, 1883, on the 9th day of March, A. D. 1883, on the 15th day of March, A. D. 1883, on the 22d day of March, A. D. 1883, on the 26th day of March, A.D. 1883, on the 20th day of April, A. D. 1883, and on the 7th day of May, A.D. 1883, go to the office of the said defendant, at the county aforesaid, between the hours of business, with a sum of money, to wit: the sum of $50, to be paid to the said defendant under the said agreement, promise and undertaking; but that on each of said goings to the said office at the county aforesaid, he, the said Charles N. Birnbaum, found the said office closed, and the said Charles N. Birnbaum could not get in said office, nor was there at the said office anyone to attend to the business of the said defendant, nor to receive the said money.

The plaintiff further avers that the defendant's agent's presence was necessary at the said office, in order that the said money should be paid by the said Charles N. Birnbaum.

The plaintiff also avers that since the death of the said Charles N. Birnbaum, a tender of said money has been made to the said defendant, and that the said defendant refused to receive the same, and still does refuse; and that the said plaintiff has been always and is now ready and willing to pay the same. And the said plaintiff and the said Charles N. Birnbaum have always, from the time of the said promise, agreement and undertaking, performed and fulfilled all things on their part to be performed and fulfilled, according to said agreement, promise and undertaking; and the said plaintiff in fact saith that the said defendant, not regarding its said agreement, promise and undertaking, although often requested so to do did not, nor would after the said defendant had received due proof of the death of the said Charles N. Birnbaum, nor at any time, pay or cause to be paid unto the said plaintiff the sum of money due to the said plaintiff, and which she is entitled to have, to wit: the sum of $3,200, or any part thereof, but has wholly neglected and refused so to do, and still neglects and refuses so to do, contrary to its said agreement, promise and undertaking, to wit: at the county aforesaid, to the damage of the said plaintiff $10,000; and, therefore, she brings this suit.

The defendant was an Association incorporated by Act of Assembly, March 14, 1871. By the second section of its charter "It shall have power to make such constitution and by-laws as they may deem proper to carry out the object of this Corporation."

Article II of the constitution was as follows: "The object of this Company is to collect money from its members for the relief of the widows, heirs or legal representatives of deceased members."

Article IV of the constitution prescribes "that members shall only be conductors of passenger or mixed passenger and freight trains."

By section 4, article I of the by-laws, it is made the duty of the directors "to order an assessment of two (2) dollars per member for the benefit of the person or persons entitled to receive such assessments upon the death of any member," and "to choose one of their number as chairman, who shall preside at meetings of the board in the absence of the president; said chairman shall indorse all checks drawn by the secretary and treasurer, and approve all proofs of death for which an assessment is to be ordered. Three members of the board shall constitute a quorum for the transaction of all business."

Article V of the by-laws provides that "In case of intestacy of a member the money to be paid shall belong to and be paid to his widow."

Article VI of the by-laws enacts:

"Sec. 1. When the death of a member of this Company occurs, notice must be sent to the president and secretary; also a certificate from the attending physician, sworn to before a notary public, justice of the peace, or a clerk of a court of record, which must state the cause, time and place of death; also a notice of who, as representative of the decedent, is entitled to receive the benefits, giving the full name of such person, whether executor, widow or administrator. No assessment to be ordered by the board of directors, until the provisions of this section are complied with."

"Sec. 2. Upon the receipt of the proof of the death of a member as hereinbefore provided, the secretary shall submit said proof to the board of directors, and with their approval shall make the assessment, copies of which shall be sent to each corresponding member for the members on his road or division, and to each member not belonging to a road or division having such corresponding member."

By section 3, article 3, of the by-laws, "Each member shall, upon receipt of notice of an assessment, forward to the secretary and treasurer, or pay over to corresponding member the sum of two (2) dollars for the benefit of the person or persons entitled to receive the same on account of the death of a member; such money to be forwarded or paid over in time to be received by the secretary and treasurer within ninety (90) days of the date said assessment has been made."

And by section 3, article VI, it is provided, that "At the expiration of ninety (90) days from the date of assessments, the secretary and treasurer shall pay over such amounts as may have been collected on such death assessments to the party or parties entitled to receive the same, and said party or parties shall receipt for the amount so received, and release the Company from any further liability."

By article IV it is provided that "All assessments must be received by the treasurer within ninety (90) days after notice thereof shall have been sent by the treasurer to the corresponding member of each road or division, and to each member not belonging to a road or division having such corresponding member. The corresponding member is the agent of the individual members of his road or division, and this Company shall not be liable for the omission of a corresponding member to notify the individual members of his road or division of any assessment, or for his omission to remit amounts collected by him for such assessments; and no assessment shall be considered as having been paid until actually received by the treasurer whose receipt shall be the only evidence of such payment."

"In case the assessment due by any member shall not have been paid by him and received by the treasurer within ninety days after notice of its assessment shall have been sent by the treasurer to the corresponding member of the road or division to which such member may belong (or in case such member does not belong to a road or division having a corresponding member, then within ninety days after notice shall have been sent by the treasurer to such member), then such person shall immediately cease to be a member of this Company, and shall immediately forfeit all the rights, privileges and benefits thereof."

"The conduct or action of any officer or agent of this Company shall not be construed as having waived, changed or modified any of the provisions of this article."

The defendant pleaded *non assumpsit* to the first and second counts of the declaration and demurred to the third count. But the demurrer was overruled, with leave to plead; whereupon, a plea of *non assumpsit* was filed to the third count also.

At the trial the following facts appeared:

The plaintiff was the widow of Charles N. Birnbaum, the insured, who died intestate. Until four months he was a member of the defendant company.

At a meeting of the board of directors of the defendant, held December 5, 1882, notice was received of the death of three members: Skinner, Gay and Gillespie. The proofs of their deaths had not then been presented. In order that their families might not be delayed in getting the money that was coming to them (the next board meeting taking place in March) the board directed the chairman to examine the proofs when they should come, and if found correct by him, the secretary was directed to issue notices of an assessment.

The proofs afterwards came, were examined, and found correct, and the assessment on Skinner's death, No. 117, was issued in January, 1883. The assessments Nos. 118, 119, on Gay's and Gillespie's deaths, were issued in February, 1883. Charles N. Birnbaum had notice of all three assessments, but did not pay any of them. He died on 12th of May, 1883. The number of members at that day was about 807.

The plaintiff on the trial gave in evidence the charter, constitution and by-laws of the defendant, certificate of membership, called the secretary of defendant who proved above facts; and rested.

The court charged the jury, as follows:

The evidence establishes the membership of deceased, at the time of his death, under the constitution of defendant. Thereupon it was the duty of the Company to order an assessment, which it did not do. It would require an assessment of $2 upon each member, and it is as if the assessment on plaintiff's testator's death had been made. The defense is that deceased was delinquent in not having paid assesment No. 117, heretofore made on the death of Skinner, which occurred prior to January 1, 1883. If this January assessment had been properly made, the defense would be complete; but inasmuch as the assessment No. 117 was not made according to the constitution and by-laws, we must regard that assessment as illegal, and as if it never had been made, and the Association had no right to strike plaintiff's intestate from membership. He was a member at the time of his death, and as such had a right to recover, and your verdict should be for the plaintiff.

Verdict and judgment were accordingly for the plaintiff for $1,617.

The assignments of error specified the action of the court: 1, in overruling the defendant's demurrer to the third count of plaintiff's declaration; 2, in not charging the jury that plaintiff had failed to make out her case under the pleadings; 3, 4, in charging the jury as above; and 5, in refusing a motion in arrest of judgment.

No exceptions to the charge were taken at the trial.

Messrs. **Norris S. Barratt** and **John Samuel**, for plaintiff in error:

The plaintiff below did not prove the promise set forth in her declaration. Her narr. avers a promise to pay absolutely a certain sum.

The proof was (if any promise at all) a promise to assess each member $2, and to pay over what was collected. This is a substantial variance. Where the averment in the narr. is of an absolute promise, it will not be supported by proof of a conditional promise.

1 Chitty, Pl. 308, and notes; *Stump* v. *Hutchinson*, 11 Pa. 533.

It was not demurrable, because the promise as laid was (if proved) a good cause of action, and is therefore not cured by the verdict.

A certificate of membership in a mutual life insurance company provided that on the death of the wife of the plaintiff an assessment should be made upon the policyholders in the company for as many dollars as there were policy holders, and that the sum collected, not exceeding $1,000, should be paid to him within ninety days from the filing of the proof of death. Held, that a declaration containing no allegation of a neglect to make the assessment provided for, and assigning no breach except of a promise to pay $1,000, was fatally defective, and that the defect was not cured by the verdict.

Curtis v. *Mut. Benefit Life Co.* 48 Conn. 98.

The fundamental error of plaintiff below was in considering the contract between defendant and her husband as one of insurance on his life, and in declaring on it as such.

Although so named, plaintiff in error is not an insurance company. The object of a private corporation is not to be ascertained from its title.

Central Pa. Telephone & Supply Co. v. *Thompson*, 2 Cent. Rep. 544.

The charter, constitution and by-laws show that it was a mere machine to collect assessments. It is substantially a beneficial or mutual aid association. It has no fixed capital. It is not bound to pay any fixed sum on the death of a member, but only so much as may be collected of that which may voluntarily be paid by surviving members. It cannot be enforced by law.

Commonwealth v. *Nat. Mut. Aid Asso.* 94 Pa. 488.

It has no assets. The money which it collects on a member's death does not belong to it, but to the nominee or representative of the deceased member. It is but a conduit into which flows the contributions of members, and through which they are transmitted to the parties to whom they belong.

State v. *Mut. Protection Asso.* 26 Ohio St. 19.

In the present instance these cases are strengthened by the fact that all the members of plaintiff in error must be car conductors—an occupation of the greatest risk to life, and, therefore, most unfit for life insurance; and there is no discrimination in rates for the age of the members.

The objection to the form of the action here is not a technical, but a substantial one, because the judgment in this case is a general one, and binds all assets (if any) of the plaintiff in error, and will not be limited to assessments collected for defendant in error; *Seitzinger* v. *New Era Life Asso.* 2 Cent. Rep. 307, 111 Pa. 557; so that should assessments hereafter be collected for the benefit of others, an execution under this judgment would sweep them away, and this, although the supreme court has held that the fund arising from such assessments is neither the estate of the member on whose death they are collected, nor the property of plaintiff in error; but that it is merely a trustee to collect what members, under fear of loss of membership, may voluntarily pay, and hand over what they receive to those entitled.

Hodge's App. and *Morrell's Est.* 8 W. N. C. 209, 183; *Williams' App.* and *Vollman's App.* 92 Pa. 69, 50; *Thompson* v. *Adams*, 93 Pa. 55; *Folmer's App.* 87 Pa. 133.

That plaintiff below cannot recover in this action is evident from another consideration. The promise upon which she sues was not made to her; therefore, if this be one of that class of cases where one can sue on a promise made to another, it can be only in the case where the promising party has had property put in his hands for the benefit of the third party.

Torrens v. *Campbell*, 74 Pa. 475; *Guthrie* v. *Kerr*, 85 Pa. 308.

Here, there is no pretense of any property in hands of plaintiff in error for Mrs. Birnbaum's use. No action by the party entitled to the fund in his own name lies against such an association.

Fairchild v. *North Eastern Mut. Life Asso.* 51 Vt. 613.

Messrs. **W. R. McAdam, Jr.**, and **Henry Budd**, for defendant in error:

The second assignment is unsupported by any bill of exceptions. The learned judge was never asked to charge that the plaintiff had failed to make out her case under the pleadings. No points were presented.

Assessment No. 117 and the subsequent ones were without any authority from the board of directors; hence, at the time of Birnbaum's death, on May 12, 1883, there existed no assessment which he was bound to pay, or for which the time for payment had expired; for the irregular assessment was as no assessment at all.

Roswell v. *Equitable Aid Union*, 15 Rep. 5.

In this case the Act of incorporation mentions the objects of the Corporation only by calling it "The Passenger Conductors' Life Insurance Company of the United States;" still, it is a matter of indifference whether the Company be called an insurance company or not.

State v. *Mut. Protection Asso.* 26 Ohio St. 19, is not in point.

Mrs. Birnbaum could maintain this action. If one person makes a promise for the benefit of a third, that third may maintain an action upon it.

Marchington v. *Vernon*, 1 Bos. & P. *note* 101; *Strohecker* v. *Grant*, 16 Serg. & R. 239; *Hubbert* v. *Borden*, 6 Whart. 93; *Blymire* v. *Boistle*, 6 Watts, 183.

But this the counsel for plaintiff in error deny, and say that the third person can sue in assumpsit "only in the case where the promising party has had property put into his hands for the benefit of the third person," and cite *Torrens* v. *Campbell*, 24 Pa. 475, and *Guthrie* v. *Kerr*, 85 Pa. 308.

These cases do not, however, support the position they are cited to sustain.

As to the contention of the plaintiff in error, that there was a variance between the narr. and the proof of a character incurable by verdict, it is sufficient to say that whatever is amendable below will be considered above as having been amended. Had the point been raised on motion for a nonsuit, and had the judge been of opinion that the insertion of the words "have not levied an assessment or," was essential to the right to recover, such insertion would have been at once made, and, this being the case, this court will consider the amendment as made.

Kelsey v. *Nat. Bank of Crawford Co.* 69 Pa. 426.

There can be no pretense here that the defendant was misled, and it is well settled that where there has been a trial on the merits, and the defendant has not been misled, a verdict will not be disturbed.

Brown v. *Gilmore*, 92 Pa. 40.

An objection which might have been raised on demurrer comes too late after verdict; *Commonwealth* v. *Davis*, 4 Phila. 95; and it is to be noted that in the case cited the demurrer which bound the defendant was not his own but the plaintiff's demurrer.

Mr. Justice **Paxson** delivered the opinion of the court:

The first assignment of error was not pressed upon the argument. Indeed, it was admitted that the narr. sets forth a good cause of action and is not demurrable. The real ground of complaint was that the plaintiff did not prove her case as laid in the narr. As this point is not before us it does not require discussion. It is true the second assignment avers that "The learned judge below erred in not charging the jury that plaintiff had failed to make out her case under the pleadings." The court was not asked to so charge, nor do we see anything in the paper book of the plaintiff in error to show that the attention of the court was called to this subject. Nor is this assignment sustained by exception.

So also of the third and fourth assignments, in which error is averred in the charge of the court. The paper book contains nothing from which we can infer that an exception to the charge of the court was taken. No bill of exceptions is printed, and for aught we know there was none. If such matters as these do not appear in the paper book, we must presume that they do not exist.

The fifth and last assignment alleges that the court erred in not arresting the judgment. As the narr. sets forth a good cause of action this assignment is not sustained.

Judgment affirmed.

PENNSYLVANIA & NEW YORK CANAL & R. R. CO., *Plff. in Err.*,

v.

Emma J. HUFF *et al.*

In an **action** to recover **damages for** the **death** of a person killed **by a railroad train, while attempting to ride over** the **track at a public crossing,** in a wagon driven by his servant, where the evidence showed that when deceased approached the track he stopped, looked and listened, and the contention was whether the place where he stopped was a suitable one to see and hear, and whether due effort was made to ascertain if a train was approaching; *held*, that the evidence justified a finding for plaintiff, and that it was **not error** for the court **to refuse to instruct** the jury that under all the evidence the plaintiff could not recover, and that unless the deceased stopped at a certain point and looked, plaintiff could not recover.

(Argued March 17, Decided March 28, 1887.)

JANUARY Term, No. 333, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Green, *JJ.*

Error to the Common Pleas of Bradford County, to review a judgment on a verdict for plaintiffs in an action to recover for the death of plaintiffs' intestate at a railroad crossing. *Affirmed.*

Plaintiffs' intestate while riding in a lumber wagon with his hired man, Walker, who was driving, on a public highway crossing defendant's railroad, was struck by an irregular train consisting of a locomotive and an express car, running at a high rate of speed, and was instantly killed.

At the trial in the court below before MORROW, *P. J.*, it appeared that the railroad ran about north and south, and that the highway crossed the same at a right angle; the train in question was bound south and Huff, the deceased, and Walker were approaching the crossing from the west; the view of the railroad from the highway towards the north in the direction of the approaching train was greatly obstructed on the west side by an orchard and a coal shed, the latter standing in the angle formed by the highway and the railroad. The coal house is 17½ feet from the west rail of the south bound track, on which the train in question was running. It appeared that the view of the track, after passing the coal house on the road, was unobstructed for a distance of a mile or so; but the view before reaching that spot was somewhat limited, and at the time of the accident a strong south wind was blowing. It appeared from the testimony of Walker, who was plaintiffs' principal witness, that they stopped before reaching the crossing and looked both ways, but did not see the approaching train or hear any noise of the same until the moment they were struck.

Other evidence was given that the parties stopped and looked before approaching the crossing, but the evidence was quite conflicting as to the spot where they stopped; the principal part of this evidence was fairly reviewed by the judge in his charge to the jury.

The defendant, *inter alia*, presented the following points:

1. That under all the evidence in the case the plaintiffs cannot recover.

Ans. We refuse to charge as requested in this point.

2. That unless the jury find from the evidence that Huff or Walker stopped their team after passing the coal house, and looked in the direction in which the train was coming, it was negligence *per se*, and the plaintiffs cannot recover.

Ans. This point is affirmed, if you find that Mr. Huff did not stop, look and listen west of the coal house. Even if he did, I submit to you to say whether it was a proper place for him to stop, look and listen, with the wind blowing from the south, and the view to the north obstructed by the orchard; if it was not, it was negligence to drive on the track without stopping and looking east of the coal house; and the plaintiffs cannot recover.

4. That, unless the jury find from the evidence that Walker looked up the track after passing the coal house and before the accident, the plaintiffs cannot recover.

Ans. The point is refused. The undisputed evidence is he did not look up the track at this point. If they had not stopped, looked and listened west of the coal house, it was negligence to drive on the track, as sworn to by Walker, and the plaintiffs cannot recover.

The jury returned a verdict for plaintiffs for $5,750.

After hearing of motion for a new trial the court ordered plaintiffs "to remit from the verdict all in excess of $2,500 and file no bill of costs; rule for a new trial to be discharged; otherwise, to be made absolute and a new trial granted."

The plaintiffs remitted all in excess of $2,500; and judgment was entered accordingly.

The assignments of error specified the action of the court in refusing the motion for a compulsory nonsuit and the answers to defendant's points given above.

Messrs. **Davies & Hall**, and **Henry Streeter**, for plaintiff in error:

It is uncontradicted that there is a practically level piece of ground, 17½ feet wide, between the coal house and the west rail, on the approach to the track from the cross road upon which Mr. Huff and Walker were traveling. It was their plain duty to have stopped at that place; and the learned court should have said so in plain, unmistakable language.

Pa. R. R. Co. v. *Beale*, 73 Pa. 509; *North Pa. R. R. Co.* v. *Heilman*, 49 Pa. 60; *Cent. R. R. Co. of N. J.* v. *Feller*, 84 Pa. 227; *Catawissa R. R. Co.* v. *Armstrong*, 49 Pa. 193.

Messrs. **Evans & Maynard**, and **Rodney A. Mercur**, for defendants in error:

The rule is that where there is any evidence which alone would justify an inference of the disputed fact, it must go to the jury, no matter how strong or persuasive may be the countervailing proof.

Howard Express Co. v. *Wile*, 64 Pa. 205; *Phila. etc. R. R. Co.* v. *Yeager*, 73 Pa. 125; *Maynes* v. *Atwater*, 88 Pa. 497; *Egbert* v. *Payne*, 99 Pa. 245; *First Nat. Bank of Easton* v. *Wirebach*, 106 Pa. 47; *Hill* v. *Nat. Trust Co.* 108 Pa. 8; *First Nat. Bank of Du Bois City* v. *First Nat. Bank of Williamsport*, 5 Cent. Rep. 194.

The judge at the trial charged that "The rule is imperative that his duty was to stop, look and listen before driving on the track. If he approached the track without having stopped and looked and listened, he cannot recover, because it was negligence *per se*." Again: "The evidence of the other witnesses bearing upon this question you will call into consideration in determining this question whether they did stop; because if they did not stop west of the coal house, then it was their duty to have stopped down by the track; and if their view was obstructed there and they could not see, it was their duty to get out and see if there was a train coming. It has been said in one case that when the view is obstructed so they cannot see, it is the duty of the person or traveler to get out and take his horse by its head and look."

Lehigh Valley R. R. Co. v. *Brandtmaier*, 5 Cent. Rep. 144; *Pa. R. R. Co.* v. *Ogier*, 35 Pa. 71; *Schum* v. *Pa. R. R. Co.* 107 Pa. 8.

It is the duty of the company to give timely and sufficient notice of the approach of trains where highways cross the railroad tracks.

Pittsburgh etc. R. Co. v. *Dunn*, 56 Pa. 280; *Pa. R. R. Co.* v. *Barnett*, 59 Pa. 259; *Phila. etc. R. R. Co.* v. *Killips*, 88 Pa. 412; *Pa. R. R. Co.* v. *Horst*, 16 W. N. C. 567.

It is the duty of the engineer, when his train approaches a public highway, to give warning by sounding whistle or other sufficient alarm.

Phila. etc. R. R. Co. v. *Stinger*, 78 Pa. 225.

Also to give proper and timely warning of the approach of its trains.

Longnecker v. *Pa. R. R. Co.* 105 Pa. 332.

Also to give sufficient long and loud warning of some kind.

Pa. R. R. Co. v. *Coon*, 2 Cent. Rep. 323, 111 Pa. 438.

Such warning must be reasonable and timely.

Continental Improvement Co. v. *Stead*, 95 U. S. 164 (Bk. 24, L. ed. 405, and note).

The failure of an engineer approaching a highway to give warning is negligence *per se*.

Phila. etc. R. R. Co. v. *Stinger*, and *Longnecker* v. *Pa. R. R. Co. supra; Strong* v. *Placerville R. R. Co.* 8 Am. & Eng. R. R. Cas. 273.

This warning must be nearer than 300 yards from the crossing.

R. R. Co. v. *Goetz*, 79 Ky. 442.

It must be given continuously when approaching a crossing.

Smedis v. *Brooklyn etc. R. R. Co.* 88 N. Y. 13.

Numerous recoveries have been sustained

where the plaintiff stopped, looked and listened at varying distances from the track.

Pa. R. R. Co. v. *Ogier*, 35 Pa. 60 (*80 ft.*); *Pa. R. R. Co.* v. *Ackerman*, 74 Pa. 265 (*10 ft.*); *Pa. R. R. Co.* v. *Bock*, 93 Pa. 427 (*60 ft.*); *Phila. etc. R. R. Co.* v. *Hagan*, 47 Pa. 244 (*40 ft.*).

If the train was a special one, it was more incumbent upon the Company to slacken their speed and sound the whistle and ring the bell, than if the train were running on regular time.

Continental Improvement Co. v. *Stead*, *supra*.

Per Curiam:

It would clearly have been error for the court to have taken this case from the jury. Henry Huff was killed while attempting to ride over the railroad at a public crossing. The unquestioned evidence is that when he approached the railroad he stopped, looked and listened. The contention was whether the place where he stopped was a suitable one to see and hear, and whether due effort was made to ascertain if a train was approaching. The evidence as to this was well submitted by the court and justified the finding of the jury.

We see no error in the charge nor in the answers to the points.

Judgment affirmed.

Alex. DE BARIL, *Plff. in Err.*,
v.
Tomas CAMPOY Y PARDO.

1. If **a writing** which is **in the possession of** the **opposite party** is required to be given in evidence, **notice to produce** the original must be given to him or his attorney; and without proof of such notice **secondary evidence** of the contents of the writing cannot be given.
2. The fact that the **opposite party is in a foreign country,** where he resides, does not affect the application of the rule.
3. **Evidence of agency insufficient** to submit to the jury.

(Argued March 30, Decided April 11, 1887.)

JANUARY Term, 1886, No. 304, E. D., before Mercur, *Ch. J.*, Trunkey, Sterrett, Green, and Clark, *JJ.*

Error to Common Pleas No. 4 of Philadelphia County, to review a judgment on a verdict for the defendant in an action of assumpsit. *Affirmed.*

The facts as they appeared at the trial are stated in the opinion of the court on a rule to show cause why a new trial should not be granted, by ARNOLD, *J.*:

This is an action of assumpsit commenced May 19, 1884, by a writ of foreign attachment. The defendant is a citizen and resident of Spain. The plaintiff claimed commissions on a contract for the sale of 16,000 tons of iron ore by the defendant to Alfred Earnshaw, the garnishee, which sale the plaintiff alleged that he negotiated; also for services in translating the contract from the Spanish to the English language; and also for money loaned and expended by the plaintiff on account of the defendant.

The plaintiff's dealings were not with the defendant in person, but with his son, Tomas Campoy, Jr.; and the main question in dispute was whether the son was the general agent of his father. In order to prove the agency the plaintiff compelled the attendance of the son of the defendant by a *subpena duces tecum*, requiring him to produce all the letters which he had received from his father since he arrived in America, in August, 1881. The son produced a large bundle of letters, from which the plaintiff extracted and used two, one of them dated April 13, 1882, and the other May 13, 1882. It was then asserted by the plaintiff that there was another letter bearing upon the question of agency, dated December 3, or 4, 1881.

The son testified that he had produced all the letters from his father which he had in his possession; that his letters had been in the possession of a Mr. Mares, of Baltimore; that he did not remember whether there was a letter from his father dated in December, 1881, but that if there was, Mr. Mares must have it; that he had not asked Mr. Mares for his letters since October, 1883; and that the last time he saw them was within the last year, when Mr. Mares produced them in the Court of Common Pleas No. 2, of this county, and they were read to the jury in a case then being tried in that court.

Mr. Earnshaw testified that he entered into a contract with the defendant for the purchase of the iron ore, and that the plaintiff translated the contract; and that by direction from the defendant, he paid the commissions to his son. The plaintiff then proposed to prove by his own testimony, the contents of a letter from the defendant to his son, dated December 3, or 4, 1881, and that he had read the letter, to which objection was made on the ground that notice to produce the letter had not been given to the defendant. The evidence was rejected.

In order to enable the plaintiff to produce the letter or prove it it by depositions on a commission, or to give notice to the defendant to produce it, so as to prepare the way for the reception of secondary evidence at another trial, I told the plaintiff that I would withdraw a juror and continue the case; but he, acting on his own judgment, refused to accept the offer, and insisted on going to the jury.

It is laid down as elementary law that if a writing, which is in the possession of the opposite party is required to be given in evidence, notice to produce the original must be given to him, or, as is more proper, to his attorney. 2 Phil. Ev. 10th ed. p. 525.

If the instrument is in the possession of the adverse party, before secondary evidence of its contents can be admitted it must be shown that he has received notice to produce it. *Id.* p. 519.

In certain cases, although the instrument which is required is not in the possession of the party to the suit, but in the possession of a third person, yet, if there is a privity between such third person and the party, or if the instrument may be considered as under the control of the party, it is deemed to be virtually in his possession; and therefore a notice to produce it, given to the party himself, will, in such cases, be sufficient. *Id.* pp. 521, 522.

It does not follow that on notice being given, the party is compellable to give evidence against himself; or that, if he refuses to produce the paper required, such a circumstance is considered as conclusive against him; but the consequence will be that the other party, who has done all in his power to supply the best evidence, will be allowed to go into evidence of an inferior kind, and may read an examined copy, or give parol evidence of the contents.

Without proof of notice to the opposite party to produce the original writing, which is in his possession, secondary evidence of its contents cannot, in general, be given. This rule has been made with good reason, that parties may obtain the best evidence in their power. When it is traced to the hands of the opposite party, no further evidence can be given of it, without a notice to produce. *Id.* pp. 525, 526.

These are the elementary rules. The application of them in the myriad of reported cases shows no material deviation from them.

Where a paper was traced to the hands of an agent of a party, and notice had been given to produce it, and the party showed that it had been delivered by the agent to the stamp officer to have it stamped, the other party was allowed to give parol evidence of its contents. *Sinclair* v. *Stevenson*, 1 Carr. & P. 582.

It will be observed that in this case notice to produce the paper had been given; and it appearing that the notice had not been served in time, the matter was disposed of on that ground. If a check drawn by a party to a cause is proved to be in the hands of his banker (having been paid), the other party may call for it under a notice to produce; and he need not call the banker's clerk. *Burton* v. *Payne*, 2 Carr & P. 520.

And a paper deposited in a court of equity by a party who has leave to withdraw it is sufficiently under his control and power to let in secondary evidence of its contents, after notice and refusal to produce it. *Rush* v *Peacock*, 2 Moody & Rob. 162; *Jackson* v. *Shearman**, 6 Johns. 19; but it is otherwise if the document is held by a stakeholder between the party in the cause and a third person. *Perry* v. *Mays*, 1 Hill (S. C.) 76.

Where it appeared that the muniments of the plaintiff's title were in the hands of his counsel at a former trial, it was held that the conclusion was that he could have produced them if he had pleased; and notice to produce the papers having been served a reasonable time beforehand, it was further held that the defendant had done all that the law required of him to entitle him to give secondary evidence of the execution and contents of the papers. *M'Kellip* v. *M'Ilhenny*, 4 Watts, 317.

It will be observed that in that case the court said that the defendant, by giving the notice to produce, had done all that the law required of him; from which the converse may be fairly deduced: that if he had not given the notice, he had not done all that the law required of him before offering secondary evidence.

To the same effect is *Irwin* v. *Lever*, 2 Foster & F. 296. The *semble* which the reporters put in the *syllabus*, that it would have been so even without notice to the attorney, must be confined to the agent and not to the principal, as to whom notice is not dispensed with.

In general it may be said that the fact of agency cannot be proved by parol while the written evidence of it exists; *M'Kinney* v. *Leacock*, 1 Serg. & R. 27; *James* v. *Gordon*, 1 Wash. C. C. 333; *May* v. *May*, 1 Porter (Ala.) 229; nor can the declarations and acts of a man be given in evidence to prove that he is the agent of another. *Plumsted* v. *Rudebagh*, 1 Yeates, 502; *James* v. *Stookey*, 1 Wash. C. C. 330; *Whiting* v. *Lake*, 91 Pa. 349; *Owen* v. *Evans*, 40 Legal Int. 26.

There are, however, some exceptions to this; as, for instance, when the defendant alleged that he had settled with the agent, who was also the wife of the plaintiff, and offered a witness to prove that he saw the power of attorney and what its contents were, it was held that while the defendant must produce the writing or give notice to produce it, so as to entitle him to give secondary evidence of its contents, yet he might give evidence of the plaintiff's admission that he had given the power: *Curtis* v. *Ingham*, 2 Vt. 289; and this without previous notice to produce it; but as to this last, the learned annotator to 1 Phillipps on Evidence puts a query on page 515, note 148; and so where it is plain that the notice would have been unavailing, as in the case where it is proved that the power of attorney has been destroyed by fire, in that case the person to whom the power was given was admitted to prove its contents; *Jackson* v. *Neely*, 10 Johns. 374; *Cornett* [*Nash*] v. *Williams*, 20 Wall. 226 [87 U. S. bk. 22, L. ed. 254]; and also where the paper is proved to be lost or destroyed: *Fox* v. *Wood*, 1 Rawle, 143; *Burton* v. *Driggs*, 20 Wall. 125 [87 U. S. bk. 22, L. ed. 299]; but the loss of the power of attorney must be first proved, before receiving secondary evidence of the declarations of the principal as to its contents. *De Haven* v. *Henderson*, 1 Dall. 424 [1 U. S. bk. 1, L. ed. 206]; *Vanhorn* v. *Frick*, 3 Serg. & R. 278.

The statement in *Burton* v. *Driggs*, *supra* (that if books or papers, necessary as evidence, be in the possession of a person living in another State, secondary evidence may be given to prove the contents of such papers, and that notice to produce them is unnecessary), must be confined to cases like that, in which the books and papers were in the hands of a third person, who was not subject to the control of the opposite party; in which case notice would be useless, and of which books and papers the evidence offered was a copy of a lost deposition which proved the contents thereof.

In this State the rule has always been strictly adhered to; and if a party desires to prove the contents of a paper which is in the hands of his adversary, notice to produce it must be given. *Alexander* v. *Coulter*, 2 Serg. & R. 494; *Eilbert* v. *Finkbeiner*, 68 Pa. 243.

But to this there are some exceptions, as in trover, replevin and detinue, and other actions directly upon the paper, the plaintiff may give parol evidence of its contents, without giving notice to produce the paper, because the form of the action gives all the notice that is required. *M'Clean* v. *Hertzog*, 6 Serg. & R. 154.

And so it is in England; *Hammond* v. *Plank*,

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*See digested citations at end of case, Lawyers' edition. [Ed.]

Peake's Add. Cas. 90; *Scott* v. *Jones*, 4 Taunt. 865; *How* v. *Hall*, 14 East, 274; *Bucher* v. *Jarratt*, 3 Bos. & Pull. 143; and against a carrier for the nondelivery of written instruments: *Jolley* v. *Taylor*, 1 Camp. *N. P.* 143; and so on an indictment for stealing a bill no obligatory proof of its contents may be given without notice to produce, differing in this respect from the English rule.

Commonwealth v. *Messinger*, 1 Binn. 273.

And on an indictment for forging bank notes, parol evidence of letters received by the defendant from an accomplice may be given without a notice to produce them; *U. S.* v. *Doebler*, 1 Baldw. 519; because otherwise guilty persons might escape, as it is not in the power of the Government to withdraw the case from the jury and put the defendant in jeopardy a second time.

Where the party to be affected by a letter is a merchant, it will be presumed that he kept a letter book, which would have afforded better evidence than mere parol proof of the contents of the letter; therefore, when sufficient notice to produce the letter book has not been given, an extract from a lost letter cannot be given in evidence. *Dennis* v. *Barber*, 6 Serg. & R. 420; *Coxe* v. *England*, 65 Pa. 212.

The question whether proof that a paper is out of the State will, alone, be a sufficient foundation for secondary evidence of its contents, without further efforts to obtain it, has been decided in the negative in Connecticut and Louisiana. *Townsend* v. *Atwater*, 5 Day (Conn.) 298; *Lewis* v. *Beatty*, 8 Martin (La.) N. S. 287.

In Kentucky secondary evidence of a paper proved to be out of the State was admitted, the court likening the case to that of a subscribing witness who is absent from the State. The fact that there was such a paper came out on cross examination; and the question whether notice to produce it was required was not mooted. *Boone* v. *Dyke*, 3 T. B. Mon. 532.

In New York a paper so situated is allowed to be proved on a commission, without requiring it to be produced in court. *Bailey* v. *Johnson*, 9 Cow. 115.

In South Carolina a party offered parol evidence of a paper which was in the hands of his agent, who had gone to another State; and it was held inadmissible, because no commission had been sent to examine the agent or ascertain what had become of the paper, and there was, besides, some reason for suspecting a design to suppress it. The question whether notice to produce was necessary did not arise, as the evidence was offered by the principal; but the judgment is important in this respect, it attributes the suppression of the paper to the principal, because it was presumed to be in his control; and if the other party had offered the evidence, it would have been admitted, provided notice to produce it had been given. *Bunch* v. *Hurst*, 3 Desau. Eq. 290. See also, as to whom the consequence of the suppression of a paper is to be imputed, *Hart* v. *Yunt*, 1 Watts, 253.

In this State a deposition which went to prove the contents of a paper was rejected, because it was not shown that the paper was unattainable. *M'Kee* v. *Reiff*, 4 Yeates, 340.

The great desire of the court in insisting upon the best evidence of the contents of a paper, by requiring its production, on notice, or proof under a commission, before receiving secondary evidence of its contents, is to save the party to be affected by it from a parti-colored account of the paper, when better evidence can be had. *Dwyer* v. *Collins*, 7 Exch. 639.

The present is a case in which the wisdom and justice of the rule are so plain that they cannot be gainsaid. The defendant is in Spain, where he resides. His case here is defended by his counsel, who is without a client to advise or witnesses to assist him. He can do nothing but look on and see that his client is condemned on legal evidence only, and to prevent the reception of any evidence which is improper. If, as the plaintiff alleges, the son of the defendant was also his agent, his counsel was entitled to reasonable notice to produce the letter which is said to have been written, but not proved to be lost, which vitally affects the case, and which is potentially in his possession or control; and of which he may be presumed to have a copy which he could have produced, in case he could not get the original; otherwise, he might be overwhelmed by what *Mr. Justice* Woodward, in *Ellis* v. *Guggenheim*, 20 Pa. 287, called the "compendious criticism" of a witness, himself an interested party, who would give his interpretation of the letter, rather than its contents.

The letters of April 13, and May 13, 1882, do not prove that the defendant's son was his general agent. They merely show that the defendant authorized his son to sell the iron ore on a commission fixed by the letters. It seems too plain to require any citation of authority to show that an agent authorized to sell on a commission is not a general agent, and that he has no power to employ other agents under him at the expense of his principal; nevertheless, if authority be wanted, the principle may be found in the maxims that one agent cannot lawfully appoint another in his place, for a delegated authority cannot be redelegated; Broom, Legal Maxims, *839–40; and the application of the principle may be found in *Hill* v. *Canfield*, 63 Pa. 77.

If the agent does employ another, he is responsible for the acts of his substitute or assistant; *Bradstreet* v. *Everson*, 72 Pa. 124; *Morgan* v. *Tener*, 3 W. N. C. 398; and consequently liable for his compensation.

The commissions agreed to be paid include all that the principal is liable for, and they cannot be increased without his consent; *Freeman* v. *Shreve*, 86 Pa. 135; otherwise he might be called upon to pay away the entire proceeds of his property to a succession of brokers not selected by himself, but depending upon each other for authority.

The letter from the defendant to the plaintiff, dated February 4, 1882, is simply an expression of thanks for the kindness of the plaintiff to the defendant's son, and the solicitude of the father for the welfare of his son. It contains nothing of a contractual nature, nor any admission that the son was invested with unlimited authority to bind his father. If such letters are to be perverted so as to raise an obligation to pay for the amenities of life, the writing of letters of courtesy and interchanges of civility must cease, unless they are accompanied with a protest that they are not intended as an acknowledgment of a liability to pay for the amenities bestowed, and are concluded with a *nota bene* that they are sent "without prejudice."

As there is nothing in the evidence to prove that Tomas Campoy, Jr., was the general agent of the defendant, the claim of the plaintiff lacks this material prop to support it, and the jury were properly instructed to render a verdict for the defendant.

The following are the letters of April 13, May 13, and February 4, 1882, heretofore referred to, written by Tomas Campoy y Pardo to his son:

Translations of inclosures in letter of Tomas Campoy y Pardo to his son, dated Portman, April 13, 1882. Private.

"Tomas, the business that you do with Mares, I cannot give more than what I tell you both in the letter, on account of furnishing you superior ore; but if the offer which I sent you is accepted by a good house, whether it be for the whole amount which I say or for one half of it, you may count on it that I will give you for commission five cents per ton and besides five cents per unit gained over 50 per cent. You see this is half of the profits for you, and the other half for me. Keep all this to yourself; and whenever those conditions are accepted you must rely on what I said. Now try to do business; but the most important is to deal with good houses. Tomas, be careful of what you are doing on account of your being there. All parties here have contracts for minerals except myself.

Preparing for your transactions I have accumulated stocks, but am in need of funds; tell me how much money you have received this year from Messrs. Holloway Bros. Make Mares, if you both want me to send some cargoes besides the one I am going to send, remit drafts on Barcelona on signing bills of lading. If not I cannot send you any more than the one cargo. Your brothers-in-law all have gone away, as they consider it humiliating to stay with me earning a salary. If the contract is accepted, telegraph me.

Tomas, I approve with pleasure your arrangements with Mr. Mares, and you may rest easy that if you have little business and I make any contract with Earnshaw direct, I will write him, particularly if I obtain two reals more per ton, and will tell him what he has to give you apart of what I give you both for commission. You will understand that the letter will be in a form to be presented to Mr. Mares and Earnshaw. It is convenient to hurry, stirring up business for next year, but in some way not showing great audacity."

"Portman, May 13, 1882.

"Dear Son: I have received yours of the 25, April, and I am informed of its contents, seeing that you are well, and, thank God, we are the same at present. Tomas, what you tell me, referring to business, that you have formed a partnership with Mr. Mares, is all right; and it is necessary that you notify me in time if at any time you should make any contracts that any document that you should require to be sent, whether it is to be named or entitled Campoy & Mares or Mares & Campoy, for me to have an understanding of all the business. In reference to what you say, that I must speak to Bapata, to ask him to fix a commission for you. I do not speak to him (particularly on business), as you know how mean he is; and in this bad season that I am passing through, he has injured somewhat my business; still I have sent him word through his nephew. What you ought to do is to address him a letter, as though you had not heard from me, saying that on account of having formed a copartnership with a gentleman of that place (without telling him who he is), that it is necessary for him to fix a commission, as otherwise you will not be able to attend to his business; but I must warn you that when he replies to you or to Mr. Mares, with the purpose of doing business direct with you both, and you should accept some contract, I would withdraw my connection with you immediately, because you know as well as I do that he would establish opposition to me at the mines. To make the business a success it would be convenient that you both should take hold of all the foundries possible, as I have most of the mines and animals necessary. You had better tell this to Mr. Mares, for him to bear in mind all these convenient particulars, because these indications are the principal bases to obtain good minerals, which could not be done without several parties.

Your question about what commission I will give you both, I have told you on several occasions that for both to have a success I cannot give you the minerals at less than thirty-four reals per ton, alongside of vessels; and with that idea I have closed for two years the Escondrigo, which is the best of the mines, as you know very well that it costs there fifteen reals per ton, fifteen reals transportation and four reals shipment. I have no other advantages than the proximity of the mines and what I may earn in shipments and advances in dispatch money, as I have established four gangs, and when the opportunity is offered I can ship 600 tons or more in a working day, and you can make the difference in price, besides half of the percentage gained over 50% and half of the dispatch money as this is the custom here. Do not Jew me down too much in the arrangements, as you know that this would prevent me from procuring good minerals, and the prejudice would be against me and you also. Above all, do not be ambitious, because to become rich does not require haste. Do not forget in making contracts that the moisture is to be deducted from the weight and not from the units. Nothing else at present. Our compliments to Mr. Mares, and love for you from all the family.

Your Father,

Tomas Campoy."

February 4, 1882.

"My Dear Sir:

I received yours dated January 11, by which I see with pleasure the pleasant relations which my son has together with yourself; because, as you may understand, my desire is that he avail himself of friends that will not deceive him, and will advise him and guide him in what he is ignorant of; consequently your assurance has filled me with satisfaction. With respect to what you tell me with regard to business, my object in sending him there has been solely for that purpose, and the only thing that delays me in pushing this business is the waiting till he is acquainted with the language and customs of the country, as well as the manner of conducting business, and (on the other hand) besides the vessel freights are so high that they exceed the ordinary costs of seven or eight shillings. Notwithstanding what I here say of the stacks of (iron ore) that have accummulated since he left me, I am putting aside superior qualities with the object of sending them to him in a cargo of 500 to 600 tons, so that he may examine them and my son ascertain the way of making contracts and——what it interests me is to send cargo on my own account by contract and on these particulars, I have already given my instructions and I——you that what would suit me better will be making contracts for large quantities. I believe the freights being as I mention there is better chance of obtaining them there than here, and besides it is necessary that funds should be placed by people who contract for the ore, in the Bank of London, to be able to draw against them; for, as you know, if the contract should be a large one, it would not be possible to send many vessels, or hope for a realization of their cargoes there (in America.) Without further to note to-day, I thank you for the interest you manifest in my son and business, and I avail myself of this to assure you, I am,

"Yours Truly."

The assignments of error specified: 1, the refusal of the court to admit evidence as to the contents of the letter of December 3, 1881; 2, the rejection of the letter of February 4, 1882; 3, the refusal to allow testimony as to the kind and value of services rendered by the plaintiff, and 4, the instruction of the court to find for the defendant.

Mr. **William Drayton,** for plaintiff in error:

The reason of the rule requiring a notice to produce before offering parol testimony is to notify the person who has control of a paper to produce it. Here we did notify the very person who naturally would have such control, who had last had the letter and who testified on the stand, not that he had returned it to his father or to his father's counsel, but that he had left it in a foreign jurisdiction. Having thus accounted for its absence plaintiff was entitled to proceed; for proof that a letter is beyond the jurisdiction of the court is identical with proof of its destruction, and secondary evidence is admissible.

Burton v. *Driggs*, 20 Wall, 125 (87 U. S. bk. 22, L. ed. 299); *Fox* v. *Wood*, 1 Rawle, 143.

This is so when it is known beforehand that the paper is out of the jurisdiction; but when it is ascertained before the trial that the paper is in the possession of a witness, the fact that it is removed from the jurisdiction, without the knowledge of the party seeking to use it, will excuse him from further efforts; as in *Leeds* v. *Cook*, 4 Esp. 256, where a letter was before the trial handed over, by the witness subpenaed to produce it, to one of the parties, the letter not being produced *Lord* Ellenborough said he would admit evidence of its contents; that it belonged to the witness called and was subtracted in fraud of the subpena.

In England the general rule is that if the fact is known prior to the trial that a document is out of the jurisdiction of the court, a demand must first be made on the party known to possess the document.

Boyle v. *Wiseman*, 10 Exch. 647; 11 Exch. 360; *Crispin* v. *Doglioni*, 32 L. J. U. S. Prob. Div. 109.

But it must be made on the party legally entitled to the custody.

Freeman v. *Arkell*, 2 Barn. & C. 494; *Crispin* v. *Doglioni*, *supra*.

The American rule is that if from the nature of the case itself it is manifest that a more satisfactory kind of evidence exists, the party will be required to produce it; but where the nature of the case does not of itself disclose the existence of such better evidence the objector must not only prove its existence, but must also prove that it was known to the other party in season to have been produced at the trial.

1 Greenl. Ev. § 84, n. 2.

If, therefore, the paper is in the possession of one who refuses, on the ground of privilege, to produce it, secondary evidence may be given of its contents.

Ditcher v. *Kenrick*, 1 Carr. & P. 161; *Marston* v. *Downes*, and *Mills* v. *Cady*, 6 Carr & P. 381, 782; *Doe* v. *Ross*, 7 Mees. & W. 121; *Newton* v. *Chaplin*, 10 C. B. 356; *Lynde* v. *Judd*, 3 Day (Conn.), 499.

These are all cases where attorneys who had been subpenaed to produce papers refused, on the ground that they held them as attorneys for third persons, and in every case secondary evidence was admitted.

If the paper is out of the jurisdiction of the court, and in the possession of one who refuses to allow it to be brought in, secondary evidence is of course admissible.

Carpenter v. *Bailey*, 56 N. H. 283, was the case of a letter, on the files of the Navy Department, alleged to contain a libel. The secretary declined to permit its removal, and parol evidence of its contents was given, and not by deposition.

U. S. v. *Reyburn*, 6 Pet. (31 U. S. bk. 8, L. ed. 424) was the case of a privateer whose papers could not be obtained.

Nor is there any difference between a copy and parol evidence of contents. If the oral testimony is clear as to the language used in the letter, it is for the jury to say whether the statement is correct or not; and the judge had no right to take it from them.

The party offering the testimony is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information which the nature of the case suggests.

Vaughn v. *Biggers*, 6 Ga. 188.

If books or papers necessary as evidence in a court in one State be in the possession of a person living in another State, secondary evidence may be given to prove the contents of such papers, and notice to produce them is unnecessary.

Burton v. *Driggs*, 20 Wall. 125 (87 U. S. bk. 22, L. ed. 299).

The person in whose possession the paper is last seen is the proper person to notify.

Waller v. *Cralle*, 8 B. Mon. 11; *Stirling* v. *Buckingham*, 46 Conn. 461.

The error in the mind of the judge who tried the case was caused by a confusion between letters written to the opposite party by the plaintiff or defendant; in which case it is, of course, necessary to give notice to produce before offering secondary evidence, as in *Pratt* v. *Patterson*, 81 Pa. 115; *Marsh* v. *Hand*, 35 Md. 123, and papers written by the opposite party to third persons. In the latter case notice or a subpena should be served on the recipient of the letter alone.

See also *Shepherd* v. *Giddings*, 22 Conn. 282; *Eaton* v. *Campbell*, 7 Pick. 10; *Boone* v. *Dyke*, 3 T. B. Mon. 532; where the mere fact of a paper being out of the jurisdiction of the court was held sufficient, although before trial this fact was known to the party offering secondary evidence of its contents.

Binney v. *Russell*, 109 Mass. 55; *Mauri* v. *Heffernan*, 13 Johns. 58; *Moody* v. *Commonwealth*, 4 Met. (Ky.) 4; *Shorter* v. *Sheppard*, 33 Ala. 648; *Wisconsin River Lumber Co.* v. *Walker*, 48 Wis. 614; *Burnham* v. *Wood*, 8 N. H. 334; *Dunbar* v. *Marden*, 13 N. H. 311; *Waller* v. *Cralle*, 8 B. Mon. 11; *Moore* v. *Beattie*, 33 Vt. 219; *Alivon* v. *Furnival*, 1 Crompton, M. & R. 291.

The cases which closely resemble the one before the court are *Brown* v. *Wood*, 19 Mo. 475, and *Hibberd* v. *Knight*, 2 Exch. 11.

Where a deed is in the possession of a person which he is not obliged to produce in answer to a subpena, you may give secondary evidence of its contents.

Marston v. *Downes* and *Mills* v. *Oddy*, 6 Carr. & P. 381, 732.

In Pennsylvania all that is required is a search among the papers of the person into whose possession the papers in question are last traced. Where a deed was written by a conveyancer from a father to a daughter, and the daughter had given all her papers to her father, and after his death, her brothers swore they had never seen the deed, and there was a notice to produce, but no proof of search, it was held sufficient to introduce secondary evidence.

Emig v. *Diehl*, 76 Pa. 359.

Where the witness testified he had looked among all his papers and could not find it, proof of the contents of a letter seven years old, was admitted.

Brown v. *Day*, 78 Pa. 131.

In *Spalding* v. *Bank of Susquehanna Co.* 9 Pa. 28, parol proof of a release was admitted where it had been in the possession of one C., who had left the State. His books and papers, left in Pennsylvania, were searched here, and witness had inquired of C's wife, who said she had no business papers in her possession. Held sufficient.

After proof that the son acted as agent the court should have admitted proof of what was done by plaintiff in furthering the very contract brought about by plaintiff's aid.

Reed v. *Ashburnham R. R. Co.* 120 Mass. 48.

Services rendered to an agent, outside of the scope of his duty, cannot bind the principal; but it is equally clear that an agent has power to bind his principal within the scope of his duties.

Williams v. *Getty*, 31 Pa. 463.

Any recognition of similar services by a principal will bind him, more especially when the agent stands in the relation of child or wife. Thus it was held in *Tucker* v. *Woolsey*, 6 Lans. 482, that an agent sent here to sell his principal's goods might bind his principal for rent of a place to store the goods.

In *Mundorff* v. *Wickersham*, 63 Pa. 88, where a clerk signed a receipt for a note which included a promise to protect it at maturity, held, the principal was bound by this promise, although it did not appear he had authorized it.

In *Kelsey* v. *Nat. Bank of Crawford Co.* 69 Pa. 426, where a cashier with the approbation of some of the directors, offered a reward for the apprehension of a thief, held, the bank was bound, although not formally notified. Held, further, that the circumstance of its being a small town would imply a knowledge.

M'Cord v. *Bergautz*, 7 Watts, 487, is authority for the fact that it is absurd to say that you trust a man to exercise the most extensive authority over land for your benefit, but he must not save it from utter loss as by paying taxes.

The same rule applies to persons and corporations.

Tanner v. *Oil Creek R. R. Co.* 53 Pa. 411; *Adams Express Co.* v. *Schlessinger*, 75 Pa. 256.

As to the inference of notice to principal, *Bredig* v. *Dubarry*, 14 Serg. & R. 30, is directly in point.

Where services are requested by a third party for one not connected with him, such request will be ground for an action.

Berry v. *Pusey*, 80 Ky. 166.

This is stronger when it is the case of a father or husband.

Van Valkinburgh v. *Watson*, 13 Johns. 480.

And much greater weight is given to acts of a son who is acting in any capacity for his father than to those of an outsider; *Valentine* v. *Packer*, 5 Pa. 333; so that, even if the agency is narrowed down to obtaining contracts for his father, and not even making them himself in his father's name, which last is certainly inferred, if not proved, the evidence of acts done at the son's request for his father in furthering and obtaining these contracts—acts which Mr. Earnshaw shows were necessary and proper—should have been submitted to the jury, together with evidence of the agent's instructions to plaintiff, especially in view of the fact that the father admits that he knew that his son was receiving services, and speaks freely of his intention and mode of doing business in America.

Foster v. *Berg*, 14 W. N. C. 215.

Mr. **Richard C. McMurtrie,** for defendant in error:

The letters produced were not sufficient to authorize an employment by the son for the father at the expense of the father.

To anyone familiar with the usages of factors of any kind it did seem this was not arguable. I employ a broker to sell my house or iron. Has the newspaper who advertises the property by direction of the broker, or the person employed to post the notices, a claim on me?

It is assumed by the plaintiff in error that the only point involved in the question as to the admissibility of secondary evidence of the contents of the letter was that a party having subpenaed a witness in whose custody the paper is, on proof that it is without jurisdiction, can state his recollection of the contents.

There is nothing on the bill of exceptions to show that there was a proper effort to compel the production of the original. There was no notice to produce the letter—or a copy.

The paper consisted of a letter alleged to contain an agency to hire at the cost of the principal. Such a paper as that was the property of the defendant quite as much as of the agent. It was almost certain that he would have a copy, and quite probable that he could produce the original, if he had any reason to suppose it was wanted.

But the evidence wholly failed to establish the existence of such a letter, so as to lay the foundation for proof of contents.

The existence of the original is not proved but assumed.

Per Curiam:

There is no error in this record. The action of the court in directing the jury to find in favor of the defendant is well sustained by the opinion of the learned judge in overruling the motion for a new trial.

The evidence relating to the letter and its contents was properly rejected.

Judgment affirmed.

Mary HEATH *et al.*, *Plffs. in Err.*,
v.
Joseph SLOCUM.

1. In an **action to obtain possession of land bought at an execution sale,** where the wife of the execution debtor claimed the property as her separate estate, which claim was alleged by the plaintiff to be fraudulent, *held*, that **evidence** offered **by** the **defendants** (the **execution debtor** and his wife) to show that before the plaintiff had become a creditor of the execution debtor the latter had **assigned** the **property to his wife** and had consulted counsel as to the validity of the transfer, should have been **admitted**—it appearing that the **property** had been **acquired with** the **wife's money.**
2. *Held also*, that evidence of any fact or circumstance occurring at the time, showing and explaining the true character of a transfer of the land by the debtor to a third person and by the latter to the debtor's wife, would have been competent; but an **offer seeking to introduce** the **opinion** of such third person as to **the** purpose of the transfers **was properly refused.**
3. Where an offer of evidence as a whole includes **evidence** which is **irrelevant** as well as evidence which would, by itself, be relevant, it is **proper to refuse** the **whole offer.**
4. The defendants claimed that although the land was originally acquired with the wife's money, the deed was made out to the husband; that thereafter he indorsed an assignment to his wife on the deed; that subsequently the husband transferred the property to a third party and such third party transferred it to the wife. *Held*, that the **defendants** were **not precluded from putting in evidence** such original **deed** and the assignment indorsed thereon, **by** the **fact that** an **affidavit** made by the wife in this proceeding **stated that she did not come into possession** and did not claim to hold **under** the **execution debtor** (her husband), **but** that she came into possession **under** the title of such **third party.**
5. If the **husband had** possession of the **wife's money** and used it in the purchase of the property, it would **support** the **wife's title.**

(Argued Feb. 21, Decided March 21, 1887.)

JULY Term, 1886, No. 89, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Clark, *JJ.*

Error to the Common Pleas of Lackawanna County, to review a judgment on a verdict for plaintiff in an action of ejectment. *Reversed.*

This action was commenced by proceedings before an alderman, to obtain possession of land under the provisions of the Act of June 16, 1836, and Supplement of May 24, 1878, brought by Joseph Slocum against Mary Heath and William H. Heath, her husband, said land having been sold to Joseph Slocum on execution sale as the property of William H. Heath and claimed as the property of his wife.

On affidavit filed by Mary Heath, the case was removed to the court of the common pleas, and there tried before HAND, *P. J.* The material facts appear from the opinion of the supreme court.

At the trial, defendants offered to prove by one DeWitt, an attorney at law, that in 1875 he met them in the City of Scranton; that they had with them the original deed from Joseph Fellows for the lot in suit; that upon it there was an assignment from W. H. Heath to Mary Heath; that they asked him whether that was sufficient in law to convey the estate; that he said the more regular and legal way was to convey the property to a third person as trustee, and let him convey it back to Mary Heath.

Counsel for plaintiff objected to the offer as immaterial and irrelevant; and that any conversation between Dr. Heath and his wife and the witness on the stand, in the absence of Joseph Slocum, is not evidence.

The Court: We sustain the objection and reject the evidence. *First assignment of error.*

Counsel for defendants proposed to prove by Miss S. A. Gardner that the purpose of the deed and assignment was to convey the legal estate in the land in question from Wm. H. Heath to Mary Heath, and that the transfer to S. A. Gardner and her assignment was for that purpose.

Counsel for the plaintiff objected to the offer as irrelevant, and they cannot show the intention in any such way; the papers must speak for themselves.

Counsel for defendants: That offer is to be preceded by the offer and admission of the deed.

The Court: We will sustain the objection and reject the evidence. *Second assignment of error.*

Counsel for defendants offered to prove by

A. D. Dean that at the time Dr. Heath signed the note to Joseph Slocum of $6,240, April 7, 1877, he, Wm. H. Heath, was the owner in his own right of real estate, to the value of from $20,000 to $30,000 outside of the land in question in this case, and that at the time the said money was borrowed there were no incumbrances against said property; that the real estate purchased by Slocum on the sheriff's sale on Slocum's judgment was sold for a nominal consideration, and that Joseph Slocum, as the result of the sheriff's sale, has been in possession of property at least to the value of $20,000, and is now the owner of the same. This offer is made for the purpose of rebutting any presumption of fraud in the conveyance of the title to the land in question from Dr. Heath to his wife, or in the perfecting of the title in Mrs. Heath, which Mrs. Heath claims was in her deed; and that at the time the deed was transferred through S. A. Gardner to Mrs. Heath, the property included in the offer was still owned by Dr. Heath.

Counsel for the plaintiff objected to the offer as irrelevant.

The Court: Objection sustained and evidence rejected. *Third assignment of error.*

L. W. DeWitt, Esq., a witness on the stand, was shown the original deed from Joseph Fellows to W. H. Heath for the land in dispute, and counsel for the defendants proposed to prove that the witness saw it in 1875, and the assignment to Mrs. Mary Heath was on the back of it at that time.

Counsel for plaintiff objected.

The Court: We will sustain the objection, and reject the evidence. *Fourth assignment of error.*

It is admitted that the subscribing witness to the assignment on the back of the Fellows deed to W. H. Heath, E. H. Heath, is not a resident of Pennsylvania, and not within the State.

Counsel for defendants offer in evidence now the assignment dated November 20, 1869, from W. H. Heath to Mary Heath of the Fellows deed.

Counsel for the plaintiff objected to the offer as irrelevant.

Counsel for defendants: You admit that it is the signature of Dr. Heath?

Counsel for plaintiff: Yes, sir.

The Court: I don't think this is evidence under her affidavit. We will reject this. *Fifth assignment of error.*

The court charged the jury, *inter alia*, as follows:

"It seems that Mrs. Heath received from her father's estate a considerable sum of money; this is not in dispute. The evidence on this point is clear. Now did she actually purchase this property with her money as her property? She says she did. She further says that the deed was by mistake made to her husband.

"How does she trace her own money into this lot? And how does she show that her husband held this in trust for her? She says she loaned $1,000 to her husband, when at Dalton. She says he paid a part of this back again to her, and that it went into this lot. She afterwards says she paid $1,200 for the lot, which was the consideration mentioned in the deed.

"I do not recollect that she specifically traces the whole of this money into this lot (if the evidence shows it why the jury will correct me if I am mistaken upon that point) except by perhaps a general assertion." *Sixth assignment of error.*

"Now, you heard all her evidence. Does she clearly satisfy you that she put her money into the lot? Does she trace her money into the lot? If she fails to do this, she does not make her title to it: and she must clearly trace the whole of the money into the lot. She cannot mix her money with her husband's and then claim that the lot is hers.

"How does she prove the trust? She says in effect that when her husband brought the deed he was sorry he had it made to him, but if they sold it he could convey it; if not, he could arrange it." *Seventh assignment of error.*

"Under these circumstances does Mary Heath give you the true version of this transaction from beginning to end? Because the whole of it must come before you under all the evidence. If she gave the money to her husband, that is, if she gave it to him as his, then she cannot recover. She must have given him the whole amount of $1,200 for the purpose of buying this lot, and he must have bought it with that money for her." *Eighth assignment of error.*

"Now, was that whole transaction an honest transaction? It is alleged by the defendant that this deed was made simply to carry out the trust of Dr. Heath in favor of his wife.

"The difficulty with this position is that Dr. Heath and his wife did not put it upon that basis, at the time that they made the deed. The attempt was to give the deed the appearance of a purchase and sale for the sum of $5,000, and Mary Heath set this up in her affidavit." *Ninth assignment of error.*

"Your attention has been called to this deed, and the alterations upon it. The alterations upon the deed raise some suspicions in regard to the deed, and they must be clearly proved before the deed is allowed to come in evidence.

"Now all the facts sworn to in regard to this are facts in the case; and they are facts which we leave to you, under all the circumstances, to determine whether the claim set up here is an honest *bona fide* claim." *Tenth assignment of error.*

Defendants' fifth point was as follows:

"There is no evidence of actual fraud on the part of Mary Heath in the purchase and conveyance of said land."

Ans. That, gentlemen, is a question of fact for you under all the evidence. *Eleventh assignment of error.*

Messrs. **H. M. Edwards** and **S. B. Price,** for plaintiffs in error:

The declarations of Mr. and Mrs. Heath before or at the time of these conveyances, expressive of an honest motive in the transaction, were admissible as part of the *res gestæ.*

1 Greenl. Ev. § 108.

On the same principle, the assignment on the back of the Fellows deed of November 20, 1869, should have been admitted.

It is competent for a party to show his acts in carrying out an agreement.

Devling v. *Little*, 26 Pa. 506; *York Co. Bank* v. *Carter*, 38 Pa. 446; *Gilchrist* v. *Bale*, 8 Watts, 356; *Steckel* v. *Desh*, 12 W. N. C. 133.

It is competent to show that the consideration of a deed, which is expressed as pecuniary, was one of kindred or marriage.

2 Washb. Real Prop. 406; *Gale* v. *Coburn*, 18 Pick. 297.

That the consideration expressed in a deed is different from the actual one is of little importance.

McElfatrick v. *Hicks*, 21 Pa. 407; *Stewart's App.* 98 Pa. 384.

Messrs. **Edward N. Willard** and **Everett Warren,** for defendant in error:

If a wife permits her husband to take title to her lands, and to hold himself out to the world as the owner of them, and to contract debts upon the credit of such ownership, she cannot afterwards, by taking title to herself, withdraw them from the reach of his creditors and thus defeat their claims.

Wait, Fraud. Convey. § 305 and cases cited.

In a long line of cases it has been held that to establish a resulting trust the evidence must be clear, explicit and unequivocal.

McGinity v. *McGinity*, 63 Pa. 38; *Nixon's App.* 63 Pa. 279; *Lingenfelter* v. *Richey*, 62 Pa. 123; *Kistler's App.* 73 Pa. 393; *Fricke* v. *Magee*, 10 W. N. C. 50; *Myers* v. *Leas*, 101 Pa. 172; *Buchanan* v. *Streeper*, 12 W. N. C. 434; *Gault* v. *Saffin*, 44 Pa. 307; *Chew* v. *Barnet*, 11 Serg. & R. 392; *Fillman* v. *Divers*, 31 Pa. 429; *Sweetzer* v. *Atterbury*, 100 Pa. 18.

The alleged declarations were not part of the *res gestæ*.

First. Declarations to become part of the *res gestæ* must be those which may truly be said to be part of "the things done."

Second. They must be contemporaneous with the facts to which they relate.

Enos v. *Tuttle*, 3 Conn. 250; *Ins. Co.* v. *Mosley*, 8 Wall. 397 (75 U. S. bk. 19, L. ed. 437) and note; 1 Greenl. Ev. § 108, note.

Fourth. They must not be a narrative of past events.

Declarations of a party in his own favor, not part of the *res gestæ*, are not evidence.

Duvall v. *Darby*, 38 Pa. 56.

A person cannot make evidence in his own favor by his declarations in the absence of the other party.

Levering v. *Rittenhouse*, 4 Whart. 130.

Where there is no ambiguity in a deed parol evidence of the intention of the parties is inadmissible.

Albert v. *Ziegler*, 29 Pa. 50; *Fisher* v. *Deibert*, 54 Pa. 460; *Kirk* v. *Hartman*, 63 Pa. 97; *Martin* v. *Berens*, 67 Pa. 459; *Kline's App.* 39 Pa. 463.

In the absence of proof any acquisition by the wife from her husband is presumed to be a gift, voidable as against subsisting creditors.

Kelly's App. 77 Pa. 236; *Grabill* v. *Moyer*, 45 Pa. 533; *Keeney* v. *Good*, 21 Pa. 355; *Baringer* v. *Stiver*, 49 Pa. 129; *Aurand* v. *Schaffer*, 43 Pa. 363.

It is clearly recognized in equity that where there are suspicious circumstances the party is put upon proof of *bona fides*.

Boyd v. *Dunlap*, 1 Johns. Ch. 479.

Mr. Justice **Paxson** delivered the opinion of the court:

We think it was error to exclude the evidence referred to in the first assignment of error. The defendants below were charged with fraud; and it is familiar law that in such cases the party alleging the fraud is entitled to a wide range of evidence to sustain such charge. This grows out of the difficulty of proving fraud. It is usually secret, and is pursued by intricate and crooked paths. At the same time a reasonable liberality must be allowed to a defendant in his attempt to rebut or disprove such a charge. It is a serious accusation to make, as it affects not only property but reputation as well.

The particular fraud with which the defendants below were charged was an attempt by the defendant William H. Heath to convey the property in dispute to his wife Mary Heath, without consideration, and in fraud of the rights of the plaintiff, who held a judgment against him for $6,240.

Chronology is sometimes of importance. The plaintiff entered a judgment against the defendant William H. Heath, on March 12, 1878, for $6,240, on a note dated April 7, 1877. The defendants conveyed the premises in controversy to S. A. Gardner by deed dated October 11, 1877, for the consideration of $5,000. This consideration was never paid. S. A. Gardner gave William H. Heath her note for $5,000, and on the 25th of November, A. D. 1877, she conveyed the property to Mary Heath; whereupon, her note was surrendered to her. The plaintiff sold the premises on August 9, 1879, under an execution issued upon his judgment against William H. Heath, and bought the same at sheriff's sale. He received a sheriff's deed therefor.

This, without more, would leave the title in the plaintiff by virtue of his purchase at sheriff's sale. But the defendant Mary Heath contends that the property belonged to her; that it was purchased for her by William H. Heath, her husband, acting as her agent, and paid for out of her separate estate, of which she had ample for that purpose; that the placing of the title in her husband's name was a mistake, to which his attention had been called as soon as it was discovered; that he had promised to correct it, or make it right; that in pursuance of said object and for such purpose, the said William H. Heath made an assignment to the said Mary Heath, of said deed, which was indorsed on the back thereof, and dated November 20, 1869; that this deed with the indorsement thereon was submitted to counsel, and his opinion asked as to whether that was the proper mode of conveying the estate; and the defendants were advised that "The more regular and legal way was to convey the property to a third person as trustee, and let him convey it back to Mary Heath;" and finally that the conveyance by the defendants to S. A. Gardner was made for the purpose of putting the title in the said Mary Heath, where she alleged it properly belonged. There was evidence that Mrs. Heath had ample separate estate derived from her father, to pay for the property.

It was under such circumstances that the offer of evidence embraced in the first assignment was made. Surely it was competent for the defendants, when charged with such a fraud as this, to show that, years before the plaintiff had become a creditor of William H. Heath, the latter had assigned the property to his wife, and had consulted counsel as to the validity of the transfer. That the assignment was not recorded does not affect the competency of the evidence; the legal title was out of William H. Heath before the plaintiff entered the judgment against him.

It was not error to reject the offer of evidence referred to in the second assignment. It was an offer to prove by the witness on the stand, Miss S. A. Gardner, that the purpose of the deed and assignment was to convey the legal estate in the land in question from William H. Heath to Mary Heath, and that the transfer to S. A. Gardner and her assignment was for that purpose; to be preceded by the offer and admission of the deed.

We can see no objection to the admission of the deed, and we think it was competent to prove any fact which tended to throw light upon the conveyance to Miss Gardner and from her to Mary Heath. The cross examination of the witness Gardner had left that transaction in an equivocal shape. It shows that the consideration named in the deed had not been paid. Now this conveyance may have been a fraud, or it may have been a bungling way of doing a perfectly lawful thing, that is: the conveying of the title from William H. Heath to his wife, where, according to the theory of the latter, it should have been placed originally; hence, we think that any fact or circumstance occurring at the time, showing and explaining the true character of the transaction, would have been competent evidence. The witness was merely asked for an opinion. What was needed were the facts of the case; from which the jury could judge of the nature of the conveyance.

The third assignment is not sustained. We think it was competent to show that at the time Heath gave the judgment to the plaintiff he was the owner of from $20,000 to $30,000 worth of unincumbered real estate, for the reason that it tended to rebut the allegation of an intent to defraud creditors. But it was accompanied by an offer to show the extent and value of other real estate purchased by the plaintiff under his execution. This was not relevant to the issue trying; and as the evidence was offered as a whole it was not error in the court to reject it. There is sometimes peril in overloading an offer of evidence.

We sustain the fourth assignment. It was competent, in rebuttal of the alleged fraud, to show by the witness, L. W. DeWitt, Esq., that he had seen the deed from Joseph Fellows to William Heath, with the assignment to Mary Heath indorsed thereon. This was in 1875, about two years before the plaintiff loaned his money to Heath. What has been said in regard to the first assignment renders a further discussion of this point unnecessary.

We also sustain the fifth assignment. The deed referred to, with the assignment to Mary Heath indorsed thereon, should have been admitted in evidence. This would seem to be obvious from what has been already said. The court rejected it as inconsistent with the affidavit of Mary Heath made in the proceeding before the justice, to obtain possession under the Act of Assembly. In that affidavit she said that she did not come into the possession of the premises, and did not claim to hold the same under the said William H. Heath, the defendant in the execution, but that she came into possession under the Gardner title derived from the said William H. Heath before the date of the plaintiff's judgments, etc. If the property belonged to Mrs. Heath, as claimed by her, she might well have made such an affidavit; and if the Gardner conveyance was an honest transaction, although a clumsy one, it would be harsh to hold her to such a rule as this. We think the deed should have been admitted.

The sixth, seventh, eighth, ninth and tenth assignments allege error in the charge of the court, and are not sustained. Some stress was laid upon those portions of it which refer to the question whether the money of Mary Heath was traced into the purchase of this property. That she had the means to do so was not seriously disputed. This is not sufficient, however. It is not enough to have the means; they must be actually applied to the purchase. If, however, her husband had her money in his possession, and he used it in the purchase of the property, it would support her title. When a wife allows her husband to act as her agent in the care and investment of her money, no presumption of a gift arises. On the contrary, if he invests it in real estate and takes the title in his own name a resulting trust arises in her favor.

The eleventh assignment is not sustained. The question of actual fraud could not have been properly withdrawn from the jury.

Judgment reversed and a venire facias de novo *awarded.*

APPEAL OF Richard WISTAR *et al.*

1. Where the **title of all parties** is **set forth in** the petition for **partition, and** it appears therein that the dispute respecting it has been **adjudicated,** and in consequence the tenants in common are in joint possession, the mere denial of the tenancy and right of partition is **not** enough to require the court to **suspend proceedings until another trial of** the **right of some of** the **parties.**
2. Not having denied the **facts averred in** the petition, they are taken as admitted by the appellants. They **must point out** some **defect in** the **petition** or aver their own title or adverse possession **to justify** the **court to refuse to proceed in** the **partition.**
3. In such proceeding a **plea** may be **treated as an answer;** the rules do not permit filing a plea.
4. An **appeal** does **not lie from a decree awarding** an **inquest;** and the court is not bound to stay partition because of the entry of an unauthorized appeal.

(Argued Jan. 19, Decided March 28, 1887.)

JULY Term, 1886, No. 198, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Green, *JJ*:

Appeal from a decree of the Orphans' Court of Philadelphia County, ordering a sale on petition for partition of land. *Affirmed.*

In February, 1886, a petition for partition was filed by Lewis A. Scott, guardian and next friend of Alexander H. Scott, a minor, John M. Scott and Lewis A. Scott, Jr., which alleged that Richard Wistar, late of the City of Philadelphia, died in June, 1821, seised in fee of a certain lot of ground called Prospect Hill (describing it), being a portion of the premises which the said Richard Wistar, deceased, purchased from George Clymer and wife, having first made his last will and testament dated February 24, 1816, which was duly proved June 25, 1821, and registered in the office of the register of wills, for the City and County of Philadelphia; wherein he devised and bequeathed the said premises as follows:

"Item. I do hereby give and devise unto my said daughters, Catharine and Sarah, all that my lot or piece of land called Prospect Hill, containing about six acres and a half, and all the buildings and improvements thereon, * * * together with the appurtenances, to hold to them for and during all the term of their natural lives and the life of the survivor of them; and from and immediately after the decease of the survivor of them, I give the same unto the male issue then living of my said son Richard, their or his heirs and assigns in fee; but if no such issue shall then be living, in such case I give the same unto all the children of my said daughters, Catharine and Sarah, and my said son Richard, their heirs and assigns in equal parts, according to the number of them."

That said Catharine Wistar died leaving her sister, Sarah Wistar, surviving; and that the said Sarah Wistar died September 25, 1866.

That the male issue of testator's son Richard, living at the time of the death of Sarah Wistar, were his sons Richard Wistar and William Lewis Wistar, also John M. Scott, Lewis A. Scott, Jr., and Alexander H. Scott, a minor, sons of Lewis A. Scott and his wife, Fanny W., daughter of the testator's son Richard, and Richard W. Hopkinson, son of Dr. Joseph Hopkinson, deceased, and his wife Sarah W., daughter of said testator's son Richard, which said Sarah W. Hopkinson, after the death of said Dr. Joseph Hopkinson, intermarried with James M. Gillilan.

That the said Richard W. Hopkinson died intestate December 30, 1881, leaving no issue or brothers or sisters or descendants, but leaving a widow, Lillie Hopkinson, and leaving his mother, the said Sarah W. Gillilan, in whom, under the Intestate Act, his estate vested.

That said real estate, upon the decease of Sarah Wistar, passed under said will to the petitioners and Richard Wistar, William Lewis Wistar and Richard W. Hopkinson, as male issue of the testator's son Richard in equal undivided sixth parts.

That said Lewis A. Scott, was duly chosen and appointed guardian of the said Alexander H. Scott, May 29, 1880.

That the said Richard and William Lewis Wistar conveyed, without the consent of the petitioners or of Richard W. Hopkinson, a portion of the said premises, being a triangular lot of ground, to Samuel K. Haines by deed dated October 1, 1868.

That by divers mesne conveyances, etc., all of Samuel K. Haines' title under said deed passed to Servetus Supplee, who is now in possession of two undivided one sixth parts of said triangular lot.

That each of the petitioners is now in possession of his undivided one sixth in the whole of the said first above described premises, which possession was delivered to your petitioners, by the sheriff under writ of *habere facias*, etc., issued out of court of common pleas No. 1, in an action of ejectment, of March Term, 1882, No. 58, against said Richard Wistar and William Lewis Wistar, and others. (See *Wistar* v. *Scott*, 105 Pa. 200.)

And the said James M. Gillilan and his said wife, the said Sarah W., in right of said Sarah, are now in possession of one other undivided sixth part of the first above described premises, which possession was delivered to said James M. Gillilan and said Sarah W., in right of said Sarah W., by the sheriff under writ of *habere facias*, etc., issued out of court of common pleas No. 3, in an action of ejectment of March Term, 1882, No. 579, against said Richard Wistar and William Lewis Wistar and others, subject to the interest of said Lillie Hopkinson, widow of the said Richard W. Hopkinson, under the intestate laws, in said one undivided sixth part thereof.

That said Richard Wistar is now in possession of one other undivided sixth part thereof, with the exception of the triangular lot above described.

That the said William Lewis Wistar is now in possession of one other undivided sixth part thereof, with the exception of the triangular lot above described.

And that the said Servetus Supplee is now in possession of two undivided one sixth parts of the above described triangular lot of ground conveyed to said Haines, as aforesaid. Jacob Dowler is tenant from year to year (paying rent) of petitioners and of Richard Wistar, William Lewis Wistar, James M. Gillilan and wife, of a certain other portion of the premises. William T. Dowler and Jacob W. Dowler are tenants from year to year (paying rent) of petitioners and of the said Richard Wistar and William Lewis Wistar, James M. Gillilan and wife, of a certain other part of the premises. All the other portions of the premises are vacant lots.

No partition of the said real estate has been had, and your petitioners are desirous to have partition thereof, in accordance with the Acts of Assembly in such cases made and provided.

In pursuance of the prayer of the petition the court awarded citations to issue to all the parties, which were duly served.

James M. Gillilan and Sarah W., his wife, in right of said Sarah W. Gillilan, filed an answer to the petition, and for cause why the inquest in partition prayed for should not be awarded, assigned the following reasons:

1. Because, by one and the same proceeding, the petitioners have sought to accomplish partition of two parcels of property held in different shares and by different parties.

2. Because the petitioners have recited and set out in their petition as parties to the proceedings, Jacob Dowler, William T. Dowler and Jacob W. Dowler, whom they aver to be mere tenants from year to year of portions of the premises whereof partition is sought to be

made, and that the said three Dowlers, or any of them, have no such interest in the premises as to entitle them or justify their being made parties to the proceedings.

Servetus Supplee filed an answer to the petition, and for cause why the inquest in partition prayed for should not be awarded assigned the following reasons:

1. Because by one and the same proceeding, they, the said petitioners, have sought to accomplish partition of two parcels of property held in different shares and by different parties.

2. Because the writ of ejectment against Richard Wistar and others in the Court of Common Pleas No. 1 of Philadelphia County, March Term, 1882, No. 58, recited in the petition, was not against respondent, who is in possession, claiming adversely to petitioners, and is not averred in said petition as having been against this respondent, and that the said alleged writ of possession was not against this respondent, and respondent's possession was not disturbed thereunder.

Richard and William L. Wistar filed the following:

"Richard Wistar and William Lewis Wistar served with a citation in the above matter, come into court and, for a plea to said petition, say:

"That they deny that the said petitioners are tenants in common with these respondents, of the premises in said petition mentioned, or any part thereof; and these respondents deny the right of the said petitioners to said property, or any portion thereof, or to have partition made of said property, or of any part thereof, as prayed for in said petition, these respondents claiming to hold the real estate in said petition described, not already by them conveyed, to the exclusion of the petitioners."

Ledden D. Garrison, a citizen and resident of the State of New Jersey, filed the following plea:

"That by indenture dated March 30, 1886, he has become seised and is entitled, for the term therein named, to all the interest of Richard Wistar and William Lewis Wistar, the defendants, in and to all the premises described in the petition filed in the above case.

"That the said Richard Wistar and William Lewis Wistar were not at the time of the filing of said petition, nor have they since been, nor are they now, tenants in common, nor is this respondent (claiming their estate as aforesaid) tenant in common with the petitioners in this case or with any of them, or with any other persons in the premises in said petition mentioned or in any part thereof.

"And this respondent denies the right of the said petitioners to said property or any portion thereof, or to have partition made of said property or of any part thereof, as prayed for in said petition.

"And this respondent claims to hold the real estate in said petition described to the exclusion of the said petitioners, and, in maintenance of his right therein, has brought his action of ejectment against said petitioners and others."

In the court below HANNA, *P. J.*, delivered the following opinion:

If the seisin of testator was denied, and respondents claimed to hold adversely, it would be proper to stay proceedings until the question of title be determined; it being well settled that in such case ejectment is the proper remedy, and not partition. *Ell's Est.* 6 Pa. 457; *McMasters* v. *Carothers*, 1 Pa. 324; *Flaherty's Est.* 5 Phila. 477; *Law* v. *Patterson*, 1 Watts & S. 184.

But here no such bar is interposed. Nor does any dispute arise as to the heirship of the parties. Had this entered into the controversy, the court has ample jurisdiction to determine it. *Davis' Est.* 9 W. N. C. 380.

Neither is the objection that the proceedings are defective by reason of petitioners including in the petition two separate parcels of property held in different shares and proportions and by different parties, instead of filing a separate petition for an inquest as to each parcel of land, valid and sustainable.

If the effort was to make partition of land held by petitioners and respondents and their vendees, under different and distinct titles, the objection would be applicable, for in such case the proceedings must be separate. *Snyder's App.* 36 Pa. 166.

But here all the parties claim under one and the same title, viz.: that of testator; and the respondents as coheirs, with their vendees by different conveyances, and tenants, may be properly joined in the same proceedings. *Harlan* v. *Langham*, 69 Pa. 237.

The contrary would be very unfortunate, and would work great practical injustice, as there shown by Sharswood, *Justice*.

As to the plea filed by two of the respondents, this is irregular and not in conformity with the rule of court which provides that "The mode of proceeding in controverted cases shall be by petition, answer, replication," etc. Rule X, § 2.

Even if allowable by the rules of equity practice, which have only been adopted "so far as they are applicable to the practice and proceedings of this court," it is defective from the absence of an affidavit that it is not for delay.

Nor does it deny the title set up by the petitioners, but that they are tenants in common with the respondents.

This is a conclusion of law, and in no wise affects the title of the testator, under whom all parties claim.

For this reason alone the plea is bad.

But respondents also claim to hold the lands, not already conveyed by them, "to the exclusion of the petitioners."

But no facts or circumstances are set forth, nor any evidence given, showing how and by what means they claim the exclusive possession.

They do not set up adverse possession, nor facts from which it may be presumed. As said by Rogers, *Justice*, in *McMasters* v. *Carothers*, *supra:* "An adverse holding by one tenant in common, for any length of time, however short, previous to the institution of an action of partition, will bar a recovery in such form of action; for ejectment and not partition is the proper remedy against a person holding adversely."

But this is neither alleged nor proved; and therefore the plea is additionally defective. Treating it as an answer, insufficient and defective, for the reasons given, it must be overruled.

It is urged by other respondents that lessees for a term of years are improperly made parties. But this is proper and necessary. A lessee or tenant has an interest in the land, is entitled to notice of the proceedings, and will not be prejudiced by a partition to which he is not a party. *Duke* v. *Hague*, 15 W. N. C. 353; 107 Pa. 57.

Where persons are included, who have no interest in the title with the petitioners, and such joinder cannot affect the title of the respondents, the irreguluarity is immaterial. *Barclay* v. *Kerr*, 1 Cent. Rep. 558.

On the other hand, if parties proper to be included are omitted, the correct practice is to apply to the court for leave to intervene and be made party to the proceedings; not to obtrude upon the record, without leave or notice to the other parties interested.

In this case a stranger to the record, and claiming as a vendee of two of the respondents, to hold all their interest in and to the premises sought to be divided, and by deed subsequent to the filing of the petition, has also filed a plea. But this cannot be recognized. It is irregular, in violation of good practice, and must be stricken off.

For the reasons stated, no sufficient ground for refusing the inquest is shown. And upon the facts contained in the petition, not properly denied nor contradicted, the petitioners are entitled to an inquest.

It is accordingly granted, as appears from the decree which counsel will prepare.

A decree was accordingly entered, dismissing the petition as to Servetus Supplee, and the premises claimed by him; and striking off the plea of Ledden D. Garrison, it having been filed without leave of court; and "having considered * * * the answers (therein denominated pleas) of Richard Wistar and William Lewis Wistar," awarding an inquest to make partition of the residue of the land in the petition mentioned between the petitioners, Alexander H. Scott, John M. Scott and Lewis A. Scott, Jr., and the said Richard Wistar and William Lewis Wistar and Sarah W. Gillilan, wife of James M. Gillilan, and Lillie Hopkinson, widow, etc., according to their several and respective shares as set out in the said petition.

An inquest was accordingly issued.

Ledden D. Garrison thereafter filed a petition for leave to intervene, which set forth: that he is a citizen of the State of New Jersey; that Richard and William Lewis Wistar, by indenture duly executed, etc., bearing date March 30, 1886, leased to petitioner all that tract of land called "Prospect Hill," for a term of six years, beginning March 30, 1886; that since the execution of said indenture the petitioner has been informed of the petition, by Lewis A. Scott, *et al.*, for partition of said land; that petitioner has not been made a party to said proceedings in partition, although he claims to have the actual and exclusive possession of the land therein described, and to hold the same adverse to the petitioners named; that no notice of the citation issued by the court in such proceeding was ever given to the petitioner; and that an inquest of partition was awarded therein; that petitioner is a party in interest entitled to absolute and exclusive possession (of the land in said petition described) for the term of years aforesaid; that his lessors are seised of the entire and absolute estate in fee of the land leased, and that neither the lessors of the petitioner nor the petitioner derive title through, from or under any of the petitioners in said petition named, but in their own exclusive right; and that petitioner denies that the complainants in said petition are in lawful possession thereof, or have any right to the possession thereof, but that he has a good right and is entitled to hold the possession thereof for said term of years, against all and every person or persons whomsoever; and petitioner prays that by an order of this court he may be allowed to come in and be made a party defendant with the other defendants therein named.

The court granted a rule to show cause why said Garrison should not be allowed to come in and be made a party defendant.

Answers to the petition of Garrison were filed by James M. Gillilan and Sarah W., his wife, and by Lewis A. Scott, which denied that the lease was taken by Garrison in good faith and asked for an examination of the circumstances under which it was taken, and an examiner was duly appointed by the court.

Thereafter a return of inquest was made; and on motion of attorneys for the petitioners the same was confirmed and the court granted a rule upon parties to show cause why the real estate or such purparts or parcels as should not be accepted and taken at their valuation should not be sold. This order was duly served; and thereupon Garrison filed a petition and an answer thereto which alleged the previous appointment of the examiner; that said examiner had not yet filed his report; and objected to the consideration of the said rule and to all actions in the inquest proceedings until said Garrison's right to intervene should have been determined by the court.

On the same day Richard and William Lewis Wistar filed an answer alleging that they had previous to the return of the inquest, appealed from the order awarding the inquest; and that a *certiorari* from the supreme court was duly served on the clerk for removal of the record in the case; and submitting that pending said appeal and *certiorari* no proceedings could be had under the inquest, and no action should be taken upon the rule to accept or refuse the purpart or parcel of land.

July 17, 1886, an order awarding a sale was entered, and Richard and William Lewis Wistar took this appeal therefrom, assigning as error: 1, the action of the court in striking off the appeal of Richard and William Lewis Wistar; 2, in awarding the inquest; 3, in proceeding with the partition pending the appeal from the award of inquest; 4, in awarding the order of sale.

Messrs. **William Gorman** and **T. Carroll Brewster,** for appellants:

The allegation in appellants' plea: that they did not hold as tenants in common with the petitioners, was sufficient to make up an issue.

The court below has seen proper, without trial of the disputed questions of fact, to award an inquest. The right of the petitioners to demand partition should have been first established.

The appellants chose to deny the petitioners' right and title by filing a plea containing averments to that effect. That they had the right to do this without going into the particulars of their case by an answer is undoubted.

Wilkin v. *Wilkin*, 1 Johns. Ch. (N. Y.) 111 (1814); *Lewis* v. *Pratt*, 2 Whart. 81 (1836); *Law* v. *Patterson*, 1 Watts & S. 184; *McMasters* v. *Carothers*, 1 Pa. 325.

Messrs. **John M. Scott** and **J. Howard Gendell**, for appellees Scott *et al.*:

Appellants' plea was not stricken off. It was Garrison's plea which the court struck off, because filed by a stranger, without leave.

The only objection made to the award of the inquest is that the title is denied; but the title depends upon the facts, and none of these is disputed or questioned.

The cases cited by the appellants are not in point.

Lewis v. *Pratt*, 2 Whart. 81, was a petition for partition on the basis of an intestacy. The respondent set up, not only that he claimed the whole of the land, but that he claimed it under a devise, etc., and that he was in actual possession thereof.

Law v. *Patterson*, 1 Watts & S. 184, and *McMasters* v. *Carothers*, 1 Pa. 325, were cases of land held and occupied adversely.

The authority of the orphans' court to make partition is higher than that of a court of chancery. That court is for the decision of questions of equity; and where purely legal questions arise, it will send the parties to law and retain the bill in the meanwhile; but the right to make partition in the orphans' court being given by statute, the right to determine all preliminary questions is likewise given.

Davis' Est. 9 W. N. C. 380, 479; *Kiegel's App.* 12 W. N. C. 179; *Smith's Est.* 2 Del. Co. Rep. 428; *Erisman's Est.* 8 Lanc. Bar, 169; *Church's App.* 17 W. N. C. 541; Freeman, Partition, § 425.

The third error assigned is proceeding with the partition pending the appeal from the award of inquest.

Appellants have not argued this assignment. We have shown in our counter statement that there was no such appeal, but that the appeal is in the Supplee matter.

Independently of this, no appeal lies from the award of the inquest.

Gesell's App. 84 Pa. 238. See also *Cristy & Burk's App.* 48 Legal Int. 251.

Such an unauthorized appeal may be treated as a nullity and the proceedings may go on.

Robinson v. *Glancy*, 69 Pa. 89-93.

Mr. **J. B. Townsend**, for appellee Sarah W. Gillilan.

Mr. Justice **Trunkey** delivered the opinion of the court:

The petitioners set forth their title, the names and interest of the tenants in common, and the adjudication resulting in the possession by each tenant of his undivided interest in the land embraced in the partition. Upon the answer of Supplee the lot in his possession, which he claims adversely to the petitioners, was excluded.

The appellants filed a plea denying that they are tenants in common with petitioners, denying the right of the petitioners to any portion of the land, or to have any partition thereof; and they claim to hold the real estate exclusive of the petitioners. This plea is unsupported by averment of any fact at variance with the averments in the petition. It avoids denial that the petitoners are in possession with themselves; it merely asserts their claim. The validity of the will, under which all the parties claim, is unquestioned; the dispute between them was about its construction,

In the ejectment against the appellants the title was adjudicated, and in execution of that judgment the petitioners were put in possession by the sheriff.

Where the title of all parties is set out in the petition, and it appears therein that the dispute respecting it has been adjudicated, and in consequence the tenants in common are in joint possession, the mere denial of the tenancy and right of partition is not enough to require the court to suspend proceedings until another trial of the right of some of the parties to take under the will. Such denial is not persuasive that there is a real dispute. Not having denied the facts averred in the petition for the purpose of awarding the inquest, they are taken as admitted by the appellants. They presented nothing to enable the court to see that they had title to the land, or had adverse possession; a claim to hold the real estate exclusive of the petitioners shows neither title to the whole, nor possession in themselves. They must point out some defect in the petition, or aver their own title or adverse possession, to justify the court to refuse to proceed in the partition.

The ruling of the orphans' court is not inconsistent with the cases cited by the appellants, namely: *Lewis* v. *Pratt*, 2 Whart. 81; *Law* v. *Patterson*, 1 Watts & S. 184; and *McMasters* v. *Carothers*, 1 Pa. 324.

In the first, Lewis averred that the decedent devised the land to him, and that he was seised and had actual possession of said land under the devise, and held the same by virtue thereof. He not only had adverse possession, but *prima facie* a good title; for the court held that the issue which had been tried, only settled that the decedent died intestate as to his personalty. Both title and adverse possession were properly averred in the answer.

It clearly appeared in *Law* v. *Patterson* that Law had adverse possession under claim of title. And in *McMasters* v. *Carothers* a part of the land was in the adverse and exclusive possession of Chalfant. Here the facts are different.

The second assignment alleges error in striking off the plea. But the plea was not struck off. The court remarked its defects, and treated it as an answer, for the reason that the rules did not permit filing a plea, overruling it for insufficiency.

The third assignment is to alleged error in proceeding pending the appeal from the award of inquest. It is denied by the appellees that an appeal was entered from that decree. It matters not if there was; for appeal from a decree awarding an inquest does not lie, and the court was not bound to stay partition because of the entry of an unauthorized appeal.

Decree affirmed, and appeal dismissed, at the costs of appellants.

Eben ROZELLE, *Plff. in Err.*,
v.
Mason C. RHODES, Exr. of Sidney Bailey, Deceased.

Pension money which has been received by the pensioner and deposited by him with a friend for safe keeping, is **subject to attachment in** the **hands of** the **depositary** for the debts of the pensioner, by attachment execution under the Act of June 16, 1836.

(Argued Feb. 21, Decided April 18, 1887.)

JULY Term, 1886, No. 17, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Clark, JJ.

Error to the Common Pleas of Lackawanna County, to review a judgment for the plaintiff on demurrer to a plea in attachment execution. *Affirmed.*

Reported below, 2 Pa. C. C. R. 5.

The facts are stated in the opinion.

Messrs. **J. Alton Davis** and **R. H. Holgate,** for plaintiff in error:

A special deposit of money for safe keeping, to be returned identically as received and not its equivalent in value, is not subject to attachment in the hands of the depositary.

Act of June 16, 1836, §§ 22, 23, 35.

Under the last two sections it has been decided that the following are not liable to seizure in the hands of the depositary under an attachment proceeding: goods left with a warehouseman, the depositor paying storage for the same monthly; *Lennig's App.* 9 W. N. C. 503; horses and carriages left with a livery stable keeper; *Buckner* v. *Croissant*, 3 Phila. 219; *Hall* v. *Filter Mfg. Co.* 32 Legal Int. 420; *S. C.* 2 W. N. C. 154; contents of a safe in a safe deposit company's vaults; *Gregg* v. *Hilson*, 8 Phila. 91; goods deposited in a store; *Good* v. *Obertauffer*, 1 Troubat & H. Pr. p. 947.

The reason assigned is that the goods must be actually pawned or pledged for a debt or liability of the defendant, and that the bailee must have some other interest in the goods than a lien for their keeping.

For a like reason the clause "deposits of money," in the twenty-second and thirty-fifth sections of the Act must be construed to mean a deposit where the depositary becomes the debtor of the depositor, and can only be relieved from civil liability by repayment of the amount received to the depositor.

Any other construction would make a new contract of the bailment. A mere depositary being only answerable for ordinary care would only be liable for the loss, theft or destruction of the money received by him, occasioned by his gross negligence. If such a deposit is subject to attachment in his hands, then, immediately upon the service of the attachment, the depositary would become liable for the value of the money so attached in his hands, although subsequently lost, stolen or destroyed without any negligence on his part, and notwithstanding he may have kept it with the greatest care. Nor can he relieve himself from this liability in any manner. He cannot pay it to the defendant, because prohibited by the attachment; he cannot pay it to the attaching creditor, because the defendant may have a valid defense; he can only hold it, and hold it insuring its safe keeping: for if it be decided to belong to the attaching creditor, he must satisfy his debt; but if to the debtor, he must return the identical money received.

Such, however, was not the original contract. The depositary contracted to use ordinary care and only to be answerable for gross negligence. No act of a third party, although done through the medium of legal machinery, can enlarge his undertaking or increase his liability. Again; a special depositary contracting for the safe keeping of a sum of money is liable criminally for its conversion to his own use, while a general depositary is only liable for the debt.

If proper process was issued and money deposited with a naked bailee for safe keeping, to be returned as received, is subject to attachment, the present money is not attachable, being the identical money paid to defendant below as a pension by the United States.

Section 4747, Revised Statutes of the United States, provides as follows: "No sum of money due or to become due to any pensioner shall be liable to attachment, levy or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."

Subsequent enactments of the United States clearly show that it is the intention of the United States in awarding pensions to award them for the use, maintenance and support of the pensioner, free and protected from seizure for any previous debts of the pensioner and from the assignments or pledges extorted from the pensioner by importunities or by his necessities.

The courts of common pleas of this State, where the question has arisen, have, so far as evidenced by reported cases, uniformly held that pension money in the possession of the pensioner is exempt from seizure.

Moore v. *Marsh*, 16 W. N. C. 239; *Clark* v. *Ingraham*, 39 Legal Int. 393; *Blood* v. *Taylor*, 2 Chester Co. Rep. 493.

The following cases, frequently cited as establishing the contrary doctrine, are not in point.

In *Hadsall* v. *Clark*, 2 Chester Co. Rep. 493, cattle bought with pension money having been seized and sold under execution, the defendant brought trespass against the sheriff, but the court, while holding that the sheriff was not liable, said: "Whether the section (4747) should be construed as protecting pension money from seizure after it comes into the hands of the pensioner * * * it is not necessary that we should decide."

In *Minnick* v. *McDonald*, 1 Pa. C. C. Rep. 191, pension money deposited in a bank, all used by pensioner except $300, for which the bank gave a negotiable interest bearing certificate, was held attachable because "When the fund was deposited in bank and the certificate taken it had lost its distinctive character. The bank was the debtor of the defendant."

In *McCalla* v. *Brennan*, 14 W. N. C. 513, a pension draft was deposited in bank and cash credit given therefor, and checks were drawn against the fund. An attachment execution issued, was served on the garnishee but not on the defendant, and after judgment against the garnishee, payment by the garnishee and satisfaction of judgment, on a rule taken by the defendant to open judgment, it was held that the judgment having been marked satisfied could not be disturbed. There the pensioner had received his pension money, loaned it to the bank as a general deposit and drawn checks against it, and in the language of *Minnick* v. *McDonald*, "It had become a debt due from the bank."

All of these cases decide simply that after pension money has been received and the pensioner has converted the same into other property, invested the same at interest, or taken other securities for it, the proceeds are subject to legal seizure.

Pension money in the possession of the pensioner is not attachable.

Folschow v. *Werner*, 51 Wis. 85; *Eckert* v. *McKee*, 9 Bush (Ky.) 355; *Burgett* v. *Fancher*, 35 Hun (N. Y.) 647; *Stockwell* v. *Nat. Bk. of Malone*, 36 Hun (N. Y.) 583.

Kellogg v. *Waite*, 12 Allen, 530, was begun before the passage of the Act of 1866, which was subsequently re-enacted without change in the Revised Statutes as section 4747; the only Act then applicable to the attachment of pension money being, as stated by *Judge* Hoar, the Act of 1838, which only applied to pensions granted by that Act, and the ruling of the court was: "It seems when this pension was paid to the agent, who is now summoned as trustee, there was no provision of law to exempt it from attachment."

In *Spelman* v. *Aldrich*, 126 Mass. 113, the pension money was deposited in a bank to the credit of the wife.

In *State, Jardain*, v. *Fairton Sav. Fund Asso.* 44 N. J. 376, money was deposited in bank subject to check; in *Cranz* v. *White*, 27 Kan. 319, it was deposited with other money in bank and from time to time drawn against by check before attachment.

The case of *Friend* v. *Garcelon*, 77 Maine, 25, does contain the doctrine claimed for it, pure and simple, viz.: that although the pensioner is protected from having his money seized until it gets into his actual possession, yet as soon as he gets it, he can have no benefit from it. It can be immediately seized and taken away from him.

Messrs. **Harding & Frear,** for defendant in error:

The demurrer to the defendant's plea admitted the facts set forth in the plea, but did not admit the argument contained in the plea: that there was not a deposit of money.

Armstrong v. *Comrs. of Allegheny Co.* 37 Pa. 280.

Under the thirty-fifth section of the Act of June 16, 1836, there are three occasions for attachment execution: 1, in the case of a debt due to defendant; 2, when defendant has deposited money; and 3, when goods or chattels are pawned, pledged or demised. It is not necessary that money should be pawned, pledged or demised to make it subject to attachment process.

The cases relied on by counsel for plaintiff in error, viz.: *Lennig's App.* 9 W. N. C. 508; *Buckner* v. *Croissant*, 3 Phila. 219; *Gregg* v. *Hilson*, 8 Phila. 91, and *Good* v. *Obertauffer*, 1 Troubat & H. Pr. p. 947, N. 10, are not in point, because they are cases of goods pawned or pledged and not of money deposited.

A deposit is a naked bailment of goods, to be kept for the bailor without recompense, and to be returned when the bailor shall require it.

Rapalje & Lawrence, Law Dic. p. 375.

The half pay of an officer of the government is not liable to be taken by his creditors; but when the pay has reached the beneficiary and lost its distinctive character it is to be governed by the direction of the law.

Elwyn's App. 67 Pa. 367.

Section 4747, R. S. U. S. reads as follows: "No sums of money due or to become due to any pensioner shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."

The language of the Act limits its operation to the time when the money is received by the pensioner. Why should it be strained by construction to operate after it reaches its destination? The object of the statute is to give the pensioner full control and possession of his pension. When this is secured to him the protection ceases. The argument, once pension money always pension money, is not a good one.

Congress cannot control the pension money after it has reached the beneficiary; he can pay his debts with it if he so wishes, or he can keep it in his pocket out of the reach of his creditors; but if he puts it within the reach of his creditors, it rests on no different footing than money earned by labor for his neighbor. The term pension money means money in the control of the government which is due a pensioner. Its character of pension money ceases when it reaches the pensioner.

"The question is whether this provision furnishes any protection to or exemption of the money after it comes into the pensioner's hands. A careful examination inclines us to the conclusion that it does not. The meaning of the section seems to be that the protection is extended so long as the money remains in the pension office, or its agencies, or is in course of transmission to the pensioner. It is money due or to become due, and not money collected that is protected by the law."

Friend v. *Garcelon*, 77 Maine, 251.

Pension money is not protected by the statute, after it reaches the hands of the pensioner.

Triplet v. *Graham*, 58 Iowa, 136; *Webb* v. *Holt*, 57 Iowa, 712; *State, Jardain*, v. *Fairton Saving Fund Asso.* 44 N. J. Law, 376: *Spelman* v. *Aldrich*, 126 Mass. 113; *Cranz* v. *White*, 27 Kan. 319; *Kellogg* v. *Waite*, 12 Allen, 530.

The New York cases of *Burgett* v. *Fancher*, 35 Hun, 647, and *Stockwell* v. *Nat. Bank of Malone*, 36 Hun, 583, relied upon by plaintiff's counsel were decided under the New York Code.

Mr. Justice **Clark** delivered the opinion of the court:

On the first day of May, 1885, Mason C. Rhodes, executor of the last will and testament of Sidney Bailey, deceased, entered a judgment in the Court of Common Pleas of Lackawanna County, against Eben Rozelle, for debt, $100 with interest and costs; on the next day he issued an attachment execution thereon, with clause of *scire facias* to Isaac F. Tillinghast, garnishee. The writ was served on the defendant, and all debts, deposits, etc., due or owing the defendant in the hands of the garnishee, were levied and attached in satisfaction of the judgment.

On June 27, 1885, the defendant filed a special plea, in substance as follows: that the defendant has no money, goods, effects, or merchandise in the hands of Tillinghast, the garnishee, except the sum of $800, which he received from the United States, as a pension for the loss of his son, while in the military service of the Government, during the War of the Rebellion; that the money attached is the identical money so received, and that it is in the hands of the garnishee for safe keeping only; that it is not held by the garnishee as a pledge, pawn, loan or deposit to be returned in kind, or in gold, silver or legal tender money of like amount, but in the identical money left in his custody.

The defendant's contention is, first, that the money is not subject to seizure in any form of legal procedure; and second, that if it is liable to be taken in execution for the defendant's debts in any form, it is not subject to seizure on an attachment execution. The answer of the garnishee is to the same effect, and the questions for consideration here are raised upon a rule to show cause why judgment should not be entered against the garnishee on his answers, and upon a demurrer to the defendant's plea.

The defendant, after issue joined on the demurrer without leave, added the pleas of *nil debet*, payment with leave, etc.; but the cause was disposed of in the court below, and argued here, solely upon the demurrer.

Is the money subject to seizure for the debts of the defendant under legal process in any form? Section 4747 of the Revised Statutes of the United States provides as follows: "No sum of money due or to become due to any pensioner shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."

The money which is exempted from legal seizure, under this section, it will be observed, is particularly designated; it is "any sum of money due or to become due to any pensioner." This refers of course, to money due or becoming due from the pension department; it is not pretended that the language of the statute can have any wider application than this. The further provision is that such money shall not be liable to levy or seizure, under any process in law or equity, "whether it remains with the pension office or any officer or agent thereof." It is very plain that the $800, in the hands of Tillinghast is not "money due or to become due" from the pension department; nor is it money which "remains in the pension office, or in the hands of any officer or agent thereof."

It is money, which, some time previous to the attachment, had been paid to the pensioner, and which when paid to him "inured wholly to his benefit;" it was his money, he could dispose of it as he pleased.

The exemption provided by the statute, upon any fair and reasonable construction, will only protect the fund while in course of transmission to the pensioner; after that it is liable to seizure as other money. Some analogy was intended, we think, to the rule of law which prevails as to the fees and salaries of public officers, which, as long as they maintain their distinctive character, have always been held not liable to be taken by creditors, under any form of process, by levy, sale, attachment, or sequestration. *Davis* v. *Duke of Marlborough*. 1 Swans. 79; *Rundle* v. *Scheetz*, 2 Miles, 330; *Hutchinson* v. *Gormley*, 48 Pa. 270.

Therefore in *Elwyn's Appeal*, 67 Pa. 367, the half pay of an officer of the Government was held not to be liable to seizure by creditors; but when it had actually reached the beneficiary, and had lost its distinctive character, when as money it was in a proper sense a distributable fund, lying in the hands of the law, it was held to be governed by the direction of the law.

The precise question, it is true, is one of first impression in Pennsylvania, no case which rules it having been brought to our notice.

In *Friend* v. *Garcelon*, 77 Maine, 25, however, the exact question has been fully considered and decided. *Chief Justice* Peters, of the Supreme Judicial Court, in passing upon this point, says: "The question is whether this provision furnishes any protection to, or exemption of, the money, after it comes into the pensioner's hands. A careful examination inclines us to the conclusion that it does not. The meaning of the section seems to be that the protection is extended, so long as the money remains in the pension office, or its agencies or is in course of transmission to the pensioner; it is money due or to become due that is protected by the law."

Spelman v. *Aldrich*, 126 Mass. 118; *Cavanaugh* v. *Smith*, 84 Ind. 380; *Faurote* v. *Carr*, (Ind.) 6 West. Rep. 281; *State, Jardain*, v. *Fairton Sav. Fund & Bldg. Asso.* 44 N. J. Law, 376; and *Cranz* v. *White*, 27 Kan. 819, although differing in some respects from the facts of this case, are substantially to the same effect.

But, assuming that the money was liable to seizure, to satisfy the defendant's debts, was it the proper subject of an attachment execution, so that Tillinghast might be charged as a garnishee? It is contended that "deposits of money," in the twenty-second and thirty-fifth sections of the Act of June 16, 1836, must, in analogy to the principle announced in *Lennig's Appeal*, 9 W. N. C. 503, be construed to be such as constitute the relation of debtor and creditor, between the depositary and the depositor. In order to have a complete understanding of this question, a reference to the provisions of the Act of 1836 becomes necessary.

Prior to 1836 the goods and chattels, lands and tenements only, of the defendant were liable to be taken in execution upon a judgment; stocks in incorporated companies held by him, it is true, were made liable to seizure and sale under the Act of March 29, 1819. With this exception, however, the general provision of the law was as stated.

By the twenty-second section of the Act of 1836, however, it is provided that in addition to stocks owned by the defendant in any body corporate, "deposits of money, belonging to him, in any bank or with any person or body corporate or politic, and debts due to him, shall be liable, like other goods and chattels, subject to all lawful claims," etc.; and by the twenty-third section, "goods, or chattels pawned or pledged by the defendant, as security for any debt or liability, or which have been demised, or in any manner delivered or bailed for a term," are declared to be "liable *to sale* upon execution, as aforesaid, subject nevertheless," etc.

The thirty-fifth section of the same Act provides, however, that in the case of a debt due to the defendant, or of a deposit of money made by him, or of goods and chattels, pawned, pledged or demised, as aforesaid, the same may be attached and levied, in satisfaction of the judgment, in the manner allowed in the case of a foreign attachment; in which case the writ shall contain a clause of *scire facias* to the garnishee, etc. See *Wray* v. *Tammany*, 13 Pa. 394; *Gochenaur* v. *Hostetter*, 18 Pa. 414; *Strouse* v. *Becker*, 44 Pa. 206.

While, therefore, all the goods and chattels of the defendant, whether they have been previously "pawned, pledged or demised, as aforesaid," or not, are liable to seizure and sale on execution under a *fi. fa.*, it is only such goods and chattels as have been "pawned or pledged by the defendant, as a security for a debt or liability, or which have been demised or in some manner delivered or bailed for a term," that are liable to an attachment execution; the party in whose possession the goods are must have such a title or interest therein that they cannot be taken from him. *Lennig's App.* 9 W. N. C. 508.

But there is no restriction in the thirty-fifth section to any particular kind or class of debts due, or deposits of money made by the defendant; that section applies in the most general terms to all debts and deposits; and while the twenty-second section provides that such debts and deposits shall be liable, like other goods and chattels, the thirty-fifth section, as was said by *Mr Justice* Woodward, in *Reed* v. *Penrose*, 36 Pa. 239, prescribes that the manner of levying and seizing all such credits and choses in action shall be like that allowed in foreign attachment.

It may be conceded, perhaps, that if the money which Rozelle deposited with Tillinghast had been in the view of the sheriff, and within his power, he might, upon a *fieri facias*, have taken of it, to the amount of his writ; but the money, it must be conceded, was a deposit with Tillinghast; and even if liable to levy upon a *fi. fa.* it was also liable to an attachment in execution in his hands.

In disposing of the rule and the demurrer we must of course assume the truth of the facts which the defendant and the garnishee have set forth in the plea and answer, respectively; but we are not bound to accept their legal conclusions. A deposit, properly so called, is a naked bailment, and exists where one of the contracting parties gives something to the other to keep, who is to do so gratuitously and obliges himself to return it, *in individuo*, when he shall be requested. When one deposits money with another for safe keeping, the latter to return not the specific money, but an equal sum, the transaction is also called a deposit, but it is an irregular deposit. Bouvier, Law Dict. *Deposit.*

Now the transaction between Rozelle and Tillinghast was undoubtedly a deposit of money, plain and simple; the money was left with Tillinghast for safe keeping, to be returned, not in money of like amount, but in the identical money deposited; and it is of no consequence that the garnishee in his answer, and the defendant in his plea, deny that it was a deposit, as by the admitted facts it was plainly nothing else.

It is true that a depositary is held to the exercise of ordinary care only; but when he becomes the depositary of a fund, he assumes that relation under the law as it exists, and thereby subjects himself to the chances that it may be attached in his hands for the depositor's debts; and if he thereby incurs a larger measure of responsibility, it is but the legitimate consequence of his own voluntary act.

Upon a careful examination of the whole case, we find no error in this record, and the judgment is affirmed.

Allen CRAIG *et al.*, Committee of the Carbon County Law Library, *Plffs. in Err.*,
v
William LILLY *et al.*, Exrs. of the Estate of Charles Albright, Deceased.

1. An **Act directing that certain fines,** amercements, penalties and forfeited recognizances, shall **be paid to a committee** to be appointed by the court of common pleas and subject to its control, for the establishment and maintenance of a **law library, does not** by implication and in the absence of express words **create a corporation.**
2. A **bequest to such a law library** is a bequest to a mere inanimate thing, having no capacity to receive a gift, and **is** therefore **void.**
3. Under the facts in this case, *held*, that even if the library were a charity, the gift would be defeated by the Act of April, 1855, because the **will** in which it was contained was **made within thirty days of** the **testator's death.**

(Argued March 9, Decided April 18, 1887.)

JANUARY Term, 1887, No. 336, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Carbon County, to review a judgment for the defendants in a case stated. *Affirmed.*

The case stated was as follows:

That Charles Albright died at his residence in the Borough of Mauch Chunk, County of Carbon, State of Pennsylvania, on the 28th day of September, A. D., 1880, leaving to survive him his wife, Naomi E. Albright, and that in his last will and testament, dated the 18th day of September, A. D., 1880, among other bequests made the following:

Fifth. "I give and bequeath to my beloved wife my law library for and during her natural life, and after her death to the Carbon County Law Library, its successors and assigns."

That said Naomi E. Albright, wife of Charles Albright, deceased, died November 9, A. D., 1884.

The Carbon County Law Library was established by Act of Assembly, approved the 9th day of April, A. D., 1868, P. L. 776, a copy of which Act is hereto attached (marked A) and made a part of this case.

If the court should be of the opinion that the Carbon County Law Library has no such existence under the Act of Assembly hereinafter cited (marked A) as would entitle it to take under the clause of said will above cited, or that the bequest to the Carbon County Law Library, contained in the clause of the will of Charles Albright, deceased, above cited is void under the provisions of section 2 of the Act of Assembly, approved the 26th day of April, A. D., 1885, P. L. 332, a copy of which section is hereto attached (marked B) and made a part of this case; and that said Library is the property of the estate of Charles Albright, deceased, then judgment to be entered for the defendants in this case; but if the court should be of the opinion that said bequest is not void, and that said Library is the property of the Carbon County Law Library, then judgment is to be entered for the plaintiffs in this case, the costs to follow the judgment and both parties reserving the right to sue out a writ of error thereon.

A. No. 720. 1868, P. L. 776.

An Act relative to the establishment of a Law Library in the County of Carbon.

Section 1. *Be it enacted*, By the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, that all fines, amercements and penalties imposed by the courts of Carbon County, and all recognizances declared forfeited by said courts, which under the existing laws are not payable to the Commonwealth of Pennsylvania for its own use are hereby directed to be paid to the committee hereinafter named for the establishment and maintenance of a law library, to be kept in the court house of the said county, for the use of the Court and Bar thereof.

Provided, however, That the provisions of this Act shall not extend to any moneys which, under existing laws, are payable to the public school fund or funds for school purposes.

And provided further, That this Act shall not be construed to impair or affect any claim for costs or for damages to which any person may, under existing laws, be entitled to out of such forfeited recognizances for injuries sustained by such person by the commission of the crime or misdemeanor, on account of which such recognizances may have been given.

Section 2. The money thus arising shall be expended from time to time under the direction of a committee composed of three resident members of the Bar of said county to be appointed by the court of common pleas of said county, at the next term immediately after the passage of this Act; said committee to continue until the next succeeding first day of January, and the said court shall annually, at the last term of said court in each year, appoint said committee to serve from the first day of January then ensuing for one year, or until their successors are chosen; *Provided*, That said court shall have the power to fill any vacancy which may occur in said committee by reason of death or otherwise.

Section 3. The said court shall from time to time adopt such rules and regulations as may be necessary or expedient for the proper use and preservation of said library, and shall require said committee annually, at the last term of said court in each year, as well as at other times, when it may be deemed expedient to present to the court a detailed account in writing of their doings, showing the condition of the library, number of volumes and such other information as may be required, together with a statement of all moneys received or expended by them during the year, which report shall be inspected by the court and remain open to exceptions until the first day of January then next ensuing, after which, if no exceptions are filed, the same shall be filed away among the archives of said library, and all funds and property belonging to said library in the hands of said committee shall be immediately handed over to their successors, which duty may be enforced in case of default by attachment or otherwise as the court may direct.

Section 4. The county commissioners of said county are required, as soon as practicable, to designate a room in the court house of said county for said library, from which the books of said library shall not be removed, except by order of the court in term time, or in accordance with the rules and regulations adopted as above directed; and the clerk of the court of quarter sessions is required to prepare within ten days after the close of each term of said court, two certified lists of all recognizances forfeited during said term, one of which lists he shall deliver to the committee aforesaid and the other to the district attorney of said county; and it shall be the duty of said district attorney to proceed forthwith to collect the amounts thereof and pay the same to the said committee.

Section 5. All laws inconsistent herewith be, and the same are, hereby repealed.

Elisha W. Davis, Speaker of the House of Representatives.

James L. Graham, Speaker of the Senate.

Approved, the 9th day of April, A. D., 1868.
John W. Geary.

B. No. 347. 1855, P. L. 332.

An Act relating to corporations and to estates held for corporate, religious and charitable uses.

Section II. That no estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person in trust for any religious or charitable uses, except the same be done by deed or will, attested by two credible, and at the same time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary thereto shall be void, and go to the residuary legatee or devisee, next of kin or heirs according to law; *Provided*, That any disposition of property within said period *bona fide*, made for a fair, valuable consideration shall not be thereby avoided.

Approved, the 26th day of April, A. D., 1855.
James Pollock.

The court entered judgment for the defendants, and this was *assigned as error*.

Messrs. **Allen Craig, Frederick Berto-**

lette, and **L. H. Barber,** for plaintiffs in error:

The Act of Assembly establishing the Carbon County Law Library creates a corporation or body politic. "There are some persons and associations, who have a corporate capacity only for particular, specified ends, but who can in that capacity sue and be sued as an artificial person. These bodies are termed quasi corporations. Yet, as it is not essential to a corporation that it should be vested with all the usual powers of corporations, but only that it should be clothed with perpetual succession and be recognized by the law as an artificial person, such bodies are really corporations."

Sharswood's Bl. Com. Bk. 1, Vol. p. 1. 469, note 1.

When it manifestly appeared from the different clauses of several local Acts of Parliament that conservators of a river navigation should take land by succession and not by inheritance, although they were not created a corporation by express words they were so by implication; and that being so, they were entitled to sue in their corporate name.

Conservators of River Tone v. *Ash*, 10 Barn. & C. 349.

A corporation is a legal institution, devised to confer upon the individuals of which it is composed, powers, privileges, and immunities which they would not otherwise possess, the most important of which are continuous legal identity and perpetual or indefinite succession under the corporate name, notwithstanding successive changes by death or otherwise in the corporators or members of the corporation.

1 Dillon, Mun. Corp. 91.

In the creating of a corporation the law does not seem to require any set form of words to be made use of, as *incorporo, fundo, erigo*, etc., but any words equivalent will be sufficient.

2 Bac. Abr. p. 438.

If the King grants lands to the men or inhabitants of D. *hæredibus et successoribus suis* rendering rent for anything touching these lands, this is a corporation but not to other purposes.

2 Bac. Abr. p. 439.

A legislative Act which authorizes the judges of a particular court to take bonds to themselves in their official capacity, held to confer on them as to such bonds a corporate character.

Abb. Dig. Corp. p. 364, § 92.

There is no particular form of words requisite to create a corporation. A grant to a body of men to hold mercantile meetings has been held to confer a corporate capacity. A grant of lands to a county or hundreds, rendering rent, would create them a corporation for that single intent, without saying, to them and their successors.

2 Kent, Com. p. 276, 11th ed. 320; *Denton* v. *Jackson*, 2 Johns. Ch. 325.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its own creation confers upon it, either expressly or incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual.

Dartmouth College v. *Woodward*, 4 Wheat. 636 (17 U. S. bk. 4, L. ed. 659).

A corporation is a franchise, possessed by one or more individuals with the capacity of perpetual succession and of acting as a single individual.

2 Kent, Com. p. *368, 11th ed. 308.

Succession is a corporate franchise, by which property passes from predecessor to successor, as it does from ancestor to heir, by inheritance. Neither are particular words necessary to create the corporation; a public grant of corporate privileges is, *per se*, an incorporation to give the capacity of enjoyment according to the grant; as, to the inhabitants of a town, to have *guildam mercatoriam*, which unites them by the franchise and makes them as a natural person for the purpose. And as the only thing for which a charter is necessary is to grant the franchise of succession, its actual enjoyment and exercise is, *per se*, evidence that it was by lawful and competent authority.

Magill v. *Brown*, Bright. Rep. 370, 371.

"The King's creation may be performed by the words '*creamus, erigimus, fundamus, incorporamus*,' or the like. Nay, it is held that if the king grants to a set of men to have *guildam mercatoriam*, a mercantile meeting or assembly, this is alone sufficient to incorporate and establish them forever."

1 Bl. Com. p. 474.

The Legislature may create a corporation without requiring conformity to the usual mode of organization known to the common law.

Penobscot Boom Corp. v. *Lamson*, 33 Am. Dec. 656.

It cannot be questioned that no particular form of words is ever required to constitute a corporation. It was so successfully held in the *Case of Sutton's Hospital*, 10 Coke, Rep. 30, and is so laid down in Kyd on Corporations; 2 Kent, Com. 27; Roll. abr. title, *Corporations*, F. 1; *Bow* v. *Allenstown*, 69 Am. Dec. 501.

Wherever it is apparent that the intention of the Legislature will be defeated if certain parties are not found to possess corporate powers, they will be held to be created a corporation.

Dyer, 100 A; *Russell* v. *Devon*, 2 Term Rep. 672; *Stebbins* v. *Jennings*, 10 Pick. 183; *North Hempstead* v. *Hempstead*, 2 Wend. 109; *Bow* v. *Allenstown*, 69 Am. Dec. 501.

Any body of persons capable of acting as one man, and in a single name fixed by law, having succession, is in some sense a corporation.

Louisville etc. R. R. Co. v. *County Ct.* 62 Am. Dec. 449.

The Act of Assembly incorporates the Carbon County Law Library by implication. The grant of the Legislature to the Committee of the Law Library and their successors, for the purpose of establishing and maintaining a library, evinces such a purpose and imposes such a burden as can only be exercised and carried out in a corporate capacity.

So corporations may exist by implication. If there be granted by the State to individuals such property, rights or franchises, or imposed upon them such burdens, as can only be properly held, enjoyed, continued or borne, according to the terms of the grant, by a corporate entity, the intention to create such corporate entity is to be presumed; and corporate capacity is held to be conferred, so far as is necessary to effectuate the purpose of the grant or burden.

Dyer, 400; *Conservators of River Tone* v. *Ash*, 10 Barn. & C. 349; *Denton* v. *Jackson*, 2 Johns. Ch. 325; *Coburn* v. *Ellenwood*, 4 N. H. 101; *Atkinson* v. *Bemis*, 11 N. H. 46; *North Hempstead* v. *Hempstead*, 2 Wend. 109; *Thomas* v. *Dakin*, 22 Wend. 9; *Stebbins* v. *Jennings*, 10 Pick. 188; Cooley's Bl. Com. Bk. 1, 472, note 4.

A corporation may be created by implication without express words of creation. It was held that, as it manifestly appeared that the conservators were to take lands by succession and not by inheritance they were a corporation by implication, although not created so by express words.

2 Bac. Abr. 440; 2 Kent, Com. 270, note E, 12th ed.

Direct words are not necessary to constitute a corporation. Incorporation may arise by necessary implication from the language of a legislative Act.

Mahony v. *State Bank*, 4 Ark. 620; *Murphey* v. *State Bank*, 7 Ark. 57; Abb. Dig. Corp. 363, § 84.

When the Crown grants lands to "the Men of Islington" at a certain rent, this incorporates them, for otherwise the grant could not be fully carried into effect.

Rapalje & Lawrence, Law Dict. 299.

An Act of the Legislature, which requires the supervisors of a county to erect a portion of a county into a levee district, to exercise corporate powers, makes a levee district so organized by the supervisors a corporation, and a public corporation, even if the Act in terms does not declare it a corporation.

Dean v. *Davis*, 51 Cal. 406.

Nor is it necessary that the name of the corporation should be expressed in the Act of incorporation; it may implied from the nature of the Act.

The name may not only be expressed in the patent but implied in the nature of the thing. As, if the King should incorporate the inhabitants of Dale with power to choose a mayor annually, although no name be given, yet it is a good corporation by the name of the mayor and commonalty.

Field, Corp. 32, § 24.

When a corporation is created a name is always given to it; or supposing none to be actually given, a name will attach to it by implication; and by that name alone it must sue and be sued and do all legal acts, although a very minute variation therefrom is not material.

1 Potter, Corp. p. 17, § 12.

A corporation may have a name only by implication.

Sharswood's Bl. Com. Bk. 1, 475, note 4.

But although a corporation must have a name, yet that must be understood to be either expressed in the patent, or implied in the nature of the thing.

2 Bac. Abr. p. 441.

The King's creation may be performed by the words, "*creamus, erigimus, fundamus, incorporamus,*" or the like, says Blackstone as already cited. The Act of Assembly creates by the word establish. The definition of *fundamus* is we found, we establish; of *erigimus*, we erect, we found.

Andrews & Ainsworth's Lat. Lex.

To establish is defined by Webster and Worcester, to found, to institute. We have, then, in the Act of Assembly the same creative and operative words, necessary, in law, to form a corporation.

The court below not only held that the Carbon County Law Library was not a corporation and incapable of taking the bequest, but it also held that the library and committee thereof, as established by the Act of Assembly, was not such an association of individuals, or entity, as was competent to take the bequest.

"In reviewing the judicial history of this State it is believed that there will be found no decision that an incorporation is necessary to give to any association of individuals the capacity of taking and enjoying an estate in perpetuity, either of the assumed name of the society, or by trustees, for their use."

Magill v. *Brown*, Bright. Rep. 352.

Our contention is that the Carbon County Law Library is either a corporation, or else a legal entity, or association of individuals directed and governed by a committee, and, in either case, capable of taking the bequest.

Messrs. **Freyman & Kiefer,** for defendants in error:

By the terms of the case stated the question is brought down to the existence of the plaintiff in error as given to it by the Act just cited. The title of the Act declares that it is "An Act Relative to the Establishment of a Law Library in the County of Carbon." It is not an Act to incorporate.

The first section provides that the fines, etc., are to be paid to a certain Committee "for the establishment and maintenance of a law library, to be kept in the court house of said county, for the use of the Court and Bar thereof." Could a corporation be kept in the court house? Clearly, the library spoken of in the first section is a mere collection of books for the use of the Court and members of the Bar. But it is argued that by the terms of the Act perpetual succession is given to the Committee. But what provision is made for this succession? The court shall appoint, and shall fill vacancies in, said Committee. In corporations of every style and class the succession is regulated by the members or corporators themselves, and not by an outside party.

The affairs of the alleged corporation are not to be controlled by the Committee, as assumed by the plaintiffs in error. The third section of the Act provides for the adoption of rules and regulations by the court. The power of governing its own affairs is one of the fundamental rights of a corporation. It is to act as one person, although composed of many. The many are to speak and act as one. In the regulation of the affairs of the alleged corporation the Committee are powerless, except to expend the funds paid to them, and then only for one specified object, viz.: the purchase of books. And even in this they are acting under the court, and as its agents or officers. The Committee act in all matters relating to the law library, so far as they have power to act, simply as the agents or officers of the court, and must account to the court. All this is repugnant to the idea of a corporation. It cannot be pretended that the court is the corporation; and yet a careful perusal of the Act shows that the court is the governing power to look after the affairs of the law library. It has exclusive control over the same as well as over the committee.

The full control given to the court excludes any presumption that any incorporation was intended, and shows that the intent of the legislative mind was to provide for a collection of law books for the use of the Court and Bar of Carbon County, and for the preservation and care of these books.

It is not necessary that there should be a corporation or body politic in order to accomplish the purposes and objects of the Act; and therefore none can be said to have been created by implication or inference. All the objects of the Act can be attained without the creation of a corporation. The object was the collection and preservation of a lot of law books; and provision is made for the accomplishment of this end. All necessary restrictions and safeguards are thrown around the property when collected; and it does not follow, as in many of the cases cited, that a corporation is to be implied from the necessity of the case. Therefore the cases cited by the counsel for plaintiffs in error have no application to this case.

The Carbon County Law Library has no such legal existence under the Act as to enable it to take under the will.

In *Magill* v. *Brown*, Bright, Rep. 347, it is held that a devise to an unincorporated religious association is good, but the decision rests upon the ground that it is a bequest to a charitable use.

Methodist Church v. *Remington*, 1 Watts, 219; and *Witman* v. *Lex*, 17 Serg. & R. 90, are to the same effect.

This bequest can only be sustained, if at all, upon the ground that it is a charitable bequest, and then it is at once met by section 11 of the Act of April 26, 1855, P. L. 332, which declares a bequest to a charity void if the testator died within one calendar month after making his will.

No particular form of benevolence is necessary to constitute a charity. General Albright certainly gave his library to the Carbon County Law Library from motives of charity, intending thereby to benefit the members of the Bar of Carbon County.

In *Pickering* v. *Shotwell*, 10 Pa. 27, the devise was of the residue of the testator's estate to "be applied, under the direction of the Monthly Meeting of Friends of Philadelphia for the northern district, as a fund for the distribution of good books among poor people in the back part of Pennsylvania, to the support of a free school, or institution, in or near Philadelphia." The court after reviewing several decisions says: "In Pennsylvania such a bequest would not be the less charitable, though the books were scientific."

A voluntary association of individuals, who have contributed funds for a public purpose, will be regarded as a charity, and a court of equity in this State has jurisdiction over the parties. Funds supplied by the gift of the Crown, or from the Legislature, or from private gift, for legal, general or public purposes, are charitable funds, to be administered by a court of equity. Therefore, where money is given by will, gift or voluntary contribution of individuals, to a voluntary, unincorporated hose company or fire association formed for general and public usefulness, without individual emolument or advantage, it is a charity over which a court of equity will exercise control. *Thomas* v. *Ellmaker*, 1 Pars. Eq. Cas. 98.

Mr. Justice **Clark** delivered the opinion of the court:

Upon a careful examination of this case, we are of opinion that the legacy created in the will of the late Charles Albright, deceased, in favor of the Carbon County Law Library, could only be sustained as a gift or legacy to charitable uses. The Carbon County Law Library has no corporate existence; it is not even an unincorporated society; it has no membership, no constitution or contract of association, in fact, no organization. The library of books is, of course, a thing inanimate, belonging perhaps to the county, and, as the learned judge of the court below suggests, has no more capacity to receive a legacy or a bequest than the court house itself.

It is unnecessary, however, for us to decide whether or not the objects and purposes of the law library, as contemplated in the Act of April 9, 1868, constitute a charity, for if the testator's provision be a bequest to a charitable use, it is defeated by the Act of April 26, 1855 (P. L. 332), and if not, it is void for want of a proper person to receive it.

The judgment is affirmed.

ROAD IN BENZINGER TOWNSHIP.

In a statutory **proceeding for** a **public road,** the **court** of quarter sessions **should** either **unqualifiedly approve or disapprove** the road laid out and returned; it cannot approve a part only.

(Argued Feb. 16, Decided March 21, 1887.)

JANUARY Term, 1887, No. 36, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Certiorari to the Quarter Sessions of Elk County, to review a decree confirming in part a report of viewers laying out a public road. *Reversed.*

In pursuance of a petition filed by divers inhabitants of the Township of Benzinger, setting forth that they labored under inconvenience for want of a public road or highway to begin in a public road leading from Kaul's Mill to George Reuscher's at a point near Erhardt Gahn's barn and to end in a public road leading from Swissmont to Rathbun at a point near where said road crosses West Creek in said township, the court appointed viewers who duly made a view of the proposed road and reported in favor of opening it.

Exceptions to such report were filed by certain citizens and taxpayers, as follows:

1. That the road is entirely unnecessary and would benefit no one but the owners of a small sawmill on the line of said road, and their em-

ployees; that said sawmill will in all probability be abandoned in about two years and the road be of no further use.

2. That there is now a good public road leading from St. Mary's to Swissmont, which answers all purposes of travel and traffic between said points, which said public road is about the same distance between St. Mary's and Swissmont as the proposed road would be.

3. That Benzinger Township is now in debt to the amount of over $8,000 and is unable to raise money to build the roads already granted by your said court, and that the granting of the proposed road would for this, if no other reason, be burdensome to the inhabitants of said township.

Depositions were taken by the parties and after hearing the court made the following order: "Now May 27, 1886, confirmed that the road be opened to a point convenient to the sawmill of Sykes & Caflish and the other part of the road not to be opened until further order of the court. *By the Court.*"

The exceptants took this appeal *assigning as error* the action of the court in confirming only a part of the report of viewers, and in ordering the road to be opened to an intermediate point, instead of confirming or rejecting the whole.

Mr. **Harry Alvan Hall**, for appellants:

The distance between the *termini* of the road laid out as shown by the plot attached to the report of viewers is three miles and 4,585 feet. Situated along the proposed line of the road one mile and 2,831 feet from the eastern *terminus* at Swissmont is the sawmill of Sykes & Caflish, to which intermediate point the court ordered the road to be opened.

The order is void for uncertainty, if for no other reason, for it does not state from which of the *termini* the road is to be opened to the sawmill of Sykes & Caflish, and consequently it does not appear which end of the road the court intended to open.

The real intention of the order, however, is evidently to grant only a part of the road and to make Sykes & Caflish's mill one of the *termini*, thereby altering the road laid out by the viewers very materially by curtailing it about one half. This the court had no power to do.

Road from Herr's Mill, 14 Serg. & R. 204.

The viewers had no notice of the proposed alteration.

It will be contended that the order of the court was a confirmation of the whole report, and that the portion which refers to the opening of the road was only an exercise of judicial discretion as to how far the road should be opened at this time. The court has no such discretion. The only discretionary power vested in the court regards the confirmation or rejection of the report of viewers; when that is done discretion is at an end.

After an approval of the report of viewers and an order fixing the width of the road the judicial functions of the court have terminated. The court in making an order to open acts merely in a ministerial capacity which could equally well be exercised by the clerk of the courts.

Road to Ewing's Mill, 32 Pa. 282.

The clerk of the court has the same power to issue an order to open that the court has. It will scarcely be contended that the clerk could exercise any discretion in regard to how much of the road should be opened.

The court cannot designate an intermediate point in an order to viewers.

McConnell's Mill Road, 32 Pa. 285; *Road in Lower Merion Township*, 58 Pa. 66.

Mr. **Walter W. Ames**, for appellees:

By the last portion of its order, the court intended to restrict the expenditures in opening the road, for the time being, by keeping it under its control; the court was only exercising judicial discretion as to how far the road should be opened at this time. There was no intention to change the *termini*; these things are shown by the order, which, after stating to what point it should be opened adds, "and the other part of the road not to be opened until further order of this court."

But objection is made that the order is uncertain in not stating which end of the road should be opened; there is little ground for discussion here, as the report states where the road commences and where it ends; and in the absence of other designation it is easily seen that the intention was to open the road from the starting point to Sykes & Caflish's mill.

The appellees do not contend that the court has a right to designate intermediate points in the order to view; it was not done in this case; hence, *McConnell's Mill Road*, 32 Pa. 285, and *Road in Lower Merion Township*, 58 Pa. 66, do not apply.

In the *Road to Ewing's Mill*, 32 Pa. 282, cited by appellant, the court did enunciate the principle that is contended for in this case, in terms applied to the facts in the case then under consideration, that where the report was filed, confirmed and the road ordered opened a certain width, without exceptions, the judicial functions of the court have terminated; but where exceptions are filed within the time required, the court must, necessarily, adjudicate.

Mr. Justice **Trunkey** delivered the opinion of the court:

The exceptions filed by the supervisors of the township had so much merit that instead of simply approving the road as laid out by the viewers, the court confirmed "that the road be opened to a point convenient to the sawmill of Sykes & Caflish, and the other part of the road not to be opened until the further order of the court."

It is suggested by the petitioners that all after the word "confirmed" may be treated as surplusage. But this should not be done in the statutory proceeding for a public road. The court should either unqualifiedly approve or disapprove the road laid out and returned. Unless satisfied of the necessity for the road under the circumstances, the court may refuse approval, notwithstanding the favorable report of the viewers.

After a public road has been laid out, approved and entered on record, the duty of the supervisors begins, which duty is prescribed by the statute. It is not in the province of the court to condition the approval by an order to open an indefinite part convenient to a sawmill, and forbid the opening of the other part until further order. Such a conditioned approval evidences that the court was of opinion that there was no present necessity for the road as laid out. The court cannot approve a part only. If this order be held valid, it is neither more nor less than approval of a part; the order to open the other part may never be made.

The entire road, in the opinion of the court, may be unnecessary; and in that case it matters not that the court should believe a fraction of it necessary, for the road must be considered as a whole.

The order of confirmation, dated May 27, 1886, is reversed.

Thomas JAMES' APPEAL.

To sustain an **order for** the **support of minor grandchildren** under the Acts of June 13, 1836, and April 15, 1857, the record must be regular in form and must show that the quarter sessions had jurisdiction of the party and the subject matter.

2. The **court of quarter sessions** has no **power to** entertain the petition or **make** the **order,** unless the petition is by some one having an interest in the support of the poor person.
3. An **order** for support under these Acts **cannot be enforced by attachment**.

(Argued April 6, Decided April 18, 1887.)

JULY Term, 1886, No. 190, E. D., before Mercur, *Ch. J.*, Gordon, Trunkey, Sterrett, Green and Clark, *JJ.*

Certiorari sur appeal from an order of the Quarter Sessions of Philadelphia County, to review an order of support. *Reversed.*

The facts as they appeared from the record were as follows:

This was a proceeding in the court below to compel Thomas James to support Henrietta and Lizzie James, aged respectively sixteen and thirteen years, on the allegation that they were poor and unable to work, and that he was their grandfather. One Jane Dubois, in no way related to any of these persons or liable for their maintenance, made affidavit, June 29, 1885, that Henrietta James was fifteen, Lizzie twelve, were poor and unable to work, and that they had a grandfather John James, who was able to support them, but would not; whereupon, a citation issued, which, upon hearing, was dismissed by the court, July 17, 1883.

On September 20, 1885, Jane Dubois again made her affidavit that Henrietta James was sixteen, Lizzie thirteen, poor and unable to work, and had a grandfather, Thomas James, able to support them; whereupon, a citation issued to him September 30, 1885, to appear on October 2, 1885, in the Court of Quarter Sessions of Philadelphia to show cause why he should not support them.

On October 2, 1885, an order was made by the court on Thomas James, to pay for the support of Henrietta, and Lizzie James, "to each the sum of $3 per week during their minority, and that he enter security in the sum of $1,000 for the faithful performance of this order."

Thomas James not complying with the order of the court, the said Jane Dubois again made affidavit to the fact of noncompliance; whereupon, the court ordered an attachment to issue, commanding him to pay, and that he stand committed until the same shall be fully paid and complied with.

On June 16, 1886, the court granted a rule to show cause why the order of court, made October 2, 1885, should not be set aside and revoked, which is still pending and undetermined.

These children, at the time said order was made, were not, nor have they ever been nor are they likely to become, a charge upon the City of Philadelphia, as Henrietta, aged eighteen, died in January, 1887, and Lizzie, aged fifteen, has been employed constantly, and has earned and is earning $4 to $5 per week.

On July 19, 1886, *certiorari* issued to the Court of Quarter Sessions for the County of Philadelphia, returnable to the first Monday of January, 1887.

The assignments of error specified the action of the court in entertaining the cause, in making the order for support and in directing the attachment to issue.

Mr. **J. Rich Grier,** for appellant:

The proceeding in the court below, from its inception to its conclusion, to be legal, must be founded upon and executed under the provisions of the Act of June 13, 1836, Pamph. L. 539 to 551, the fifth and sixth sections of which provide that "application must first be made to the overseers of the poor, for support and maintenance, and no person shall be entered on the poor book of any district or receive relief from any overseers before such person, or some one in his behalf, shall have procured an order from two magistrates of the county for the same;" and by the twenty-eighth section it is provided that "The father and grandfather, the mother and grandmother, the children and grandchildren of every poor person not able to work, shall, at their own charge, being of sufficient ability, relieve and maintain such poor person at such rate as the court of quarter sessions of the county shall order and direct, on pain of forfeiting a sum not exceeding $20 per month, should they fail therein, which shall be levied by the process of the said court, and applied to the relief and maintenance of such poor person."

In this case no application was made to the overseers of the poor by the poor person; no order procured, and no petition presented or complaint made to the court by the overseers, by the father, mother, grandfather, grandmother, children or grandchildren, in behalf of Henrietta and Lizzie James for support and maintenance; and all of the proceedings were without authority of law and not according to law; therefore, the order of the court should not have been made.

The court below was not justified in making the order on appellant "to enter security in the sum of $1,000, for the faithful performance of this order," for there is no such authority given the court by any of the provisions of the Act.

Dierkes v. *Philadelphia*, 93 Pa. 270.

Mr. Chief Justice **Mercur** delivered the opinion of the court:

This was a proceeding under the Act of June

13, 1836, and its Supplement of April 15, 1857, P. L. 191, to compel Thomas James to pay for the support of two of his minor grandchildren. The court of quarter sessions made the order prayed for. The making of this order and the method of enforcing the payment of the sums directed to be paid present the errors assigned.

As the Act of Assembly does not authorize any appeal in such cases we cannot review the evidence, but are restricted to an examination of the record only. To sustain the order the record must be sufficiently regular in form, and must show that the quarter sessions had jurisdiction of the party and the subject matter.

The twenty-fifth section of the Act of June 13, 1836, does not state in specific language by whom the application may be made. Other parts of the the same Act sufficiently show that when the application is made by the overseers of the poor, an order must first have been obtained from two magistrates of the proper county, directing them to furnish relief to the poor person named. It is to relieve and support such poor person that the aid of the quarter sessions can be invoked. Until the obligation is imposed on the overseers to furnish relief, they have no interest in such poor person as to authorize them to apply to the quarter sessions under the Act of 1836. Any person having no interest could not make the application.

The Supplementary Act of April 15, 1857, modifies the former Act to this extent: it gives to the quarter sessions jurisdiction to make the order or decree, either on the petition of the overseers of the poor or of any other person or persons having an interest in the support of such poor person or persons, and either with or without an order of relief having been first obtained.

The court has no jurisdiction on the application of any person or authority not designated by this Act. *Wertz* v. *Blair County*, 66 Pa. 16.

It was held in *O'Connor's Appeal*, 104 Pa. 437, that a poor person, who came within the Act imposing upon a relative the liability to relieve and support him, might make the application himself; that he had such an interest in himself that he might make the application under the Act of 1857.

The court of quarter sessions has no power or authority to entertain the petition or make the order, unless the petition is by some one having an interest in the support of the poor person. Such an interest is essentially necessary to give the court jurisdiction. The Act is silent as to the kind or extent of the interest. *O'Connor's App. supra.*

The whole proceeding necessary to give the court jurisdiction is prescribed by the statute. The record must show those facts. In this case they are not shown. There is no averment in the petition that the person making it has any interest in the support of the poor persons named. It follows that the court had no jurisdiction to entertain the application.

The method attempted for the enforcement of the order is not authorized by the statute. The Act of 1836, and in that respect not changed by the Act of 1857, directs the sum ordered to be paid "shall be levied by the process of the said court," and be applied to the relief and maintenance of such "poor person." *Dierkes* v. *Phila.* 93 Pa. 270.

The statute prescribes no other or further remedy for its enforcement. The order, in so far as it directed that Thomas James stand committed until the money be paid, is clear error.

The several assignments of error are, therefore, sustained. Judgment reversed.

NEW YORK.

COURT OF APPEALS.

Le Dette A. BOSTWICK, *Respt.*,
v.
Emily P. BEACH *et al.*, *Appts.*

1. Where **specific performance** is decreed the court will, as far as possible, place the parties in the same situation they would have been in if the contract had been performed at the time agreed upon.
2. The **vendor** is regarded **as trustee of** the **land for** the benefit of the purchaser, and liable to account to him for the rents and profits, or for the value of the use and occupation, and the **purchaser** is treated as the **trustee of the purchase money** unpaid, and charged with interest thereon.
3. The **vendee** also, **having obtained** a **decree for specific performance,** may be **allowed** the **damages** sustained during the pendency of the suit, by deterioration from waste committed by defendant during the pendency of the suit.
4. Where a **decree** was **sought to be opened** for the purpose of letting in the defendant **to claim interest on** the **purchase money**, *held*, that the plaintiff should also be let in to prove the **damages** he claims by reason of deteriorations caused by mismanagement and negligence of the defendant during the pendency of the action.
5. The modified **decree should provide,** in such case, **for** the **ascertainment** and allowance of the **interest** claimed by the defendant, **and** also of the **damages** claimed by the plaintiff.

(Decided April 26, 1887.)

MOTION to settle form of judgment order. The case on the appeal is reported in 5 Central Reporter, 388.

The facts appear from the opinion.

Mr. **Milton A. Fowler,** for appellants.

Mr. **O. D. M. Baker,** for respondent.

Rapallo, *J.*, delivered the opinion of the court:

When this case was before us on the appeal from the interlocutory judgment, it appeared from the findings that the unpaid portion of the purchase money ($10,500) had been tendered to the executors on the first of March, 1882, and that on their refusal to accept the same and deliver the deed, that sum had been deposited by the plaintiff in the First National Bank of Lowville to the credit of the executors, to be paid to them on the delivery of the deed. There was nothing to show that after that deposit the plaintiff had derived any benefit from the use of the fund, and presumptively it had lain idle and unproductive. Therefore the purchaser was not charged with interest on the purchase money.

It is now shown by affidavits that, shortly after this deposit, the fund was wholly or in part withdrawn from the bank by the plaintiff, and we are now asked to add to the modifications directed in the opinion, a further provision charging the plaintiff with interest on the amount so withdrawn.

If the fact had appeared in the case when before us on appeal, this modification would doubtless have been proper, and even now we might find means to make it, if no other facts were shown on the part of the plaintiff raising a counter equity.

But in opposition to the application of the defendants, the plaintiff presents affidavits showing that during the pendency of this action, in consequence of neglect and mismanagement on the part of the defendants, the ditches on the premises have been allowed to be filled up, the buildings to become dilapidated, the water works to go to decay, the fences to be destroyed, and the value of the property to be thus depreciated to an amount exceeding the interest on the unpaid purchase money.

If these facts had appeared, they undoubtedly would have influenced our judgment in respect to allowing interest upon the purchase money, or making some other provision for compensating the plaintiff for the damages alleged to have been sustained. Where specific performance is decreed the court will, so far as possible, place the parties in the same situation they would have been in if the contract had been performed at the time agreed upon; and by the application of the rule of courts of equity, by which things which ought to have been done are considered as having been done at the proper time, the vendor is regarded as trustee of the land for the benefit of the purchaser, and liable to account to him for the rents and profits, or for the value of the use and occupation, and the purchaser is treated as trustee of the purchase money unpaid, and charged with interest thereon, unless the purchase money has been appropriated and no benefit has accrued from it to the purchaser.

But this is not the only manner which the court has adopted to adjust the equities of the parties. For instance, where the subject of the purchase was a leasehold estate in a mill, and the delay of performance of the contract was attributable to the vendor for his failure to show good right to assign his lease, and dilapidations had occurred, he was charged with the expenses of repairs required to put the mill in tenantable condition, and of those which had been incurred for keeping up the machinery until the purchaser could prudently take possession.

And in *Ferguson* v. *Tadman*, 1 Simons, 530, where the estate had deteriorated in value by reason of mismanagement and neglect, during the five years which elapsed between the filing of the bill for specific performance and the decree, the amount of the deterioration, with interest, was ascertained and allowed to the plaintiff out of the purchase money, which had been paid into court.

In *Worrall* v. *Munn*, 38 N. Y. 137, these principles were recognized and the vendee, having obtained a decree for specific performance, was allowed the damages sustained during the pendency of the suit by deterioration from waste committed by the defendant during the pendency of the suit.

If the matter should now be opened for the purpose of letting the defendants in to claim interest on the purchase money, it would be no more than just that the same indulgence should be extended to the plaintiff to let him in to prove the damages he claims by reason of deteriorations caused by mismanagement and neglect. These points appear to be the only ones as to which the parties have been unable to agree in settling the form of the judgment.

From the affidavits presented, it would seem that the damages claimed by the plaintiff would about equal the interest claimed by the defendants; but if the judgment below is modified so as to admit the allowance of interest, it should also be modified so as to admit proof of the damages claimed. If the statements in the affidavits are correct, justice would apparently be done by leaving the matter as it is and confining the modifications of the interlocutory judgment to those directed in the original opinion of this court, which appear to be substantially contained in the modified judgment as proposed on the part of the plaintiff. The details, however, are subject to settlement in the supreme court.

But if the defendants desire to insist upon their claim to be allowed interest and to contest the amount of damages resulting from deterioration and mismanagement, the modified judgment should contain provisions referring it to the referee to ascertain what amount of the sum deposited in the bank was withdrawn by the plaintiff, or subject to his control, and for what length of time, and charging him with interest thereon during that time. The amount of deterioration of the property by reason of mismanagement and neglect, between the first of March, 1882, and the time of plaintiff's obtaining possession should also be ascertained and charged, either to the defendants, as executors, or to the defendant Emily P. Beach, as the equities may appear. She certainly has no reason to complain of any loss she may sustain through this litigation, as it appears to have been caused by her persistent refusal to carry out the contract, which, according to the findings of fact, was intelligently entered into by her, and was a fair contract for the full value of the farm and was beneficial to all concerned in the estate. By this unjustifiable refusal on her part all parties have been subjected to damage, and there is no reason why the loss should fall upon the plaintiff who seems to have been always ready to perform his part of the contract.

It is to be hoped that upon the principles here indicated the counsel for the respective parties may be able to agree upon the form of judgment to be entered; otherwise, it may be settled by the supreme court, and the interlocutory judgment may be modified so as to provide for the ascertainment and allowance of the interest claimed by the defendants; and also of the damages claimed by the plaintiff, at the election of the defendants. If the defendant shall not consent to have the damages ascertained and allowed, the application for the allowance of interest is denied.

All concur.

Charles C. BLAIR *et al.*, *Respts.*,
v.
Patrick LYNCH, *Appt.*

1. The **efficacy of** a **payment to avert** the effect of the **Statute of Limitations** as a bar, resides in the conscious and voluntary act of the debtor, explainable only as a recognition and confession of the existing liability.
2. A **payment** upon a debt, **obtained** from the debtor **through** the pressure of an examination and an order of the court in **proceedings supplementary to execution, is not** such a payment as will, under the provisions of the statute, **revive** the **promise of third person to pay** such **debt,** such payment not being made by any act or agency of the promisor.
3. Whether or not a **payment by** such **promisor** of one half of the debt upon and in consideration of the transfer to him of one half of such debt, was also made and accepted as a payment upon the original promise to be answerable for the whole debt, if not paid by the debtor, was a **question of fact** for the jury.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Fourth Department, affirming a judgment of the Onondaga Circuit on a verdict directed for plaintiffs in an action to recover a balance due upon an alleged loan. *Reversed.*

This action was brought by Charles C. Blair and John W. Truesdell against Patrick Lynch, December 2, 1879. The complaint alleged the following facts:

1. That plaintiffs were partners engaged in the business of brokers in the City of Syracuse.

2. That on or about January 31, 1873, the defendant, as administrator of Andrew J. Lynch, deceased, held a certain bond and mortgage on a salt lot in the Salt Springs Reservation, dated September 7, 1870, executed by Michael and Patrick Slattery to Andrew J. Lynch to secure the payment of $6,000.

3. That on January 31, 1873, defendant, as such administrator, sold and assigned said bond and mortgage to John O. S. Lynch, who, on March 12 thereafter, assigned the same to J. F. and A. Wilkinson as collateral security for the loan of $2,000.

4. That on July 1, 1873, and while this mortgage was held by the Wilkinsons, the defendant, Patrick Lynch, requested plaintiffs to purchase it for him at the price of $4,000 and agreed to pay a commission therefor of $100. July 15 thereafter John O. S. Lynch applied to plaintiffs for a loan of $3,500 on said bond and mortgage. He declined to sell them absolutely, but would assign them as collateral security for such loan, and give the plaintiffs authority to sell the same without notice to him, if the note which he was to give on such loan was not paid at maturity. The plaintiffs communicated said offer to defendant, who instructed them to make the loan on the security of the bond and mortgage and agreed that if John O. S. Lynch failed to pay the loan, defendant would then take an assignment thereof from plaintiffs and pay them the loan and interest and $100 as commission.

July 19, 1873, in pursuance thereof, plaintiffs loaned $3,500 to John O. S. Lynch, and took assignments of the bond and mortgage from both the Wilkinsons and John O. S. Lynch. The assignment from said Lynch was absolute in form but taken with the understanding that he was at liberty to redeem the same after maturity of the note.

5. That the notes given by John O. S. Lynch were dishonored and on being informed thereof, defendant requested plaintiffs to bring suit in their own name and get the demand into judgment, saying that he would then take an assignment of the mortgage and judgment and pay plaintiffs the amount of the loan and interest, costs of the suit, and $100 commission, as aforesaid.

Action was accordingly brought, and after commencement thereof John O. S. Lynch agreed to allow judgment for the sum of $3,200; and on direction of defendant, the plaintiffs accepted said offer, and judgment was entered accordingly.

6. That after obtaining said judgment, at request of defendant, the plaintiffs examined John O. S. Lynch on supplementary proceedings which were commenced in May, 1874, and continued until July thereafter, and plaintiffs realized on such proceedings, and on direction of defendant applied on the balance due on said purchase or agreement, the following sums: August 31, 1874, $101.74; December 31, 1874, $101.74; August 31, 1875, $101.74; December 31, 1875, $101.74; January 31, 1879, $40.

7. That on November 25, 1873, defendant gave to plaintiffs his promissory note for the sum of $1,800, for six months with interest, being one half of said loan and one half agreed commission, which note was paid at maturity. At the same time defendant promised that he would, before maturity of said note, pay the other half and take a full assignment of said mortgage. At the time of giving the note he took an assignment of one half interest in the mortgage. Defendant has from time to time promised, both before and after examination of John O. S. Lynch, to settle up with plaintiffs and to pay them their loan commissions and interest.

8. That on said property on which the mortgage in question was a lien, there were two prior liens, one for $1,000 and the other for $1,800, which were assumed by Andrew J. Lynch, when he took the mortgage in question, all of which was known to the defendant, but unknown to plaintiffs; that the foreclosure of these prior liens was had at the instance of the defendant, who became a purchaser at the sale thereunder, and by such sale the lien of the mortgage held by plaintiffs was cut off and destroyed.

The defendant's answer admitted the first, second and third allegations of the complaint and denied all the other material allegations, and for a further defense pleaded usury and the Statute of Limitations.

It appeared at the trial from plaintiffs' witnesses that November 5, 1873, when defendant gave the note mentioned in the seventh allegation of the complaint, plaintiffs executed and delivered to defendant the following instrument:

"For and in consideration of the sum of $1,800 this day paid by Patrick Lynch, the receipt of which is hereby acknowledged, we hereby sell and assign one half of our interest in the above described bond and mortgage, and hereby agree with the said Patrick Lynch to pay over to him one half of all the moneys hereafter collected upon said bond and mortgage, and said Patrick Lynch is the owner of a one half interest in the said bond and mortgage and hereby agrees to pay one half of all expenses incurred in the collection of the same.

Syracuse, November 25, 1873.

Blair & Truesdell."

The plaintiffs, to avoid the Statute of Limitations, relied upon the payments procured through supplementary proceedings in the action against John O. S. Lynch and the payment of the $1,800 as alleged in the seventh paragraph of their complaint. The plaintiffs' evidence tended to support the allegations in their complaint.

The defendant offered no evidence, but after close of plaintiffs' evidence moved for nonsuit, on the ground that the cause of action was barred by the Statute of Limitations, and that the alleged agreement is void under the Statute of Frauds. The motion was denied, and defendant then requested that the court submit "as questions of fact upon all the evidence in the case, such matters as the court thinks the case turns upon, one being the question as to whether the defendant employed the plaintiffs to purchase the mortgage for him, and agreed to pay them for the same if they did; and the second being as to whether the mortgage became the property of the defendant by virtue of plaintiffs' purchase of the mortgage from John O. S. Lynch."

Plaintiffs moved for the direction of the verdict for them, because there was no question of fact for the jury, on the ground that "There was no dispute upon the evidence upon the main proposition that Blair and Truesdell, as agents for Patrick Lynch, transacted this business and that he undertook to repay to them the amount of the money." The motion was granted and defendant duly excepted. The jury returned a verdict as directed, and judgment was duly entered thereon.

On appeal to the general term this judgment was affirmed, and defendant appealed to this court.

Mr. **Louis Marshall,** for appellant:

I. The court below acted upon the theory that because plaintiffs' witness was not disputed by witnesses, his version of the case was undisputed that there was no question except one of law presented by the evidence. This was, however, clearly error, since it is now well settled that a court or jury is not bound to adopt the statements of a witness simply because no other witness has denied them, or the witness is not impeached.

A witness may be contradicted by circumstances as well as by statements of others contrary to his own, or there may be such a degree of improbability in his statements as to deprive them of credit, however positively made, or he may be interested in the question at issue, and have a motive which would impel him to testify falsely. In all such cases, uncontradicted evidence even is to be submitted to the jury, and may be disregarded by it.

Elwood v. *Western Union Tel. Co.* 45 N. Y. 549; *Kavanaugh* v. *Wilson*, 70 N. Y. 177; *Gildersleeve* v. *Landon*, 73 N. Y. 609; *Koehler* v. *Adler*, 78 N. Y. 287; *Wohlfahrt* v. *Beckert*, 92 N. Y. 490: *Tolman* v. *Syracuse R. R. Co.* 31 Hun, 397.

II. The agreement alleged in the complaint is void by the Statute of Frauds, for the reason that it is either an agreement on the part of the defendant to answer for the debt of John O. S. Lynch, or the purchase of a chose in action of the value of more than $50, no memorandum of which agreement is in writing.

Talmadge v. *Spofford*, 9 Jones & S. 428; *Belknap* v. *Bender*, 75 N. Y. 446; *People* v. *Beebe*, 1 Barb. 379; *Hagar* v. *King*, 38 Barb. 200.

III. The plaintiffs' cause of action did not accrue within six years before the commencement of this action, and is therefore barred by the Statute of Limitations.

An action upon a guaranty accrues when an action against the principal debtor accrues; and payments by persons other than the guarantor are ineffectual to save the bar.

McMullen v. *Rafferty*, 89 N. Y. 456; *Douglass* v. *Howland**, 24 Wend. 35; *Morris* v. *Wadsworth*, 17 Wend. 103.

Wood, in his work on "Limitation of Actions," says on page 325: "Where money is paid for another under such circumstances that the law will imply a promise to repay it, and no time is fixed for its repayment, the right of action accrues at once."

Payne v. *Gardiner*, 29 N. Y. 168.

When money is borrowed and no time for payment is fixed by the contract of loan, the debt is instantly due, and an action may be brought without demand, the bringing of the action being a sufficient demand to entitle the lender to recover. Even if the debt is by the terms of the agreement to be paid on demand, yet no special demand is necessary, the money being due without it.

Norton v. *Ellam*, 2 Mees. & W. 461; *Howland* v. *Edmonds*, 24 N. Y. 307; *Wenman* v. *Mohawk Ins. Co.* 13 Wend. 267.

In order to make a money payment a part payment within the statute it must be shown to be a payment of a portion of an admitted debt, and paid to and accepted by the creditor as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment of more being due, from which a promise may be inferred to pay the remainder.

Wood, Limitation of Actions, § 221; *Foster* v. *Dawber*, 6 Wels. Hurlst. & G. 853.

A part payment is thus placed upon the same footing as an acknowledgment.

Bateman v. *Pinder*, 3 Q. B. N. S. 574.

The following requisites are necessary, in order to give to a part payment the effect of nullifying the Statute of Limitations:

1, The payment must have been made on account of a debt; 2, it must have been made on account of the debt for which the action was brought; 3, it must have been made as a part payment of a greater debt.

Tippets v. *Heane*, 1 Cromp. Mees. & R. 252.

It follows, therefore, that to avoid the statute a part payment or acknowledgment must not only be made under such circumstances as to amount to the admission of the existence of a liability, but there must also be a recognition of a liability to pay, in such a mode as will authorize the inference of a new promise.

Commercial Mut. Ins. Co. v. *Brett*, 44 Barb. 489; *Allen* v. *Webster*, 15 Wend. 284; *Van Keuren* v. *Parmelee*, 2 N. Y. 523; *Shoemaker* v. *Benedict*, 11 N. Y. 176; *Bloodgood* v. *Bruen*, 8 N. Y. 362; *Deyo* v. *Jones*, 19 Wend. 491.

The moneys collected by the plaintiffs from John O. S. Lynch in supplementary proceedings do not constitute payments which destroy the effect of the Statute of Limitations.

The reason of the rule that part payment of a debt enlarges the time within which an action can be brought thereon is that such payment is an acknowledgment by the debtor of his liability for the whole debt; and from this acknowledgment a new promise to pay is implied, dating from the time of the part payment. To bring a case within the reason of the rule the payment must be made by the party to be charged, or by one authorized to make a new promise on his behalf for the residue.

Harper v. *Fairley*, 53 N. Y. 442.

Upon the same principle it has been held that a payment by one of several joint debtors is not sufficient to revive the demand as against the other.

Van Keuren v. *Parmelee*, 2 N. Y. 523.

A part payment by a surety does not revive the demand against the principal, unless made at the express request of the principal.

Winchell v. *Hicks*, 18 N. Y. 558.

Where there has been a voluntary assignment for the benefit of the creditors, a partial payment of the debt by the assignee does not take the case out of the statute, since the act of the assignee in paying a portion of the debt is beyond the control of the assignor, who cannot accompany the payment with a qualification or disclaimer as when made by himself.

Pickett v. *Leonard*, 34 N. Y. 175.

So it has also been held, and for the same reason, that a partial payment by an administrator or executor is not sufficient to revive a demand against the estate.

36 N. Y. 88.

So a payment by an administratrix, out of the assets of the estate, under a decree made by a surrogate, does not amount in law to a promise to pay the balance so as to deprive her of the benefit of the statute.

Arnold v. *Downing*, 11 Barb. 554.

The payment by the assignee of an insolvent, upon a note, under the direction of the insolvent debtors' court was held insufficient to take a case out of the Statute of Limitations as against the insolvent or the other makers of the note.

Davies v. *Edwards*, 6 Eng. Law & Eq. 520.

Messrs. **Forbes, Brown & Tracy,** for respondents:

I. The agreement proved in this case was an original undertaking from defendant to plaintiffs, and not a promise to answer for the debt or default of a third party.

When the leading object of the promisor is to subserve or promote some object of his own the case is not within the statute.

Nelson v. *Boynton*, 3 Met. 396, 400.

When the promise arises out of some new

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*See editorial note at beginning, and digested citations at close of case, in Lawyers' edition. [Ed.]

consideration of benefit or harm moving between the newly contracting parties, it is not within the statute.

Farley v. *Cleveland,* 4 Cow. 434.

An action lies upon a promise made by the defendant upon a valid consideration to a third person for the benefit of the plaintiff.

Lawrence v. *Fox,* 20 N. Y. 268.

If the Statute of Frauds was applicable in this case, defendant is not in a position to avail himself of it, because the agreement has been fully performed, and defendant has had the full benefit thereof.

A party is not permitted to perpetrate a fraud by availing himself of a statute intended to prevent a fraud.

Sherman v. *Scott,* 15 N. Y. Week. Dig. 149.

II. Where parties in interest testify to a series of personal conversations and transactions with the opposite party, making out their alleged claim, and such opposite party fails to produce the evidence directly within his power to explain or contradict the testimony adduced against him, it is not error to refuse to submit to the jury the question of fact established by the testimony.

Lomer v. *Meeker,* 25 N. Y. 361; Starkie, Ev. 846; *Blatch* v. *Archer,* Cowp. 65; Beccaria, chap. 14; Lawson, Presumptive Ev. 120; *The Ville du Havre,* 7 Ben. 328; *Lumley* v. *Wagner,* 1 DeG. M. & G. 604; Wharton Ev. §§ 1266, 1268.

A jury has the right to infer that the evidence of an eye witness to a transaction would not be favorable to a party who voluntarily excluded such witness from testifying in the case.

People v. *Hovey,* 92 N. Y. 560; *Re Laurence,* 15 Fed. Rep. 685; *Rice* v. *Commonwealth,* 102 Pa. 408; *State* v. *Rodman,* 62 Iowa, 456; *Oregon Steamship Co.* v. *Otis,* 100 N. Y. 452, 458; *Gordon* v. *People,* 33 N. Y. 508; *Brooks* v. *Steen,* 6 Hun, 516; *People* v. *Tweed,* 5 Hun, 387; *People* v. *Grimshaw,* 33 Hun, 510; *Schwier* v. *N. Y. Cent. etc. R. R. Co.* 90 N. Y. 564.

Finch, *J.*, delivered the opinion of the court:

If we assume that the learned trial judge correctly decided that the plaintiffs' evidence was sufficient to establish the contract pleaded beyond any necessity for submitting that question to the jury, because there was no direct contradiction of the witnesses; and the circumstances tending to raise doubt or suspicion were more than balanced by the silence of the defendant who might have made an effectual denial (an assumption not above criticism, and as to which we do not all agree), there yet remains a material question which, if not decided in favor of the defendant, should at least have been submitted to the jury.

The Statute of Limitations was pleaded as a defense, and confessedly barred the right of recovery, unless the debt was revived by a payment upon it. So far as such payment is sought to be deduced from the collection by plaintiffs of the sums obtained from John O. S. Lynch, through the pressure of an examination and an order of the court, it is quite clear that the effort must fail. The efficacy of a payment to avert the effect of the statute as a bar resides in the conscious and voluntary act of a debtor, explainable only as a recognition and confession of the existing liability.

But here there was no act of the defendant. He paid nothing to the plaintiffs. The man who did pay was not his agent, or acting or authorized to act in his behalf. The payment which he made was on his own debt to plaintiffs, and not on defendant's contract with them. The very existence of that contract was unknown to him, and the fact of his payments unknown to defendant until after they were made. The debtor paying did so by compulsion, and not in obedience to any direction or request of the defendant. The money paid never belonged to the latter, but passed from the ownership of John O. S. Lynch to that of the plaintiff. Its transfer was in no respect the act of the defendant, and could serve to indicate no purpose or intention of his. One must go outside of the act and busy himself with spoken words and debatable inferences, changing its inherent and obvious character before it can be connected with the defendant; and then it amounts only to a direction that plaintiffs should collect from their debtor a sum due to them and, when that remedy was exhausted, a promise that the defendant would take the security and pay the balance remaining. If those payments operated to reduce the defendant's liability it was not through any act or agency of his, and their existence indicates absolutely nothing as a recognition or admission on his part. They were entirely consistent with a denial by him of any liability whatever and with an utter repudiation of the alleged contract. They might equally have been made if plaintiffs had held the claim in their own right, having no recourse against the defendant, and so open to a complete explanation, in no manner dependent upon any purpose or intention of his. We should infringe a very wise and valuable rule of evidence if we gave to the act of John O. S. Lynch a constructive effect amounting to recognition of a contract by the defendant, the existence of which he could, nevertheless, consistently dispute.

The other payment relied upon was that of $1,800 in exchange for which the plaintiffs executed and delivered to the defendant an assignment of one half of the Slattery mortgage. The consideration for this payment was expressed in writing by the parties concerned, and the terms of that instrument so far from purporting a payment upon the contract pleaded, are on their face and without explanation inconsistent with the existence of that contract. The writing expresses that the payment was made upon a contract of purchase, and in full discharge of that contract. It not only fails to admit that something more might be due or become due, but negatives any such inference. It speaks of the mortgage as being the property of the plaintiffs, and involves the concession that only one half of it became the property of the defendant, and that by a purchase then and there made. Stopping with the written paper, the conclusion is irresistible that the $1,800 was paid upon a contract of purchase made at its date, and not upon a broader one already existing.

But the plaintiffs offer an explanation: having proved a previous agreement, by the terms of which they were to obtain the mortgage for defendant, and hold and enforce the legal title for his benefit, looking to him for direction and for the reimbursement of their unpaid advances, they further testify that the $1,800 was one half of the $3,600 which that contract called for; and that after such payment they demanded of defendant the balance remaining due, which he promised to pay. They then argue that the assignment made was a transfer of the legal title *pro tanto* for the protection of the defendant, and that both the assignment and the payment made were consistent with the contract of agency alleged, and were steps in furtherance and in execution of that principal contract. By that process they seek to show that the payment of $1,800 was made and accepted upon the contract pleaded.

The question is not without its difficulties. It cannot be decided in favor of plaintiffs as a pure question of law. The most that they can reasonably claim is that it raised a question of fact, or a mixed question of law and fact. Adhering to the assumption upon which our reasoning has been founded, that the contract of agency was proved beyond contradiction and to be taken as a conceded fact, we have a case in which two contracts have been proved, upon either of which the $1,800 might have been intended to apply and upon one or both of which it must have been applied. The writing indicates one application; the conversations another.

It does not solve this difficulty to say that the assignment was but an incident in the execution of the principal contract, for the defendant may have intended not to recognize or admit it by a payment upon it, and for that very reason have made a special contract of purchase upon which alone his money should be applied and which only he would recognize. The facts proved admit of conflicting inferences; and it seems to us, therefore, that the question (whether the payment made in form upon the contract of purchase was also made and accepted upon the contract of agency within the intent of the parties) was a question which, under proper directions from the court, should have been submitted to the jury.

The defendant asked to go to the jury upon all the evidence in the case as to such matters as the court should direct; but the request was refused, the court holding that there were no questions of fact and directing a verdict for plaintiffs. To this there was an exception which we think points out error.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except **Ruger,** *Ch. J.*, not sitting.

MANUFACTURERS & TRADERS BANK of Buffalo, *Respt.*,

v.

Harriet M. KOCH, Admrx. of Harry H. Koch, Deceased, *Appt.*

1. *Held*, in an action of **replevin for chattels claimed under a mortgage** which had not been accompanied with an immediate change of possession, **that sufficient evidence of good faith on** the **part of** the **mortgagee** (plaintiff) **was given, to take** the **case to** the **jury** under a charge which correctly stated that it was incumbent on the plaintiff to show that the mortgage debt was just and that the mortgage was made in good faith and without any intent to defraud; a nonsuit was therefore properly refused.
2. Where notice to the mortgagee of **sales of** the **mortgaged chattels by** the **mortgagor and** of the **appropriation of** the **proceeds** by the mortgagor **on his own account** is only evidence from which a previous agreement to permit such sales and appropriation may be inferred, it is not ground for an absolute direction to the jury to find for the defendant in such case.
3. A party may be examined as to his own **intentions and motives** when **a question of fraudulent intent** on his part is in issue; but he cannot be permitted to testify as to the motives or intent of another party.

(Decided April 19, 1887.)

APPEAL from the judgment of the General Term of the Superior Court of Buffalo, affirming a judgment of the Trial Term, on a verdict for the plaintiff in an action for the alleged wrongful seizure of goods. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **Matthew Hale,** for appellant:

There can be no question as to the fraudulent intent of the mortgagors. The intention was to keep the business from interruption, and levy on the judgment obtained by Sutherland.

Plaintiff was not a purchaser in good faith for a valuable consideration. The mortgage was given in renewal of a former mortgage and to secure an antecedent indebtedness.

The plaintiff had notice of the fraudulent intent of the mortgagors, and is therefore not protected by the statute.

The knowledge of the president of the bank acquired in the course of the transaction is the knowledge of the bank.

Holden v. *N. Y. & Erie Bank*, 72 N. Y. 286, 293, 294; *Getman* v. *Second Nat. Bank*, 23 Hun, 498.

The mortgage, not having been accompanied by an immediate delivery and followed by an actual and continued change of possession, is to be presumed to be fraudulent as against creditors; and the fact that there was no such change of possession is conclusive evidence of fraud, unless it was made to appear on the part of the plaintiff, that it was made in good faith, and without any intent to defraud such creditors.

2 R. S. § 5.

The uncontradicted evidence in the case shows that there was an arrangement between the parties to the mortgage, which permitted the mortgagors to remain in possession and to sell the mortgaged property, and use the proceeds for their own benefit.

Edgell v. *Hart*, 9 N. Y. 213, 219; *Griswold* v. *Sheldon*, 4 N. Y. 586, 590; *Potts* v. *Hart*, 99 N. Y. 168.

Proof that a mortgage was given to secure a debt actually owing by the mortgagor does not, as matter of law, disprove the existence of a fraudulent intent on the part of the debtor.

Billings v. *Russell*, 101 N. Y. 226; reversing *S. C.* in 31 Hun, 65.

The court erred in excluding evidence of the knowledge, by the executive officers of the plaintiff, of the fraudulent intent of the mortgagors.

Parker v. *Conner*, 93 N. Y. 118, 128; *Holden* v. *N. Y. & Erie Bank*, 72 N. Y. 286, 293, 294; *Getman* v. *Second Nat. Bank*, 23 Hun, 498.

The court erred in excluding evidence that the mortgage in question was never intended to be enforced, and that the first chattel mortgage was fraudulent.

1 Greenl. Ev. § 467, 468; *Kaufman* v. *Schoeffel*, 37 Hun, 140, 143, 144.

The proposition of the plaintiff that, having taken possession of the goods, before the levy under the execution by defendant, it is immaterial whether there was fraud originally in the mortgage or not, is untenable. Precisely the contrary has been repeatedly held by the courts of this and other States and of the United States.

Dutcher v. *Swartwood*, 15 Hun, 31; approved in *Stimson* v. *Wrigley*, 86 N. Y. 332, 339; *Wells* v. *Langbein*, 20 Fed. Rep. 183; *Chenery* v. *Palmer*, 6 Cal. 123; *Delaware* v. *Ensign*, 21 Barb. 85, 88, 89; *Blakeslee* v. *Rossman*, 43 Wis. 116; *Stein* v. *Munch*, 24 Minn. 390.

Mr. **John G. Milburn**, for respondent:

The court charged the jury that if the mortgage was not executed for the sole purpose of securing the plaintiff's debt, but was executed with the view and purpose of defrauding the creditors of Woodruff & Co., it was void. It also charged that if there was any such arrangement or understanding as the defendant claimed, with respect to the sale of the stock by the mortgagors, it made the mortgage void and the plaintiff could not recover.

The charge of the court was a correct presentation of the law bearing on the case.

Brackett v. *Harvey*, 91 N. Y. 214; *Frost* v. *Warren*, 42 N. Y. 204; *Gardner* v. *McEwen*, 19 N. Y. 123; *Conkling* v. *Shelley*, 28 N. Y. 360; *Potts* v. *Hart*, 99 N. Y. 168.

There was no direct proof that the intention of the mortgage was to defraud creditors, or of an agreement that the mortgagors could go on and dispose of the property as their own. All parties disclaimed any fraudulent intention. Thus the existence of such an intention or agreement was purely a matter of inference from the other facts and evidence in the case; and it was the province of the jury to weigh those facts and draw the inference which they warranted.

Frost v. *Warren*, 42 N. Y. 204; *Gardner* v. *McEwen*, 19 N. Y. 123; *Brackett* v. *Harvey*, 91 N. Y. 214; *Potts* v. *Hart*, 99 N. Y. 168.

It was not error to refuse to charge that "The possession of the Bank by Richardson is not such possession by the Bank as to remove the case from under the statute," the refusal of the charge being a refusal to charge otherwise than had been charged.

Rexter v. *Starin*, 73 N. Y. 601; *Morehouse* v. *Yeager*, 71 N. Y. 594.

A party may not testify to motives and intentions of another party.

Stephen, Dig. Law of Ev. Chase's ed. pp. 126, 127; Whart. Ev. § 508 and cases there cited.

The plaintiff having taken possession before the levy, it is immaterial whether there was fraud originally in the mortgage or not.

Read v. *Wilson*, 22 Ill. 377; *Brown* v. *Platt*, 8 Bosw. 324; See Jones, Chattel Mort. § 178.

Rapallo, *J.*, delivered the opinion of the court:

This action was brought against Harry H. Koch, in his lifetime, as Sheriff of Erie County. He having died after judgment, it was continued against the present defendant as his administratrix.

The cause of action was the taking and conversion by the sheriff of certain personal property which was claimed by the plaintiff by virtue of a chattel mortgage made to it by Lauren C. Woodruff and Alfred B. Benedict, composing the firm of L. C. Woodruff & Co., of the City of Buffalo, to secure certain partnership liabilities of the firm.

The mortgage covered the stock in trade and other chattels of the firm, and was dated the 30th of October, 1884, and duly filed the same day.

The mortgagee took actual possession of the mortgaged property on the 26th of November, 1884, and continued in possession down to the 26th of December, 1884, when it was levied upon and taken from its possession by the sheriff, who justified the taking under two executions issued on the 19th of December, 1884, upon judgments recovered the same day against said firm of L. C. Woodruff & Co., and alleged that the chattel mortgage under which the plaintiff claimed title was not made in good faith, and was in fraud of the creditors of L. C. Woodruff & Co., the mortgagors.

On the trial the question of fraud was submitted to the jury and they found in favor of the plaintiff, who had judgment on the verdict. That judgment was affirmed by the general term, and the defendant now appeals to this court. As no opinion was rendered in the court below we must state our reasons for affirming its judgment.

The first point urged on the part of the appellant is that the trial court erred in refusing to nonsuit the plaintiff. The ground upon which a nonsuit was claimed was, in substance, that the uncontroverted evidence established that the mortgage was fraudulent as against creditors. The evidence on the part of the plaintiff showed that at the time the mortgage was given, October 30, 1884, there was a valid indebtedness on the part of the mortgagors as copartners, to the plaintiff, to an amount exceeding the value of the property mortgaged; and the president of the plaintiff testified that the mortgage was given to secure then existing indebtedness and any that might afterwards arise.

The indebtedness in question arose out of dealings of the firm of L. C. Woodruff & Co., with the plaintiff, which had continued for several years before the giving of the mortgage; and it appeared in evidence that in the spring of 1884 the plaintiff had required security from the firm and they had given it a similar mortgage, but that after the giving of that mortgage the firm had continued in possession of the mortgaged property, and had carried on its business, in the course of which it had sold a large part of the mortgaged stock, and had replaced it by new purchases, which were not covered by the mortgage, and that the mortgage of October 30, 1884, was given with the view of covering such after acquired property.

During the running of the first mortgage and before the giving of the second the plaintiff had made an arrangement with Mr. Richardson, the bookkeeper of L. C. Woodruff & Co., for an agreed compensation, to look after the interests of the plaintiff as mortgagee, but no actual possession was taken by or on behalf of the mortgagee until about a month after the giving of the second mortgage, viz: November 26, 1884, when, the mortgage debt having become due, the plaintiff put a deputy sheriff in charge of the property. An arrangement was then made allowing sales of the mortgaged stock, the proceeds to be paid over to the plaintiff as mortgagee and applied on the mortgage, and afterward; and before the levy by the sheriff the plaintiff, as mortgagee, gave public notice of the sale of the property under the mortgage.

It was claimed on the part of the defendant that the mortgage given in the spring of 1884 was not intended as a security to the plaintiff, but for the purpose of protecting the property against the claims of the creditors of the mortgagors and enabling them to continue their business for their own benefit; that it was agreed that the mortgagors might make sales for their own benefit, and that the mortgage of October 30, 1884, was a mere renewal or continuation of the previous mortgage.

All these points were controverted by testimony on the part of the plaintiff, and presented questions of fact for the jury. The only evidence of actual intent to defraud creditors was to the effect that Lauren C. Woodruff, one of the mortgagors, was indebted on some individual transactions of his own; that L. C. Woodruff & Co. were apprehensive that these individual creditors of Woodruff might interfere with the property of the firm, and that one object of giving the mortgage to the plaintiff was to protect the firm property against these individual creditors; and there was some evidence to the effect that the plaintiff was aware of these facts.

But, on the other hand, the evidence was that the mortgage was demanded by the plaintiff by direction of a committee of its directors, because it had ascertained that a portion of the mortgaged property had been sold, and it required a new security for the indebtedness to it. Even if it did know that the property of the firm was liable to be interfered with by individual creditors of Woodruff, it had a right to demand that it should be secured, so as to have a preference over such individual creditors; and securing such a preference was not a fraud.

All these questions were properly submitted to the jury as questions of fact. The court charged the jury that it was for them to say whether the second mortgage was given for the purpose of securing the defendant to the plaintiff and nothing else; that if given with the view of defrauding the creditors of L. C. Woodruff & Co., it was fraudulent as matter of law.

The allegation that permission was given to the mortgagors to sell the mortgaged property was denied on the part of the plaintiff, and neither of the mortgagors testified to any arrangement or understanding allowing such sales. It does not distinctly appear what sales, if any, of mortgaged property were made after October 30, 1884, and before November 26, or that the plaintiff had knowledge of them, for there was property in the store of L. C. Woodruff & Co. not covered by the mortgage. The court left the question to the jury, charging them that if they found that there was an agreement or understanding that the mortgagors might sell the mortgaged property and use the proceeds as they saw fit, it invalidated the mortgage.

We think the court committed no error in refusing to nonsuit the plaintiff, and that the question was properly submitted to the jury.

Some exceptions were taken to the charge which are now insisted upon:

First, the court was requested to charge that "The possession of the Bank by Richardson was not such a possession by the Bank as to remove the case from under the statute."

The court refused to charge otherwise than it had already charged. Aside from any criticism of the form of this request, we think the charge asked for, although perhaps correct in substance as an abstract proposition, was quite unnecessary and irrelevant. It does not appear to have been claimed by the plaintiff that by means of the arrangement with Richardson the mortgage was accompanied by an immediate and followed by an actual and continued change of possession of the mortgaged property, so as to prevent the application of the statutory presumption of fraud, arising from the want of such change of possession, or to relieve the plaintiff of the onus of establishing affirmatively the *bona fides* of the mortgage. On the contrary the cause was tried on the theory that the mortgage was not accompanied by an immediate change of possession. The plaintiff assumed the burden of proving its *bona fides*, and the court charged the jury that it was incumbent upon the plaintiff to show that its debt was a just debt, and that the mortgage was made in good faith, and without any intent to defraud.

This charge gave to the defendant all the benefit which he could have derived from a charge in express terms that no such immediate and actual change of possession had been proved as was required by the statute to relieve the plaintiff from the presumption of fraud, or from the onus of affirmatively proving the good faith of the transaction. The arrangement with Richardson was one of the circumstances of the case which the jury were permitted to consider, not on the question of an actual change of possession, but on this question of good faith. The court had charged on that subject that it was for the jury to say whether the arrangement with Richardson, "if made, was made in good faith, and the intent was a change of possession and control, or on the other hand was a blind as it had been called by counsel."

This charge was not excepted to. The court had in no part of the charge instructed the jury, or even permitted them to find, that the arrangement with Richardson, whatever was its intent, was effectual to bring about the actual change of possession required by the statute, but left it to the jury to determine its intent only as bearing upon the question of good faith, and when requested to charge as an abstract proposition that it was not such a possession by the Bank as to remove the case from under the statute it did not negative that proposition but declined to charge further on the subject than had already been charged. In this refusal we find no error.

Second, the court was requested to charge that if the jury found that the plaintiff had an agent in the store of the mortgagors during the time the chattel mortgage was in existence, who knew the full facts of sales out of the mortgaged property, and that the mortgagors disposed of the proceeds of such sales for their own account, the jury should find for the defendant. The court declined so to charge, on the ground that the testimony did not warrant the statement of assumed facts. In this refusal we think the court was correct, as well for the reason assigned by it as for the further reason that the proposition applied to the first mortgage as well as to the second and no distinction was made.

Even if Richardson knew of sales during the running of the first mortgage and could be presumed to have assented to them, that would not be a conclusive defense to the plaintiff's claim under the second mortgage and thus authorize a charge that the jury must find for the defendant. No authority was shown to Richardson, in either case, to consent to sales by the mortgagors; nor does it clearly appear that he was cognizant of them, or of the application of the proceeds. But at all events even if the Bank, through Richardson, had notice of sales by the mortgagors and of the appropriation of the proceeds, such notice at the most was only evidence from which a previous agreement to permit such sales and appropriation might be inferred. It was not ground for a direction to the jury to find for the defendant. *Gardner* v. *McEwen*, 19 N. Y. 126; *Potts* v. *Hart*, 99 N. Y. 168, 173.

Third, the same answer applies to the further request to the court to charge that if the jury found that Richardson was the agent of the plaintiff to look after the mortgaged stock, they must find that the plaintiff agreed to the sales made of the stock during the time.

These are all the exceptions to the charge which are insisted upon in the appellant's points in this court.

There are some exceptions to rulings upon questions of evidence; but we are of opinion that they present no point which requires a reversal of the judgment. Certain questions, relating to the intent or motives of the mortgagors in executing the first and second mortgages, were asked of the officers of the mortgagees and excluded. A party may be examined as to his own intentions and motives when a question of fraudulent intent on his part is in issue, but he cannot be permitted to testify as to the motives or intent of another party.

Exception was also taken, and is now insisted upon, to the exclusion of testimony of Lauren C. Woodruff, offered on his redirect examination, for the purpose of showing that the first mortgage was fraudulent.

Woodruff had been called as a witness by the defendant, and had been examined for the purpose of showing fraud in the second mortgage. He detailed the circumstances and the conversations which led to its execution, and was examined as to his intentions in giving it and as to his individual embarrassments. He was also examined on his direct examination with reference to the first mortgage, and stated that the second mortgage was given as a renewal of the first; that the president of the plaintiff claimed that a great part of the goods covered by the first mortgage had been sold and new goods had come in, and it had ceased to be a security, and requested that a new inventory be taken and a new mortgage executed, and that witness assented to the request.

On his cross examination on the part of the plaintiff the witness was not asked anything about the first mortgage, but only as to the second, and his motives for giving it. Being then recalled on the part of the defendant, Mr. Woodruff was asked whether the first mortgage was ever intended to be enforced. Objection being made to this question the defendant's counsel offered to prove that the first mortgage was fraudulent. The court refused to permit the proof to be made by the witness then on the stand, stating to counsel that that was part of his direct examination. We think this ruling was a proper exercise of the discretion of the court, and further that the question asked the witness was, in itself, improper, as he was not competent to testify to the intention of the plaintiff with respect to enforcing the mortgage. This, if material, must be shown by circumstances or the declarations of the party.

The judgment should be affirmed.

All concur.

William JARVIS, *Respt.*,

v.

Adolphus C. SCHAEFER, *Appt.*

1. In an action for **commissions** earned by plaintiff upon employment by defendant to effect a **sale of real estate** of the latter's wife, *held*, that whether defendant's **agency** for his wife was disclosed to plaintiff or not, he became personally bound for the commissions if he undertook to be so, and this might be inferred from the fact that he contracted with the plaintiff in his own name and without any qualification.
2. While it may be difficult for a **broker** to **serve,** with equal efficiency, **two masters,** neither of them can complain nor **refuse** compensation if it was promised when fully informed that his agent held the same relation to the adverse dealer; especially when the **principals agreed upon** the **terms of sale** and **neither** of them was **prejudiced** by the real character of the broker.
3. That defendant **paid full commissions to another broker** does not impair the plaintiff's **right to compensation for services** actually **rendered** in pursuance of a valid contract.

(Decided April 19, 1887.)

APPEAL from a judgment of the General Term of the Court of Common Pleas of the

City and County of New York, affirming a judgment of the Trial Term entered on a verdict for plaintiff in an action to recover broker's commissions. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **Frank E. Blackwell**, for appellant:

It being uncontradicted that defendant was not the owner of the property in question, and that he disclosed to the plaintiff the true owner for whom he was agent, no right of action accrued against defendant.

Bonynge v. *Field*, 81 N. Y. 159, 160; *Covell* v. *Hart*, 14 Hun, 254; *Bonynge* v. *Waterbury*, 12 Hun, 534.

This is a case of a number of agents engaged in disposing of the Red Hook property. An exchange was effected, and the question is: Which broker is entitled to the commission?

The rule is well settled. Says Church, *C. J.*, "A person claiming a commission upon a sale of real estate must show an employment, and that the sale was made by means of his efforts or agency." "An owner may employ several brokers for the sale of the same property, and is, of course, only liable for commissions to the one who effects the sale. And although he employs one or more brokers, he may negotiate and sell the property himself, without liability to anyone for commissions."

Sussdorff v. *Schmidt*, 55 N. Y. 319, 321; See also *Sibbald* v. *Bethlehem Iron Co.* 83 N. Y. 378, 383; *Briggs* v. *Rowe*, 4 Keyes, 424,

Where negotiations are begun by a broker, but abandoned by him, and a sale is subsequently effected, either by the owner or a second broker to the same party, the original broker is entitled to no compensation.

Wylie v. *Marine Nat. Bank*, 61 N. Y. 415; *Ludlow* v. *Carman*, 2 Hill, 107 (This is a case directly in point); *Chandler* v. *Sutton*, and *Bennett* v. *Kidder*, 5 Daly, 112, 512; *Briggs* v. *Rowe*, 4 Keyes, 424.

The testimony of plaintiff that he was acting as broker for Streeter and the defendant, at the same time, defeats his right to recover in this case, unless previous to the consummation of the transaction he fully disclosed the fact of his agency to the defendant.

Murray v. *Beard*, (N. Y.) 4 Cent. Rep. 129; *Carman* v. *Beach*, 63 N. Y. 97; *Rice* v. *Wood*, 113 Mass. 133; *Walker* v. *Osgood*, 98 Mass. 348; *Farsworth* v. *Hemmer*, 1 Allen, 494; *Watkins* v. *Cousall*, 1 E. D. Smith, 65; *Vanderpoel* v. *Reaves*, 2 E. D. Smith, 170; *Moore* v. *Mandlebaum*, 8 Mich. 433; *Everhart* v. *Searle*, 71 Pa. 256; *Dunlop* v. *Richards*, 2 E. D. Smith, 181.

Mr. **Henry Daly, Jr.**, for respondent:

It is submitted that after a fair and honest trial, where there is much testimony on the questions of fact, and there is no misdirection of the jury by the court, the verdict will not be set aside because the court would have come to a different conclusion from that of the jury, on the force and weight of the evidence.

Polhamus v. *Moser*, 7 Robt. 491; *Williams* v. *Vanderbilt*, 29 Barb. 491; *Mackey* v. *N. Y. Cent. R. R. Co.* 27 Barb. 528; *Fleming* v. *Smith*, 44 Barb. 554.

The verdict was not against the evidence, it was on a disputed question of fact; there was a slight conflict of testimony, but the preponderance must be overwhelming to induce a court to disturb the verdict of a jury.

Morss v. *Sherrill*, 63 Barb. 21; *Culver* v. *Avery*, 7 Wend. 384.

The verdict must be entirely against the weight of evidence to justify the court in setting it aside. The questions of fact were presented to the jury—they have decided, and of these they were the judges.

Morss v. *Sherrill*, 63 Barb. 21; *Culver* v. *Avery*, 7 Wend. 384; *Wallace* v. *Patterson*, 29 How. Pr. 170; *Clark* v. *Mechanic's Nat. Bank*, 8 Daly, 481; *Murphy* v. *Baker*, 3 Robt. 4, 5; *Tinson* v. *Welch*, 7 Robt. 392; *Hermann* v. *Kreppel*, 8 Week. Dig. 177.

It is the province of the jury to weigh and determine conflicting evidence; and the court should not set aside their verdict which determines on one side or the other.

Brooks v. *Moore*, 67 Barb. 393; *Stafford* v. *Leamy*, 43 How. Pr. 40; *Duncan* v. *Baillee*, 3 Alb. L. J. 30.

Respondent was employed by both Schaefer and Streeter, and in bringing them together was a mere middleman; and they having consummated an exchange, he became entitled to recover commissions from both.

Seigel v. *Gould*, 7 Lans. 179; Paley, Agency, § 12; Story, Agency, § 31; *Rupp* v. *Sampson*, 16 Grey, 398; *Redfield* v. *Tegg*, 38 N. Y. 212; *Balheimer* v. *Reichardt*, 55 How. Pr. 414.

Both parties knew that respondent was acting for both; there was no concealment on respondent's part, and appellant does not claim to have been misled or injured by anything respondent said or did.

Rowe v. *Stevens*, 53 N. Y. 621.

Danforth, *J.*, delivered the opinion of the court:

The plaintiff sued for commissions earned, as he alleged, upon employment by the defendant to effect a sale or exchange of certain real estate at Red Hook. He recovered judgment. This was affirmed by the general term and the defendant now appeals, making in this court the following points:

First, that he was not the owner of the property referred to, and so informed the plaintiff, at the same time disclosing the name of the owner for whom he was acting.

Second, that the plaintiff was not the procuring cause of the sale or exchange made.

Third, that the plaintiff was at the same time, but without the knowledge of the defendant, acting as agent for the other party to the trade.

Fourth, that one F., also a broker, was employed, and the court erred in excluding (against objection) evidence that he paid F. full commissions.

The defendant moved to dismiss the complaint upon the grounds:

First, that defendant having stated that his wife owned the property, he was a known agent; and a recovery could not be had against him.

Second, that the employment of the plaintiff, by Mr. Streeter, not being disclosed to the defendant, is a fact which precludes plaintiff's recovery.

Third, that the evidence shows that the trade was not consummated by the plaintiff.

The motion was denied, and the trial judge in submitting the case to the jury directed them to inquire:

I. Which of these brokers was the procuring cause of the sale; in other words which of these men brought the sale about,—saying, "There is no doubt of the employment of Jarvis by Schaefer. The question is whether Jarvis brought the sale about. Was he the means by which Streeter and Schaefer came together, and did Mr. Jarvis' action result in the effecting of the sale?"

He also called attention to the defendant's claim that F. was the efficient cause, and instructed the jury in substance that the plaintiff could not recover unless they found that the plaintiff actually produced the purchaser. He was not asked to charge differently, nor to charge upon any other question, and no exception was taken to the charge as made. The verdict answered the question addressed to the jury in the affirmative, and we have only to see whether the trial court erred in refusing to dismiss the complaint.

If it be a fact that the legal title to the property was in the wife of the defendant, it would not follow that the plaintiff could not recover in this action. There is evidence that the defendant represented himself as owner, and as such that he put the property into the plaintiff's hands to sell or exchange, knowing at the time he did so that the plaintiff was a broker and that he "expected a commission;" that the defendant, at the time, responded "That is all right; that he always paid a commission and expected to pay it."

The price was fixed by the defendant at $20,000. The usual commissions were proven to be 2½ per cent, or $500. If the defendant was in fact dealing in behalf of his wife, it does not conclusively appear that he so stated, or that he assumed to act in any other than an individual capacity. But in any view of the evidence, even his own, and although he told the plaintiff that Mrs. Schaefer was the owner, the question would still be as to whom the plaintiff gave credit—to the wife or to the defendant.

In one aspect of the evidence there was no disclosure of his agency, and *prima facie* the agreement was his own, and he was bound personally. If there was evidence tending to a different conclusion, it should have been submitted to the jury. The defendant did not request it, but by his own motion left it to the trial judge. In either view, whether the defendant's agency was disclosed or not, he became personally bound if he undertook to be so, and this might be inferred from the fact that he contracted with the plaintiff in his own name and without any qualification.

Nor can it be said, as matter of law, that the employment of the plaintiff by the other party was not disclosed to the defendant; and while it may be difficult even for a broker to serve with equal efficiency two masters, neither of them can complain, or refuse compensation if it was promised, when fully informed that his agent held the same relation to the adverse dealer. Nor is there in such a contract as the present much danger that either one will be prejudiced by the dual character of the broker. The principals themselves agreed upon the terms of sale or exchange, and became indebted to him for procuring an actual buyer or vendor, as the case may be. *Sussdorff* v. *Schmidt*, 55 N. Y. 319.

The jury found that the plaintiff brought about the sale; that he was employed by the defendant. His own testimony is that he was first employed by the defendant, and afterwards by Streeter; that each was to pay him a commission for negotiating, or selling, or trading this property, and he adds: "I told them this."

The defendant, although present at the trial and examined as a witness, does not deny it, nor does he testify that he was ignorant of the plaintiff's claim that he was acting for Streeter also. The plaintiff's testimony on this point is to be weighed according to the power of the defendant to contradict it if not true; and his silence in view of the assertion of the plaintiff, made it impossible for the trial judge to hold, as matter of law, that the true relation of the plaintiff to the other party was not disclosed to the defendant. No fraud, or even concealment, was practiced by the plaintiff, and the case is not one where the same person acted as agent for both parties without their knowledge.

The appellant relies upon the fact that he put property in Georgia with the Red Hook property. This was a circumstance for the jury to consider in determining whether the plaintiff actually produced the purchaser; and that was the proposition which the defendant asked to have the jury pass upon.

If it were conceded that the defendant paid full commissions to F., the other broker, it could not impair the plaintiff's right to compensation for services actually rendered. It was not error therefore to exclude evidence of such payment. The plaintiff's contract was valid, and, as the jury have found, made upon good consideration and fully performed by him. The verdict was rendered upon conflicting evidence, but the exceptions point to no error.

The judgment appealed from should be affirmed.

All concur.

Thomas RUTHERFORD, *Respt.*,
v.
VILLAGE OF HOLLEY, *Appt.*

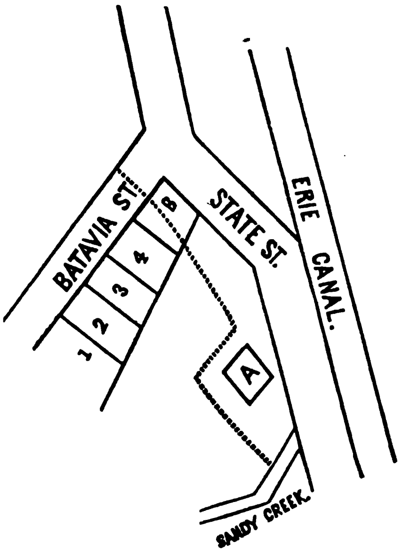
1. It would be unreasonable to hold that every **change** in the natural surface or condition of land, made **in** the improvement of **a** street or **highway,** which to any extent **increases** the **flow of surface water** on adjacent premises, constitutes an actionable injury.
2. Defendant **village** is **not responsible** for the manner in which the water flows over the plaintiff's lot, unless it is attributable to some act of defendant.
3. Where **excavations made in** the **street** and adjacent lots **by the State** changed the direction of the drainage, *held*, that if the **village** defendant by turnpiking the street and improving the highway did not increase the flow of surface wa-

ter on the plaintiff's lot beyond what it was prior to the excavations, it **committed no wrong** to plaintiff.

(Decided April 19, 1887.)

APPEAL from an order of the Supreme Court at General Term in the Fifth Department, reversing a judgment entered in Orleans County upon report of a referee dismissing the complaint in an action to restrain the discharging of surface water (which collected on a street) upon lands of the plaintiff. *Reversed.*

State Street in the Village of Holley follows the course of the Erie Canal in a southeasterly direction. From this street Batavia Street extends in a southwesterly direction. Within the southerly angle formed by these streets lay a line of lots extending along Batavia Street and the lands of the plaintiff; the latter are bounded northeasterly by State Street, northwesterly by the said row of lots extending along Batavia Street, and southerly and easterly by Sandy Creek. A lot called the "Cary lot" is on the corner and fronts on both Batavia and State Streets.



A. The tannery building owned by plaintiff.
B. The Cary lot.
1. 2. 3. 4. Lots on Batavia Street.
The broken line shows the position of the sewer across Batavia Street and the course the water took over the surface of plaintiff's lands.

Prior to 1864 the surface water of Batavia Street and lands lying northwesterly thereof passed over the plaintiff's lands along the north side of the building thereon known as the tannery building, and into Sandy Creek.

In 1862 the surface of the land where Batavia Street now is and all west of the plaintiff's lands was removed by the State and used in repairing a break in the embankment of the Erie Canal; at the same time the State permanently appropriated the north end of the tannery building and the lands lying north of it, over which the surface water passed and filled up the same, entirely obstructing the surface water so that it passed around the tannery building to the south.

After Batavia Street was rebuilt by the State there was no way for the waters which collected in the gutter on the northwest side of the street to pass off, except by evaporation and soakage, or by passing over the street at its lowest point, which point was at or near where a sluice had been constructed across said street in 1840, at which point a sewer was constructed in 1864. To more effectually drain the waters from the northwesterly side of the street, the village trustees lowered said sewer in 1879, about six inches; and about the same time, with consent of the owner of the Cary lot, they took up a sewer running across the Cary lot and emptying on the lands of the plaintiff, and lowered that. About the same time they also constructed a covered sewer in the bed of the gutter on the northwest side of the street and connected the same with the sewer running across the street and emptying into the sewer running through the Cary lot.

The referee found that after the sewer across said Batavia Street and the sewer across the Cary lot were filled with water, the same being unobstructed, could and did come upon the plaintiff's premises in such quantities and with such force and volume as to soak into and percolate the walls of his said tannery building and to damage and injure the same and otherwise injure and damage his said premises.

In 1879 in an action by plaintiff against the owners of the Cary lot to restrain and close up the sewer running through the same and emptying on plaintiff's land, an injunction was granted and such sewer was closed so that no water could pass through it.

At the time of lowering the sewer running across Batavia Street, defendant's officers placed a sewer plate or grate at the end of the sewer on the southeasterly side of the street at the place where it emptied into or connected with the sewer running across the Cary lot.

The referee found that since the sewer running across the Cary lot was filled up, whenever the sewer running across the street was filled with water, the water wells up through the sewer plate or grate and makes its way over the surface of the ground of the Cary lot at the lowest part thereof, and is discharged or passes on to the lands of the plaintiff, substantially in a body; and in heavy rains and thaws water flows from this sluice as aforesaid, and passes down and against the walls of the tannery building and percolates the same, and damages and injures it.

This was the condition of things at the time this action was commenced, and has so existed since the filling up of the sewer in pursuance of the decree of the court in 1879.

The plaintiff brought this action to restrain defendant from turning the surface water so collected upon his lands, and for damages. The referee reported in favor of defendant, dismissing the complaint. On appeal from a judgment entered upon his report, the general term reversed the same and defendant appealed to this court.

Mr. **John H. White,** for appellant:

It is immaterial what changes the defendant made upon the highway, so long as they did not increase the flow or manner of the flow of water which passed on to the plaintiff's land. *Mills* v. *Brooklyn*, 32 N. Y. 489-495.

The case of *Noonan* v. *Albany*, 79 N. Y. 470, relied upon by plaintiff's counsel, is not in point. There the city, by means of streets and gutters, had collected surface water from a large territory and poured it into a ravine where it did not flow before that time. The act of the defendant being wrongful, it was not excused from the fact that the waters would have passed off without injury to the plaintiff if some other person had not obstructed the flow of the water below the plaintiff's premises, thus causing him injury. If no more water had been poured down this ravine by the improvements made by the city than before such improvements, the defendant would not have been liable and the cases would be nearer parallel. Here the obstruction below was placed there by the State, and the plaintiff has had his pay for it.

The cases of *Byrnes* v. *Cohoes*, 67 N. Y. 204; *Bastable* v. *Syracuse*, 8 Hun, 587, and *Sleight* v. *Kingston*, 11 Hun, 594, cited by the plaintiff below, are all cases of diversion of water in other and different directions from what it had before run, to the injury of the plaintiff. And the same may be said of the case of *Seifert* v. *Brooklyn*, 2 Cent. Rep. 135, 101 N. Y. 136.

The trustees in any event did no more than they had the right to do in lowering this sluice. No substantial injury could be done the plaintiff. The improvement was proper and necessary, and they had the right to make it. The following cases illustrate this case, and lay down the correct rule as to the rights and liabilities of highway commissioners and municipal corporations, when acting as such:

Graves v. *Otis*, 2 Hill, 466; *Benedict* v. *Goit*, 3 Barb. 459; *Radcliff* v. *Mayor*, 4 N. Y. 203; *Wilson* v. *Mayor*, 1 Denio, 595; *Waffle* v. *Porter*, 61 Barb. 130; *Waffle* v. *N. Y. Cent. R. R. Co.* 58 Barb. 413; 53 N. Y. 11; *Mills* v. *Brooklyn*, 32 N.Y. 489; *Barkley* v. *Wilcox*, 19 Hun, 320.

Mr. **John Cunneen,** for respondent:

A municipal corporation has no right to collect surface water from its lands or streets into an artificial channel and discharge the same upon the lands of another.

Noonan v. *Albany*, 79 N.Y. 476; *Barkley* v. *Wilcox*, 86 N.Y. 140; *Haskell* v. *New Bedford*, 108 Mass. 208. See also *Byrnes* v. *Cohoes*, 67 N. Y. 206; *Bastable* v. *Syracuse*, 8 Hun, 578; *Sleight* v. *Kingston*, 11 Hun, 597; 35 Am. Rep. 431; 37 Am. Rep. 150, 763; Cooley, Torts, 579.

There is no allegation, and there is no finding, that for one moment was the use adverse or under a claim of right, or that a right to use these artificial sluices has accrued to defendant by prescription, dedication, grant or otherwise. Their use merely for forty years would constitute no defense.

Wiseman v. *Lucksinger*, 84 N.Y. 31.

The rights of the parties after the action of the State in walling up the tannery, are to be determined by the subsequent events.

Hancock v. *Wentworth*, 5 Met. 446; *Missey* v. *Proprietors Union Wharf*, 41 Maine, 34.

The "gully or waterway" being obstructed by the State, the defendant subsequently had no right to gather and discharge this water in the upper end of the sluice, when it knew that the necessary consequence would be and is, as the referee finds, to damage plaintiff's property.

Noonan v. *Albany*, 79 N.Y. 470, 478.

It is the province of the referee to find the fact instead of reporting the evidence; and judgment cannot be given upon a report of evidence, no matter how strongly it may tend to establish the fact.

Jarvis v. *Jarvis*, 66 Barb. 331; *Avery* v. *Foley*, 4 Hun, 415; *Spooner* v. *Lefevre*, 2 Thomp. & C. 666.

Andrews, *J.*, delivered the opinion of the court:

The fact is uncontroverted that the natural drainage of the surface water from the northeasterly side of the hill, over which Batavia Street was constructed, was through a depression at the foot of the hill on Batavia Street, which extended over the Cary lots and the lot of the plaintiff, from whose lot, prior to 1862, the water was discharged into a gully or water course at the northwesterly corner of the plaintiff's tannery.

It is also evident that the injury which the plaintiff has sustained to his tannery building, since that date, from the flow of the surface water over his premises, has resulted from the closing up of the outlet by the wall erected by the State, whereby the water was turned from its natural course and thrown against the side of the tannery. But this is not decisive against the right of the plaintiff to maintain the action. It is claimed that the Village, by the grading of Batavia Street in 1863 and the construction of gutters therein, and of the sluice across Batavia Street, has increased and facilitated the collection and discharge of surface water at the lowest point in the street, and that as a consequence a greater amount of water than naturally would have collected there, has been cast upon the Cary lot, and from there upon the premises of the plaintiff.

The finding of the referee, which is not without evidence to support it, negatives this contention. The referee, in his twentieth finding, in substance finds that the water discharged from the sewer plate or grate over the sluice on the east side of Batavia Street passes on to the plaintiff's premises from the Cary lot at about the same place that the water has at all times since 1824, when said street was laid out, passed upon the same; that it is the drainage from substantially the same territory; and that with the same amount of rain fall, "No greater amount or volume of water passes, or is discharged on to plaintiff's premises from this sluice (since said Cary's sewer was closed) than did pass or was discharged on to the same at all times since said streets (Batavia and State Streets) were laid out."

It is not claimed that the course or amount of surface water which found its way to the foot of the hill, before Batavia Street was laid out in 1824, was increased by the original construction of the street. The finding, therefore, is equivalent to a finding that the present discharge from the sluice does not exceed the natural drainage at this point, of the surface water of the adjacent territory. It is insisted, however, that by the construction of the gutter on the north side of Batavia Street, and the sluice across the street, the water is made to flow in an artificial channel, and is collected in a body and cast upon the plaintiff's lot. The gutter and sluice were constructed for the protection and improvement of the road way.

It is not improbable that the turnpiking of the street and the construction of the gutters diminish to some extent the waste by soakage and evaporation, and thereby increase somewhat the quantity of water which collects at the sluice, and which is discharged on to the Cary lot, and ultimately on the plaintiff's lot. But it would be quite unreasonable to hold that every change in the natural surface or condition of land, made in the improvement of a street or highway, which to any extent increases the flow of surface water on adjacent premises, constitutes an actionable injury. The case of *Noonan* v. *Albany*, 79 N. Y. 476, and cases of kindred character, establish no such unreasonable and inconvenient doctrine.

But it is said that the water, by the acts of the defendant, is thrown upon the plaintiff's lot in a body, whereas before it was dispersed over the surface and was absorbed doing comparatively little injury. But there is no finding that the manner of discharge has been materially changed by the acts of the defendant, and such a finding would have been in conflict with some of the evidence, although it might have been warranted by other evidence. It is true that it is found that the water passes on to the plaintiff's lot from the Cary lot substantially in a body.

But this finding is made in connection with another finding: that the water now passes over the surface of the Cary lot at the lowest point, before reaching the plaintiff's lot. The defendant is not responsible for the manner in which the water flows over the plaintiff's lot, unless it is attributable to some act of the defendant. This question was controverted on the trial.

The Cary sewer which connected with the sluice was closed in 1879. It is found that since that time no water has passed through it; and the water which now reaches the plaintiff's lot first passes through the sluice across the road to the east side thereof, where it is interrupted by the wall or face of the closed Cary sewer, and escapes by "welling up" through the sewer plate or grate, and thence passes over the surface of the Cary lot and on to the lot of the plaintiff.

The construction of the sluice probably facilitates the passage of the water from the road way; but it was not shown, or at least it was not shown by uncontradicted evidence, that the construction of the sluice, or the manner in which the water was discharged from it, affected materially the flow across the plaintiff's lot, from what it originally was before the sluice was constructed.

It is claimed that the excavations in the street and adjacent lots, made by the State in 1862 for canal purposes, changed to some extent the direction of the drainage, and that the Village had no right afterward, by turnpiking the street, to alter to the prejudice of the plaintiff's lot, the surface of this new earth created by the canal authorities, and that in determining the rights of the parties, this new condition must be regarded in the same way as though it was the original and natural condition of the land. It is a sufficient answer to this claim that there is no satisfactory evidence that the act of the defendant in restoring the highway made any substantial change in the direction or volume of the surface water, unfavorable to the plaintiff. But at all events we are of opinion that if the defendant in improving the highway did not increase the flow of surface water on the plaintiff's lot beyond what it was prior to the excavation, they committed no wrong to the plaintiff.

Our conclusion, after a careful examination of the case, is adverse to the general term. The general term reversed the judgment of the referee, on the ground that the facts found by him showed an actionable injury, within the case of *Noonan* v. *Albany*, *supra*. We differ from the general term on the merits, simply as to the construction of the findings of fact by the referee, which are numerous and complicated.

We think there are no valid exceptions to evidence.

The order of the General Term should, therefore, be reversed, and the judgment on the report of the referee affirmed.

All concur.

Alfred H. SMITH, *et al.*, *Respts.*,
v.
Henry CLEWS *Appt.*

A diamond **dealer** who had on two former occasions been **entrusted with diamonds** by plaintiffs, which he **had** sold and accounted for the proceeds without any fault being found, so far as appears, on account of any lack of authority to sell, obtained from them other diamonds, for which he gave a receipt stating that they were received on approval to show to his customers and that they were to be returned to plaintiffs on demand. He subsequently **sold** the diamonds to defendant **and received** the **price.** *Held,*

(*a*) That the receipt, construed in connection with the facts, meant that the **dealer had authority to sell** the diamonds to a customer if they met his approval, and that if not actually sold before demand made, they should be returned to plaintiffs upon such demand.

(*b*) That, under the facts, **plaintiffs** had **conferred** upon the dealer **authority** to sell the diamonds and **to give a good title,** and that defendant, having purchased them from him in good faith, has a right to retain them as against plaintiffs.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Circuit, on a verdict for plaintiffs in an action to recover the possession or value of certain personal property. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **Albert A. Abbott,** for appellant.

Mr. **Chas. H. Woodbury,** for respondents.

Peckham, *J.*, delivered the opinion of the court:

This is an action under the Code to obtain the delivery of personal property alleged to belong to plaintiffs, and to be wrongfully withheld by defendant.

The plaintiffs had a verdict which was affirmed at general term and the defendant has appealed here. The plaintiffs claimed to be the owners of what they called a pair of diamond ear knobs, of the value of $1,400, which came into the possession of the defendant, as shown by the evidence, in the following manner:

Elijah Miers was a dealer in diamonds in New York. His business was to procure diamonds from the larger dealers and sell them to his customers. Before the 18th of January, 1879, he had procured from an authorized agent of the plaintiffs a pair of diamond earrings which on that day he had sold to the defendant for $300, and had received the check of defendant, payable to his order in payment therefor.

Before the 23d day of January, 1879, Miers had procured another pair of earrings from plaintiffs' said agent and sold them on that day to defendant for $450, receiving in payment the first pair of earrings and the check of defendant for the balance of $150.

Miers had paid to plaintiffs' agent the price of these diamonds after the sale to defendant.

The defendant had purchased them in good faith from Miers, assuming him to be the owner. He intended the first pair as a present for his wife, but when shown to her she preferred a more expensive pair; and hence, the second purchase.

These also proved unacceptable, and it was some time after their purchase by defendant before the diamonds in question were presented to him for purchase, he having, in the meantime, kept the second pair; and upon the purchase of the diamonds in question by the same man, Miers, defendant gave back the second pair and paid $650 in addition, thus making up $1,100, the purchase price of these last diamonds.

There is no question of the *bona fides* of this series of purchases by the defendant.

The evidence is uncontradicted as to the manner in which Miers obtained the last diamonds from the plaintiffs. They had delivered them to Plumb, the diamond broker who had delivered the other diamonds to Miers. One of the plaintiffs was asked how it happened that he delivered these diamonds to Plumb, and he testified that he could not say whether it was at Miers' request or not, but that Miers had called on him before he delivered them to Plumb and had said to him that he had a customer for a pair of diamond ear knobs; and although the plaintiff could not say that he told Miers that he would send him the diamonds through Plumb, yet he says he stated to Plumb that he would do so, and he did do so, and he authorized Plumb to deliver the diamonds to Miers, and that that is the way Miers got them. The witness also said that he knew Miers had the diamonds in his possession immediately, that they were taken from the plaintiffs' office and delivered to Miers by Plumb; they were delivered to Plumb on the 12th of April, and by him to Miers on that day. When Plumb delivered them to Miers he took from him a receipt in this form:

"New York, April 12, 1879.

Received from Alfred H. Smith & Co., by their representative, B. W. Plumb, a pair of single stem, diamond earrings, 10½ carats, of the value of $1,400, on approval to show to my customers; said knobs to be returned to said A. H. Smith & Co., on demand.

E. Miers."

Having thus become possessed of the diamonds, Miers, as has been stated, sold them to defendant, and the question is, Did he get a good title as against the plaintiffs?

Taking the undisputed evidence and reading this receipt in the light thereof, we cannot resist the conclusion that the plaintiffs conferred upon Miers the power to sell these diamonds, and of course to give a good title; and therefore the court should have directed a verdict for the defendant.

The plaintiffs were dealers in diamonds, and they knew Miers and that he was engaged in the business of a diamond dealer, a seller of the stones to whomsoever he chose.

They had on two former occasions entrusted, through their agent, diamonds to Miers, who had sold them and accounted for the proceeds of the sale without any fault being found, so far as appears, on account of any lack of authority to sell.

They were informed by Miers on this particular occasion, that he had a customer for a pair of diamond earrings, and these diamonds were then entrusted to Miers by the plaintiffs, through their agent, Plumb. Upon taking them Miers gives the receipt spoken of.

Now, upon these facts, what other meaning can be attached to that receipt than that Miers had power to take these diamonds, show them to his customer and, if approved of by the customer, sell them to him? The fact that Miers agreed to return them to plaintiffs, on demand, must be construed with reference to the obvious purpose for which the diamonds were entrusted to him, viz.: that of a sale; and so construed, the plain meaning is that if not already sold, the plaintiffs had a right to demand a return of the diamonds at any time and Miers would then be bound to return them.

The information given to plaintiffs by Miers that he (Miers) had a customer for a pair of diamond ear knobs, is susceptible of no other interpretation than that he had a customer who wanted to buy a pair. Under such circumstances what could a dealer in diamonds mean by entrusting them to another dealer, who had a customer who wanted to buy them and who came to this dealer for the purpose of being supplied by him with diamonds of a kind which his customer wanted to buy?

Enlightened by these facts the interpretation of the receipt signed by Miers is an easy matter. It can mean nothing else than an authority to sell the stones to the customer if they met his approval; and if not actually sold before demand made, they should be returned to the plaintiffs upon such demand.

This conclusion as to what was the actual authority given to Miers, does not, in the least, affect the propriety of the decisions cited by the counsel for the respondents, and in the opinion of the court at general term, to the effect that one entrusted simply with the possession of personal property with no power to sell or pass title cannot give title to the property, even to a *bona fide* purchaser for value.

The question here is simply, What was the authority with which the man Miers was clothed? And upon the undisputed evidence in the case we hold that it was an authority to sell.

The judgment of the General Term and of the Circuit should be reversed, and a new trial ordered, costs to abide event.

All concur.

Re Application of Mary R. HYNES, General Guardian, etc.

1. A **general guardian** of infants **has**, under the statute (1 R. S. p. 718, § 5) giving such guardian the rights and powers of a guardian in socage, the **right to employ** an **attorney to obtain possession of the ward's lands, and to make** an **agreement to pay** such **attorney** a certain specified portion of the value of the property recovered.
2. A **general guardian** of infants (who was also their mother) **agreed,** individually and as such guardian, **to pay an attorney** at law, in consideration of his services in attempting to recover possession of real estate which had belonged to her deceased husband, the father of said infants, at the time of his death, a sum equal to **one third** of the **value of** all such **property** as might be **recovered.** *Held*, on the facts of the case, that a judgment to the effect that such **agreement** was **valid and proper** should be affirmed.
3. *Held also*, that the **fee of counsel** who had been **employed by a third person** to assist such attorney in litigation to recover said real estate, should **not** be **deducted** from the amount to be paid to said attorney under said agreement.
4. *Held also*, that, under said agreement, the **attorney** was **entitled to** his stipulated **share in funds** arising from the sale of lands of the deceased father of the infants in another State, **for which notes were given.**

(Decided May 13, 1887.)

APPEAL from an order of the Supreme Court at General Term in the First Department, modifying an order of the Special Term confirming the report of a referee directing the sale of infants' real estate to pay claims against such estate. *Reversed.*

March 7, 1884, Mary E. Hynes, mother of the infants, William R. and Andrew Hynes, presented a petition to the supreme court for leave to sell certain property of the infants to pay an indebtedness of $16,000 to one Charles Todd, for necessaries furnished said infants, and an indebtedness to one John L. Brower, their attorney and counsel, of about $40,000. Thereupon, the court appointed the Farmers Loan & Trust Company special guardian for the infants, and an order of reference was made to Philo T. Ruggles, Esq., to inquire into the merits of the application; to examine into the truth of the allegation of the petition; to hear the allegations and proofs of all persons interested in the property or otherwise interested in the application and report his opinion thereon, particularly as to alleged indebtedness of said infants, together with the testimony.

The referee made his report June 24, 1884, whereby he found that all the material facts set forth in the petition were proven; that William R. Hynes, father of said infants, died in England, June 27, 1874, intestate; that upon his death, his sisters, claiming to be his only heirs and next of kin, entered into possession of his real estate, one of them becoming administratrix, etc., and seized all his personal estate; that said infants and said mother were in poor and needy condition, and had no means to commence or carry on proceedings to recover their said property; that the petitioner, Mary E. Hynes, mother of said infants and general guardian appointed by the surrogate of New York County, November 24, 1875, made the following agreement in writing with John L. Brower, an attorney at law:

"This agreement, made the 24th day of November, 1875, between Mary Eliza Hynes, individually, and as general guardian of William R. Hynes and Andrew Hynes, party of the first part, and John L. Brower, of the City of New York, party of the second part;

Whereas, The said party of the first part and her two children, William R. Hynes and Andrew Hynes, are in poor and needy condition; and,

Whereas, A large amount of real and personal property belonging to William R. Hynes, the late husband of the party of the first part, is unlawfully withheld from said party of the first part and her said children; and,

Whereas, Said party of the first part, individually and as guardian aforesaid, had and has no means wherewith to commence and continue proceedings for the recovery of said property; and,

Whereas, The said party of the second part, at the special request of the said party of the first part, has commenced proceedings to recover said property;

Now, this agreement witnesseth: That the said party of the first part, individually and as said guardian, for and in consideration of the assistance and service of the said party of the second part attempting to recover the property aforesaid, agrees to pay to the said party of the second part a sum of money equal to one third of the value of all the said property recovered and restored to her and her said children.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

M. E. Hynes, [L. S.]
M. E. Hynes, as guardian, [L. S.]
John L. Brower. [L. S.]

Sealed and delivered in presence of
Richard C. H. Finch."

That said Brower, relying upon said agreement, did finally recover and restore to said petitioner and said infants the entire estate, real and personal, of William R. Hynes, deceased, the total net value of which was $141,660.28 of which said Brower was entitled to one third, to wit: $47,220.09, less cash recoveries and costs awarded to him, amounting to $6,638.12; that under said agreement said Brower commenced and carried on said proceedings at his own risk, without any compensation or right to any, except in case of success; that said general guardian had lawful power and authority to make said agreement; that such services, under the circumstances under which they were rendered, were well and reasonably worth one third of the net amount recovered thereby.

Referee also reported that the indebtedness of the infants and their mother to Charles Todd was $19,836.56, for moneys advanced by him, individually, for their separate education and maintenance and for moneys paid by him to Joseph H. Choate, Esq., as counsel on behalf of said infants.

The court at special term confirmed the report of the referee, except as to the claim of Brower, refusing to sanction the agreement made by the mother of the infants with him and referred the matter back to the same referee for further proof as to the reasonableness of the agreement. Thereupon, an order was entered confirming the report as to the indebtedness to Todd and directing a sale of sufficient property to pay the same, and referring the matter back to the referee to take further proof as to the reasonableness of the agreement with Brower.

Included in Todd's claim was the sum of $2,250, paid to Joseph H. Choate, Esq., as counsel for the infants. The testimony taken before the referee shows that Mr. Choate acted as counsel in the ejectment suit brought by Brower under the agreement with Mrs. Hynes, from the time of the commencement of the first trial in the circuit court, through the several appeals taken therein, in the second trial at the circuit and again upon appeals, ending with the last hearing in the court of appeals. Mr. Choate testified that his claim against the estate amounted to $10,000, less the sum of $2,250, paid to him by Todd, and $500 paid to him out of damages recovered. The claim of Mr. Choate is not included in the amount claimed by said Brower.

Upon the second hearing before the referee, evidence was taken as to the reasonableness of the agreement in question; and the referee made his second report in which he found that the agreement in question was in all respects a just, fair, reasonable and proper agreement under the circumstances under which the same was made and was advantageous to said infants; that said infants were each indebted to said Brower, to the extent of the value of one third of the estate, real and personal, recovered by him for them.

This report was confirmed at the special term and the special guardian appealed to the general term, which court modified the order confirming the report so as to provide that the money which had been paid and should thereafter be found due to Mr. Choate should be paid out of the one third allowed to said Brower and as modified confirmed the same.

From this affirmance the special guardian appealed to this court. John L. Brower also appealed from that part of the order modifying the special term order.

Further facts appear from the opinion.

Mr. **David McClure,** for The Farmers Loan & Trust Co., special guardian:

The agreement is void as against the infants.

Mrs. Hynes had no power to bind the property of her children. There is no authority in the State for any such contract.

A guardian can contract for services, and that they shall be paid for at their value, and where services are rendered, a party can recover for their value without an agreement. The court will not strain the law to sustain an agreement such as this, where the party who has rendered services has another and an easy remedy to obtain payment therefor.

Mr. **Truman H. Baldwin,** for John L. Brower:

The supreme court has power to direct the sale of real estate belonging to infants for the purpose of paying the infants' debts.

Code Civ. Proc. § 2348.

Mrs. Hynes, as a general guardian of her infant children, had the power to enter into the agreement with Mr. Brower and to bind them thereby.

3 R. S. 6th ed. 167, §§ 3, 7–10; Bacon, Abr. title, *Guardian*, A. F. G.; *Truss* v. *Old*, 6 Randolph (Va.), 556; *King* v. *Inhabitants of Oakley*, 10 East, 494; *Wade* v. *Baker*, 1 Ld. Raym. 131; *Byrne* v. *Van Hoesen*, 5 Johns. 66; *Emerson* v. *Spicer*, 46 N. Y. 596; *Holmes* v. *Seely*, 17 Wend. 75; *Beecher* v. *Crouse*, 19 Wend. 306; *Torry* v. *Black*, 58 N. Y. 185, 189; *White* v. *Parker*, 8 Barb. 48; 2 Kent, Com. 228; Schouler, Dom. Rel. 393; Tyler, Infancy, 240; *Osborn* v. *Carden*, 1 Plowden, 293; *Sherman* v. *Wright*, 49 N. Y. 227; 1 Crary, Pr. 435, 438, 440; *Lovell* v. *Minot*, 20 Pick. 116; *Taylor* v. *Bemiss*, 110 U. S. 42 (Bk. 28, L. ed. 64).

The agreement in question was in every respect just, fair and reasonable, and was beneficial to the infants.

The agreement was duly executed by Mrs. Hynes as general guardian of the infants, with full knowledge that it provided for compensation to Mr. Brower of one third of the recovery.

No part of the counsel fee paid to Mr. Choate, or to which he may be entitled, can lawfully be deducted from Mr. Brower's compensation. Mr. Choate was not retained nor employed by Mr. Brower. The general term erred in holding that the agreement imposed upon Mr. Brower the obligation to render or pay for all services by whomsoever or howsoever rendered.

Peckham, *J.*, delivered the opinion of the court:

There can be no doubt of the authority of a guardian in socage to make a contract such as this.

By our Revised Statutes, under the facts in this case, the mother became a general guardian with the rights, powers and duties of a guardian in socage. 1 R. S. 718, § 5.

Such a guardian had the right to the possession of the ward's lands and to the receipt of the rents and profits thereof, and could maintain ejectment to recover possession of such lands. *Jackson* v. *De Walts*, 7 Johns. 157; *Beecher* v. *Crouse*, 19 Wend. 306; *Byrne* v. *Van Hoesen*, 5 Johns. 66; *Sylvester* v. *Ralston*, 31 Barb. 286; *Emerson* v. *Spicer*, 46 N. Y. 594;

Schouler, Dom. Rel. §§ 286-290; 2 Kent, Com. marg. p. 222.

The right to the possession of the real estate of the ward carries with it a corresponding duty to obtain such possession; and, if wrongfully withheld, the guardian should sue for it.

In imposing this duty upon the guardian the law necessarily gives to him the right to employ counsel, and of course to make a contract for his compensation. *Taylor* v. *Bemiss*, 110 U. S. 42 [Bk. 28, L. ed. 64].

The attorney for Mrs. Hynes and also all the other parties seem to have regarded this proceeding as practically a suit to enforce a specific performance of the contract made between the attorney and Mrs. Hynes as general guardian for her infant children; and with that view he proved the facts surrounding the making of the agreement, and gave evidence as to the value of the property to be recovered, the pecuniary situation of the infants and their guardian, the labor involved in the prosecution of the various legal proceedings and the success attending such prosecution; and he also called some of the most reputable and eminent members of the New York Bar upon the question of the reasonableness of such agreement; and their opinions were unanimous, and were all favorable to its propriety and fairness. The questions involved in the litigation in the actions of ejectment were argued upon appeal before this court and have been reported. See 82 N. Y. 41, and 91 N. Y. 451.

That they were complicated and grave cannot be doubted.

The question of the propriety of the agreement was before the special term of the supreme court; and although there was then no affirmative evidence against it, yet the learned and careful judge therein presiding referred it back to the referee, to take further evidence on that subject and to report thereon to the court. It was upon the proceeding on the second reference that the opinions of the members of the bar were procured under oath, and upon a fair statement of all the facts as shown in the record now before us. The referee in his second report said upon this subject:

"I have carefully considered the situation of the infants after the death of their father, as disclosed by the testimony taken herein, in that the estate, both real and personal, of their father had been taken possession of by relatives of the father residing in this country, claiming to be his only heirs at law and next of kin, they insisting that the marriage of the father of said infants with their mother, the petitioner, was illegal and void, and said infants illegitimate; and in that the marriage claimed had taken place in a foreign country without the performance of any marriage ceremony; and that said relatives were possessed of large means and said infants were without any means to prosecute legal proceedings to establish their claim to legitimacy and to their father's property, and their mother was also without any means, and the infants were dependent upon the charity of the friends of their late father for support and were of tender years."

The referee finds as a fact that the agreement with Mrs. Hynes individually and as general guardian of the infants was in all respects just, fair, reasonable and proper. The special term again examined this report, and in an opinion the learned justice holding that court said: "I have most carefully examined the testimony taken before the learned referee, both at the original and supplemental hearings; and I have reached the conclusion that the judgment twice pronounced by him, after hearing and seeing the witnesses, is correct, and that his report should therefore be confirmed."

The general term, with an exception to be noticed, agreed with this view of the case and, after a modification, affirmed the order of the special term. Upon this testimony this court would not be justified in reversing the conclusion of the lower courts upon the fact as to the character of the agreement in point of fairness and propriety.

It appears, however, that just as the attorney and one whom he had associated with him were about to enter upon the first trial of the action of ejectment, another counsel appeared for the plaintiff therein, and with their assent took the leading part in the trial of the action, which lasted five days, and such counsel also argued the various appeals thereafter and took the same part in the second trial and the subsequent appeals from the judgment then obtained. The services of the counsel were most meritorious and valuable, but they were not rendered upon the retainer or request of the attorney making the agreement with Mrs. Hynes, and so far as appears were wholly separate and distinct from his contract with her. The general term held that whatever sums were or should be paid this counsel must be deducted from the amount claimed by the attorney, and modified the order of the special term to that extent.

We are unable to see the force of the reasoning which led to this result. Undoubtedly the attorney would have to pay out of his share all expenses of counsel retained by him in the conduct of the cause. He could not make the infants or the mother liable for that expense. It seems equally true that neither the mother nor anyone for her, or as a mere stranger, could retain counsel and charge the expense of his payment to the attorney, without his assent to such arrangement. There is no proof of any such assent, and we think none is implied from the fact that counsel was employed by a third person; and thereafter the attorney consulted with such counsel and permitted him under such retainer to take the leading part in the trial and argument of the action.

As the evidence shows, what took place in court, while of course of the most vital importance, was but a small part of the actual labor performed in the case. And if the attorney were responsible for the payment of counsel out of his share, when such counsel was not retained by him, and when he was ready and willing to go on without him, the amount of his possible compensation might be very seriously diminished, if not entirely wiped out, without his consent. Treating with counsel retained by a third person, and permitting him to aid in the trial of and to argue the case is very far indeed from any assent that his services shall be paid for by the attorney instead of the person who retained him.

One other objection is made. There was a sale of vacant lots in Tennessee; and the proceeds of the sale are in the hands of the clerk of the chancery court of the State. Counsel for appellants claims that the attorney is not entitled to his proportion of that fund. We think otherwise. The title of the infants to the property of their late father has been established by these actions, and Tennessee funds have come or are coming to them by reason of that title. Notes were given for the amount of the sale, less 10 per cent paid in cash. The sale took place December 29, 1883, and the last notes became due fourteen months thereafter, or in March, 1885. The notes were secured by mortgage on the lands sold. It is to be presumed, in the absence of evidence to the contrary, that the notes were worth their face and that they had been paid; for if not, it would have been proved, as the referee did not make his report until September, 1885.

The counsel for the infants also claims that the attorney should only be allowed to recover upon filing a waiver by his associate of all claims upon the infants or the widow. In his brief before this court the counsel for the attorney says that he (such attorney) had himself selected counsel who had actually commenced the opening address to the jury when the counsel retained by others appeared. As has been already said, counsel employed by the attorney would have to look to him for compensation, and would have no claim against the estate of the infants or the widow; but we do not think it proper in this proceeding to add the condition asked for.

The order of the General Term should be reversed, and that of the Special Term affirmed, with costs.

All concur, except **Ruger,** *Ch. J.*, and **Earl,** *J.*, dissenting; **Finch,** *J.*, not voting.

Truman SYMSON, *Appt.*,
v.
Hannibal S. SELHEIMER *et al.*, *Respts.*

1. A **motion** at special term **to** obtain permission to **amend** the statement of a **confession of judgment** is one addressed to the discretion of the court, and which it may refuse or **grant** on such terms as to it may seem just.
2. Where, upon motion by plaintiff for leave to amend his judgment, the motion **was granted**, but the lien of his judgment was absolutely **postponed**, the order should have been in the form of **granting leave upon** condition of his assenting to the postponement of his lien, thus giving him the **option of amending upon** such **condition** or of not amending and leaving his judgment in its original state.
3. **A motion to amend** the **remittitur** by putting in some other condition than that imposed by the supreme court, is to appeal from the discretion exercised by that court, and to ask this court to exercise its own, which it has no right to do.
4. An **order postponing** the **lien of a judgment does not postpone** the judgment **to** the lien of **a judgment** docketed in form but **which is,** as matter of law, **void.**

(Decided April 26, 1887.)

MOTION to amend *remittitur*. *Denied.*

Hannibal S. Selheimer and Dwight S. Beckwith doing business as Selheimer & Beckwith, in Carlton, Orleans County, N. Y., on December 15, 1884, made a general assignment for the benefit of their creditors, in which there were preferences to the amount of over $38,000. On January 6, 1885, thereafter they confessed judgment in favor of plaintiff, Truman Symson, to the amount of $3,433.01, represented in part by three notes and in part by an open account between the parties for produce sold, etc.

After the entry of plaintiff's judgment numerous other judgments were obtained against Selheimer & Beckwith, by confession or by action; and on February 13, 1885, a receiver was appointed in proceedings supplementary to execution on one of such latter judgments and subsequently the receivership was extended to some of the other judgments obtained against the partnership but not to the judgment confessed in favor of Symson, the latter not having instituted supplementary proceedings. Thereafter such receiver commenced an action to set aside the general assignment of Selheimer & Beckwith as fraudulent and void, in which action all judgment creditors, including the plaintiff Symson, were, on order of the court, made parties defendant.

The receiver obtained a judgment in such action declaring the assignment void, because not properly acknowledged, and fraudulent in fact and in law.

August 15, 1885, certain real estate of the partnership was sold upon foreclosure of a mortgage given prior to Symson's judgment and purchased by Symson at a price which created a surplus of nearly $2,000. Symson filed a claim to the surplus and, about September 15, 1885, was informed for the first time that an informality existed in his judgment, and that its validity was to be questioned, because the statement for confession did not contain a statement of the facts out of which the debt arose.

Upon an affidavit of Symson, alleging that the failure to insert such statement of facts was due solely to the inadvertence or ignorance of the attorney who prepared the papers, a motion was made at special term upon which the court, October 5, 1885, granted an order to show cause why the statement made by defendants for confession of judgment and upon which the judgment was entered be not amended in the particular mentioned and why plaintiff should not have such other or further relief in the premises, etc.

This order was directed to and served upon all the judgment creditors of Selheimer & Beckwith, whose judgments were subsequent to that of plaintiff. At the hearing upon the return day of the order to show cause on affidavits *pro* and *con*, the court directed the judgment to be amended and corrected by adding the concise statement of facts out of which the debt arose, *nunc pro tunc*, as of the time said judgment was entered.

From this order an appeal was taken to the general term by the defendants and several others, judgment creditors, and by the receiver in the supplementary proceedings. The general term modified the order of the special term by adding thereto the following clause:

"It is further ordered that the lien of said judgment, in favor of said Truman Symson, be and the same is hereby deferred to that of the judgment creditors of said defendants, Selheimer & Beckwith, existing on October 5, 1885, as to all the real estate of said judgment debtors which is embraced in the general assignment dated on the 15th day of December, 1884."

From the order of the general term plaintiff appealed to this court where the same was, March 1, 1887, modified in the following order, no opinion being delivered:

"Order of general term modified by providing that plaintiff's motion to amend is granted, upon his consenting to postpone the lien of his judgment to those existing on the 5th of October, 1885, as to all real estate embraced in the assignment of the judgment debtors, dated December 15, 1884; otherwise denied; no costs to either party on this appeal." (See *ante*, 339.)

Thereafter on affidavits alleging the invalidity of certain of the judgments existing on October 5, 1885, the plaintiff moved this court to amend the *remittitur*, so as to postpone the lien of plaintiff's judgment to all *valid* judgments existing October 5, 1885, the plaintiffs in which had by the receiver joined in the action to set aside the general assignment.

Mr. **Nathaniel Foote,** for appellant.

Mr. **John H. White,** for respondents.

Per Curiam:

The motion made by plaintiff at special term to obtain permission of the court to amend the statement of the confession of judgment was addressed to the discretion of the supreme court. It was not an amendment which he had the legal right to demand, but was one which the court might in its discretion refuse, or grant upon such terms as to it might seem to be just. *Mitchell* v. *Van Buren*, 27 N. Y. 300.

The special term granted the motion to amend unconditionally. Upon appeal the general term, while affirming that part of the order of the special term granting leave to amend, coupled it with a provision absolutely postponing the lien of the plaintiff's judgment as stated in such order. The effect was that upon a motion for leave to amend his judgment, the plaintiff found that his motion had been granted and the lien of his judgment absolutely postponed, instead of which, as he was asking for a favor, the order should have been in the form of granting the favor upon condition of his assenting to the postponement of his lien, thus giving the option to him of taking his favor upon the condition imposed, or of not taking it, and leaving his judgment in its original state.

This court thought that the plaintiff had a right to have this option granted him. We, therefore, modified the order of the general term in the manner set forth in the *remittitur*.

The present motion to amend the *remittitur* by putting in some other condition than that imposed by the supreme court is to appeal from the discretion exercised by that court and to ask us to exercise our own, which we have no power to do. We think, however, that the order as modified by this court, in case plaintiff accepts the conditions, cannot be construed to postpone the plaintiff's judgment to the lien of a judgment docketed in form, but which is, as matter of law, void. Where is the lien of a void judgment or how can it be said to be a judgment at all?

The motion to amend the remittitur *must be denied, without costs.*

All concur.

WELLS, FARGO & CO., *Respt.*,
v.
Erwin DAVIS, *Appt.*

1. **Objections that** a paper purporting to be **a copy of a judgment roll of a district court** of the Territory **of Utah** was **not properly exemplified,** in that the certificate did not show that the person making it was either "sole judge, chief justice, or presiding magistrate of the court," nor that the court was composed of one judge only and that the person making the certificate was that judge, **not considered** in the court of appeals, **because not raised at the trial**.
2. It seems that **a copy of a judgment roll** of a court of another State, purporting to be exemplified under section 905 U. S. Rev. Stat. is **not** rendered **inadmissible in evidence** in this State by the fact that the **seal** to the attestation clause was put directly upon the paper, **without wax** or other adhesive substance.*
3. The rate of **interest** to be recovered in an action **upon a judgment** must be **measured by** the **laws** of the **State in which** the **action upon** the **judgment is brought**. Hence, where suit was brought in this State upon a judgment obtained in Utah in 1877 for a certain sum "with interest thereon at 10 per cent per annum from the date hereof until paid," *held*, that the plaintiff was only entitled to recover interest on the judgment at the rate of 7 per cent up to the time chapter 538, Laws of 1879, changing the rate of interest took effect, and from that time at the rate of 6 per cent.

(Decided May 10, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Circuit in favor of plaintiff in an action on a judgment recovered in a District Court in Utah Territory. *Modified.*

The facts and questions raised appear from the opinion.

Messrs. **Henry A. Root** and **Thaddeus Kenneson,** for appellant:

I. There is no evidence of the recovery of the alleged judgment. The record of the judgment is not properly exemplified. It is not

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*See Hunt v. Hunt (N. J.), *ante*, 462.

authenticated in accordance with United States Revised Statutes, § 905. There is no evidence that the person making the certificate was the sole judge of the court from which the record purports to come. The statute is of no avail unless precisely followed.

Rogers v. *Jackson*, 19 Wend. 383; *Bissell* v. *Edwards*, 5 Day (Conn.) 363; *Turner* v. *Waddington*, 3 Wash. C. C. 126; *Stewart* v. *Swanzy*, 23 Miss. 502.

The certificate must show that the person signing it as judge was, at the time of so signing, the judge, chief justice or presiding magistrate of the court in which the judgment is of record.

U. S. v. *Biebusch*, 1 Fed. Rep. 113, 115.

"The certificate ought to contain intrinsic evidence of the official capacity of the person who certifies; *i. e.*, it must show that he is the person by whom the certificate is required to be made."

Kirkland v. *Smith*, 2 Martin (La.) N. S. 497; *Stephenson* v. *Bannister*, 3 Bibb. 369; *Settle* v. *Alison*, 8 Ga. 201, 205.

This precise defect in such a certificate has been held fatal in a large number of cases.

Pratt v. *King*, 1 Oreg. 50; *Van Storck* v. *Griffin*, 71 Pa. 240; *Ordway* v. *Conroe*, 4 Wis. 45; *Bennett* v. *Bennett*, Deady, U. S. C. C. 299; *Stewart* v. *Gray*, 1 Hempstead, 94; *Stephenson* v. *Bannister*, 3 Bibb, 369; *Kirkland* v. *Smith*, 2 Martin (La.) N. S. 497.

To aid the defect in the certificate the court below could not take judicial knowledge of the laws, if there are any, under which the Court of Utah has been formed, in order thus to disclose the Constitution of the alleged Utah Court, and that it was in fact composed of one judge only.

U. S. Bank v. *Stearns**, 15 Wend. 314.

These territorial courts are not United States courts.

Clinton v. *Englebrecht*, 13 Wall. 434 (80 U. S. bk. 20, L. ed. 659).

"Courts of this State cannot take notice of the laws of other States, unless they are proved in the same manner as other facts."

Hosford v. *Nichols*, 1 Paige, 220, 226. See also *Holmes* v. *Broughton**, 10 Wend. 75, 78; *Phœnix Ins. Co.* v. *Church*, 81 N.Y. 218; *People Lawrence*, v. *Brady*, 56 N. Y. 182; *Matter of Belt*, 7 N. Y. Legal Obs. 80; Code Civ. Proc. § 942; *Stephenson* v. *Bannister*, 3 Bibb, 369; *Settle* v. *Alison*, 8 Ga. 201, 205; *Hudson* v. *Daily*, 13 Ala. 722; *Van Storck* v. *Griffin*, 71 Pa. 240.

The judge's certificate does not comply with the Act of Congress in that it certifies to the exemplification. It should certify to the attestation. The attestation is the clerk's work; the exemplification is the whole, and consists of the clerk's attestation, the judge's certificate and the seal. A proper judge's certificate is absolutely indispensable.

Drummond v. *Magruder*, 9 Cranch, 122 (13 U. S. bk. 3, L. ed. 677); *Smith* v. *Blagge*, 1 Johns. Cas. 239; *Burnell* v. *Weld*, 76 N. Y. 103; *Craig* v. *Brown*, 1 Pet. C. C. 352.

There is no attestation of the clerk in the exemplification. The so-called attestation of the clerk, preceding the certificate by the judge, is not properly sealed. The seal should have been impressed upon wax or other adhesive substance.

Coit v. *Millikin*, 1 Denio, 376; *Bank of Rochester* v. *Gray*, 2 Hill, 227; *Warren* v. *Lynch*, 5 Johns. 239; 2 Cow. & Hill's Notes to Phil. Ev. 5th Am. ed. *455; *Andrews* v. *Herriot*, 4 Cow. 508; *Farmers etc. Bank* v. *Haight*, 3 Hill, 493;. *Leavitt* v. *Blatchford*, 17 N. Y. 521, 541, 546; *Gillespie* v. *Brooks*, 2 Redf. 349.

Our statute in regard to seals, Code, Civ. Proc. § 29, has no extraterritorial force.

Bank of Rochester v. *Gray*, and *Coit* v. *Millikin*, *supra*.

In the absence of proof of foreign statute, the common law is presumed to govern.

Harris v. *White*, 81 N. Y. 532, and cases cited.

II. The court erred in allowing interest at 10 per cent on the amount of the alleged judgment.

In the recent and carefully considered case of *O'Brien* v. *Young*, 95 N. Y. 428, it is held that "A judgment is an obligation of record; and interest thereon is given, not on the principle of implied contract, but as damages for delay in performing the obligation, the measure of which is the statutory rate."

First Nat. Bank v. *Fourth Nat. Bank*, 89 N. Y. 412; *Salter* v. *Utica etc. R. R. Co.* 86 N. Y. 401; *Sanders* v. *Lake Shore etc. R. Co.* 94 N. Y. 641.

In an action on a judgment rendered in another State interest is to be allowed according to the rate in this State by way of damages. "This is not interest, but damages; and the rule of damages is that of the court where the action is brought."

Barringer v. *King*, 5 Gray, 9. See also, *Hopkins* v. *Shepard*, 129 Mass. 600, 601.

"The remedy must be pursuant to the laws of the State where it is sought."

Blanchard v. *Russell*, 13 Mass. 1, 5.

The nature, validity and interpretation of contracts are to be governed by the law of the country where the contracts are made or are to be performed. But the remedies are to be governed by the laws of the country where the suit is brought; by the *lex fori*.

Bank of U. S v. *Donnally*, 8 Pet. 361, 372 (33 U. S. bk. 8, L. ed. 974, 978). See also, *Clark* v. *Child*, 136 Mass. 344.

Mr. **Wm. Bro. Smith**, for respondent:

I. The District Court of the Third Judicial District of the Territory of Utah is a court created and organized, and its jurisdiction prescribed, by and under Acts of Congress of the United States.

R. S. U. S. pp. 331, 337, § 338; Supplement, U. S. R. S. 1874, § 3, p. 107.

The attention of the trial court was called to these statutes. The court was bound to take judicial notice of these statutes, and of the organization and existence of this court.

U. S. Const. art. 6, § 2; *Jack* v. *Martin*, 12 Wend. 311; *Hatcher* v. *Rocheleau*, 18 N. Y. 87, 90, 91.

The record of the judgment recovered in the territorial district court was properly admitted in evidence. The attestation of the clerk, the seal of the court annexed thereto, and the certificate of the judge conform to the requirements of the Acts of Congress.

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*See note, Lawyers' edition. [Ed.]

U. S. R. S. § 905, p. 190, § 6, p. 2.

The introductory clause in the exemplification, taken together with the paragraph at the end of the record, is an attestation by the clerk within the meaning of the Act of Congress, and the certificate by the judge that the exemplification is in due form of law, is a certificate within the same Act that the attestation by the clerk which forms a part of the exemplification is in due form.

Taylor v. *Carpenter*, 2 Woodb. & M. 1; *Thrasher* v. *Adams*, 32 Ala. 645; *Blair* v. *Caldwell*, 3 Mo. 249; Freeman, Judgments, 2d ed. § 412.

There is but one judge for each district court in Utah, and he is assigned to one particular court.

U. S. R. S. §§ 1716, 1907.

The record is as good as an exemplification at common law. An exemplification at common law may be under the great seal or the seal of the court; the great seal in cases of records from foreign courts, and the seal of the court in records from courts of the same common government.

Hatcher v. *Rocheleau*, 18 N. Y. p. 87; Starkie, Ev. 10th ed. 257, 258, 259; Greenl. Ev. §§ 501, 503; Abb. Trial Ev. p. 536; Code Civ. Proc. § 962.

The judicial record so certified and admitted in evidence was at least *prima facie* evidence of a legal judgment.

Hatcher v. *Rocheleau*, 18 N. Y. 87; *Bosworth* v. *Vandewalker*, 53 N. Y. 597.

II. The respondent was entitled to recover interest on the judgment in suit, from the recovery thereof in the territorial court until the verdict in this action, at the rate of 10 per cent per annum.

The judgment in the case at bar required the payment of a given sum with interest at a specified rate for a specified time; and the interest at the rate specified is a part of the obligation to be discharged.

O'Brien v. *Young*, 95 N. Y. 428, 433.

This court cannot separate the judgment and give to one part and refuse to the other the full faith and credit required by the Constitution. It is a judgment which it must be presumed the territorial court had the power and jurisdiction to render.

The law of Utah allows interest at 10 per cent per annum.

The judgment in the case at bar is within the saving clause of chapter 538, Laws of 1879 of this State.

The case of *Clark* v. *Childs*, The Reporter, Vol. 17, p. 368, cited below by the appellant, and which the general term declined to follow, ought not to be followed by this court.

The cases of *Barringer* v. *King* and *Hopkins* v. *Shepard*, cited in *Clark* v. *Childs*, do not sustain that decision. In neither of these cases did the judgment, so far as the reports show, make the payment of a specified rate of interest for a specified time a part of the judgment as in *Clark* v. *Childs* and the case at bar.

The court in *Clark* v. *Childs* might with equal justice have inquired into the original recovery in the California judgment, on which its decision was based; and if it found that the recovery therein was based upon a rate of interest exceeding that allowed in Massachusetts, it might have reduced the recovery in Massachusetts in that particular also.

Danforth, J., delivered the opinion of the court:

There are two questions in this case: *first*, whether the paper purporting to be a copy of a judgment roll of the District Court of the Third Judicial District of the Territory of Utah, was properly exemplified, and if so then, *second*, whether the plaintiff was entitled in this action to recover interest at the rate of 10 per cent upon the sum adjudged thereby to be due.

First. The Act of Congress (U. S. R. S. § 905) requires that "The records and judicial proceedings of the courts of any State or Territory shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate that the said attestation is in due form."

These forms seem to have been strictly complied with. After the exemplification of the record under the seal of the court, comes first, the attestation of a judge described as "Judge of the District Court of the Third Judicial District, Territory of Utah," that the exemplification referred to is in due form of law; that O. J. Averell, whose name is subscribed thereto, was at its date clerk of that court; and that the signature of his name is genuine. After that is the certificate of Averell described as clerk of the court referred to, that its records are in his custody as such officer, that the foregoing is a copy of so much of said records as constitutes the judgment record in said cause, that he has compared the same with the original, and that the same is a correct transcript therefrom and the whole of such original. To this is affixed, as he certifies, his official seal. We have, therefore, a copy of the entire record, the attestation of the clerk, the seal of the court and the certificate of an officer described as "judge" of the court in which the judgment disclosed by the record appears to have been rendered.

The appellant's objection at this point is that the certificate does not show that the person making it was either "sole judge, chief justice or presiding magistrate of the court;" nor that "at the time of making it the court from which it purports to come was composed of one judge only, and that the person making the certificate was that judge."

If this objection had been presented to the trial court and there insisted upon, it would be necessary to consider whether in view of the decisions of other courts, cited by the learned counsel for the appellant, it would not be ground of error. But it was not there pointed out. The objections to the admission of the copy of the judgment were of a different character. It was assumed by the defendant that the provisions of the Laws of the United States applied to the case; but it was said: 1, that no evidence had been offered of the organization of the court "which rendered it" as a territorial court of Utah and that the judgment does not prove the organization of that court; 2, that the certificate of the clerk does not certify that the judge whose signature is attached to the certificate, was a judge of the District Court of Utah, and that the exemplification is not a proper one."

In *Burnell* v. *Weld*, 76 N. Y. 103, to which the appellant calls our attention, it appeared that the copy of the record offered in evidence was objected to upon the trial upon the ground that "It was not properly exemplified as required by the Act of Congress, in that there was no certificate of the chief justice," and we were constrained to sustain an appeal from the ruling of the court below, because the defect was specifically pointed out at the time its admission was objected to. It was not so in the case at bar. Had it been, other evidence might have been offered, An objection which could be obviated, if made in time, cannot prevail when taken for the first time in an appellate court.

The same remarks apply to the point now made, also for the first time, that the seal to the attestation clause was put directly upon the paper, whereas it is urged it should have been impressed upon wax or other adhesive substance. Without reference, however, to the Laws of the United States (*supra*), we think the record was properly certified under the provisions of the Laws of this State and so admissible in evidence.

Second. But we think the court erred in allowing interest upon the cause of action at the rate of 10 per cent per annum. The judgment sued upon was entered in October, 1877, upon a verdict of $7,462.33, and the record recites that "By virtue of the law and the premises aforesaid," the proceedings in the action, "it is ordered and adjudged that said plaintiff have and recover from said defendants the sum of $7,462.33, with interest thereon at the rate of 10 per cent per annum from the date hereof till paid."

Upon the trial the plaintiff's counsel proved, against objection and exception by the defendant, that under the Laws of Utah relating to the subject it was lawful to take 10 per cent interest per annum, when the amount of interest has not been specified or agreed upon, and computed interest upon the recovery from its date at 10 per cent per annum, making at that rate the sum due upon the judgment of principal and interest, $12,063.88. This sum the court held that the plaintiff was entitled to recover; and the defendant, by proper exceptions to this ruling, and exceptions to the refusal of the court to charge otherwise, has fairly raised the proposition upon which he asks a modification of the judgment which followed this ruling. We think his contention must prevail under the rule already declared by this court that interest is given upon a judgment, not on the principle of implied contract, but as damages for delay in performing the obligation.

In *Taylor* v. *Wing*, 84 N. Y 471, the mortgage in terms called for interest at 7 per cent until paid, and by the judgment interest at the same rate was directed to be paid on the amount found due from the date of the decision. Upon appeal this was held to be wrong, and that after judgment the mortgage was merged therein, and thereafter plaintiff was entitled to interest, not by virtue of the mortgage, but of the judgment, and that the interest should have been at the lawful rate, *i. e.*, 6 per cent.

To the same effect was *Salter* v. *Utica etc. R. R. Co.* 86 N. Y. 401.

In *Prouty* v. *Lake Shore etc. R. Co.* 95 N.Y. 667, the judgment before the court was by its terms payable with interest.

In *O'Brien* v. *Young*, 95 N. Y. 428, that provision was lacking; but each judgment was recovered when the statutory rate of interest was 7 per cent; and as to each it was held that the amount of interest to be collected on execution must be governed by statute, and that the rate changed when the general law reduced that rate to 6 per cent. Laws 1879, chap. 538.

The fact that one judgment specifically provided for the payment of interest was not supposed to create any distinction in the application of the law regulating that question. The law of the State made every judgment interest bearing; and the obligation for its payment was not increased or varied by inserting a direction to that effect in the record.

The provision in the judgment of Utah, therefore, in regard to interest, is of no more force in regulating the rate of interest upon suit brought in this State than is the statute of that Territory which justified its court in allowing it. As the increase is allowed, not as interest, but as damages, its measure must be that of the State where the action for its recovery is brought. The *lex fori* governs. This is the necessary result of the decisions in this court already referred to, and the same doctrine as to similar cases prevails in the courts of Massachusetts. *Clark* v. *Child*, 136 Mass. 344.

The respondent relies, as against this position, upon an expression in one of the opinions in the *O' Brien Case* (*supra*), to the effect that when a judgment required a specified rate of interest to be paid, the rate specified becomes a part of the obligation to be discharged. That was said in reviewing *Prouty* v. *Lake Shore etc. R. R. Co. supra*, a decision in equity which provided for a specific performance of a contract between parties in respect to certain dividends in arrear, directed to be paid, "with interest thereon from the entry of judgment until the same shall have been fully paid and satisfied." The clause was held to be insufficient to justify the collection of interest at 7 per cent after the Act of 1879, although the judgment was recovered before that time, and the remark quoted was by way of argument merely, not essential to a disposition of any question upon which the case finally turned, nor to the conclusion that interest upon a judgment was allowable by way of penalty or damages for default. Concerning it neither the law of Utah nor the judgment can have extraterritorial force.

It seems to me, therefore, that the interest to be allowed as damages in this case should be governed by the law in force in this State at the time of the trial (Laws 1879, chap. 538), viz.: 6 per cent; but a majority of the court are of opinion that the plaintiff may properly recover 7 per cent interest from the time of the rendition of the judgment in Utah until the Act of 1879 (*supra*) took effect, and from that time at the rate of 6 per cent.

The judgment should, therefore, be modified by deducting the difference between these rates for the times specified, and interest at 10 per cent, and as so modified, affirmed, *without costs in this court.*

All concur except **Earl and Finch,** *JJ.*, who vote for general affirmance.

Samuel W. NASH, *Respt.*,
v.
WHITE'S BANK OF BUFFALO, *Appt.*

1. The effect of chapter 567 of Laws of 1880,* fixing **bank discount** at 6 per cent, was to repeal the penalties imposed by chapter 163 of Laws of 1870,† for taking discount in excess of 7 per cent. Hence an **action to recover** such **penalties,** brought **under** the **Act of 1870,** could **not** be **maintained after** the **passage of** the **Act of 1880.**
2. The **General Repealing Act of 1828,**‡ related only to the Acts repealed thereby and **had no effect on subsequent legislation.**
3. Subsequent **legislation cannot revive** an extinguished **cause of action.**

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Fifth Department, affirming a judgment entered in Erie County on report of a referee in favor of plaintiff on the third trial of an action to recover penalties under chapter 163, Laws of 1870. *Reversed.*

This action was commenced in 1878, to recover penalties incurred by taking illegal discounts in the discounting of commercial paper. It was first tried before a referee, who dismissed the complaint. On appeal to the general term this judgment was affirmed; but on appeal to this court it was reversed and a new trial granted.

See 68 N. Y. 396.

On the second trial the referee found for the plaintiff. On appeal, the general term reversed his decision and ordered a new trial. On the third trial, the referee again found for the plaintiff. Judgment entered on such finding was affirmed by the general term (see 37 Hun, 57), and defendant appealed to this court.

Further facts appear from the opinion.

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*An Act to amend chapter 163 of the Laws of 1870, entitled "An Act to Amend the Act entitled 'An Act to Authorize the Business of Banking,' passed April 18, 1838."

Passed June 4, 1880.

Section 1. Section 1 of chapter 163 of the Laws of 1870, entitled "An Act to Amend the Act Entitled 'An Act to Authorize the Business of Banking,' passed April 18, 1838," is hereby amended so as to read as follows:

Sec. 1. Every banking association organized and doing business under and by virtue of the Act entitled "An Act to Authorize the Business of Banking," passed April 18, 1838, and the various Acts supplementary thereto and amendatory thereof, and every private or individual banker or bankers doing business in this State, are hereby authorized to take, receive, reserve and charge on every loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate of 6 per cent per annum; and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run. The knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon; and, in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back twice the amount of the interest thus paid, from the association taking or receiving the same; *Provided,* That such action is commenced within two years from the time the said excess of interest is taken. But the purchase, discount or sale of a *bona fide* bill of exchange, note or other evidence of debt, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts, or a reasonable charge for collecting the same, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest than 6 per cent per annum.

Sec. 2. Section 2 of said chapter 163 of the Laws of 1870 is hereby amended so as to read as follows:

Sec. 2. It is hereby declared that the true intent and meaning of this Act is to place and continue the banking associations organized and doing business as aforesaid on an equality, in the particulars in this Act referred to, with the national banks organized under the Act of Congress, entitled "An Act to Provide a National Currency, Secured by a Pledge of United States Bonds, and to Provide for the Circulation and Redemption Thereof," approved June 3, 1864. And all Acts and parts of Acts inconsistent with the provisions hereof are hereby repealed.

Sec. 3. This Act shall take effect immediately.

†An Act to Amend the Act entitled "An Act to Authorize the Business of Banking," passed April 18, 1838.

Passed April 9, 1870.

Sec. 1. Every banking association organized and doing business under and by virtue of the Act entitled "An Act to Authorize the Business of Banking," passed April 18, 1838, and the various Acts supplementary thereto and amendatory thereof, is hereby authorized to take, receive, reserve and charge on every loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate of 7 per cent per annum; and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon: and, in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back twice the amount of the interest thus paid, from the association taking or receiving the same; *Provided,* That such action is commenced within two years from the time the said excess of interest is taken. But the purchase, discount or sale of a *bona fide* bill of exchange, note or other evidence of debt, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts, or a reasonable charge for collecting the same, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest than 7 per cent per annum.

Sec. 2. It is hereby declared that the true intent and meaning of this Act is to place the banking associations organized and doing business as aforesaid, on an equality, in the particulars in this Act referred to, with the national banks organized under the Act of Congress entitled, "An Act to Provide a National Currency, Secured by a Pledge of United States Bonds, and to Provide for the Circulation and Redemption thereof," approved June 3, 1864. And all Acts and parts of Acts inconsistent with the provisions hereof are hereby repealed.

Sec. 3. This Act shall take effect immediately.

‡An Act to repeal certain Acts and parts of Acts. Passed December 10, 1828.

Sec. 5. The repeal of any statutory provision by this Act, shall not affect any act done, or right accrued or established, or any proceeding, suit or prosecution had or commenced in any civil case, previous to the time when such repeal shall take effect; but every such act, right and proceeding shall remain as valid and effectual as if the provision so repealed had remained in force.

Mr. **Sherman S. Rogers,** for appellant:

The Act of 1880 repealed the Statute of 1870, by declaring that it should thenceforth read in a way which defined a different offense and provided for its punishment a different penalty. By the amendment the penalty for which the plaintiff sues was repealed.

Hartung v. *People*, 22 N. Y. 95–97; *Knox* v. *Baldwin*, 80 N. Y. 610, 613; *Moore* v. *Mausert*, 49 N. Y. 332.

A penal statute must speak not only in its prohibition from the time the offense was committed, but in its penalty, at the time the infliction of the penalty is demanded; and we have the right to call upon the respondent to show an existing statute which denounces a penalty of twice the excess above 7 per cent.

It may be that a *casus omissus* is here presented. The Legislature may have thought the statute, after its amendment, would reach offenses theretofore committed. But their error cannot be corrected by judicial construction.

Commonwealth v. *Kimball*, 21 Pick. 376.

The re-enactment of a statute, with amendments, repeals the original statute, so far as prospective action thereunder or the future enforcement of penalties for past offenses is concerned, unless the penalty under the amended statute is for doing something which would have been an offense under the original statute, and unless, also, the penalty for its commission is the same in kind under the amended statute as it was under the original, and not greater in amount or degree.

The repeal of a criminal or penal statute ends all prosecutions under it, and will even arrest a judgment in such an action.

Rex v. *Justices of the Peace of London*, 3 Burr. 1456; *Miller's Case*, 1 W. Bl. 451; *Butler* v. *Palmer*, 1 Hill, 324; *Maryland* v. *Balt. & O. R. R. Co.* 3 How. 534 (44 U. S. bk. 11, L. ed. 714); *Hartung* v. *People*, 22 N. Y. 95; *Knox* v. *Baldwin*, 80 N. Y. 610; *Norris* v. *Crocker*, 13 How. 429 (54 U. S. bk. 14, L. ed. 210); *Commonwealth* v. *Marshall*, 11 Pick. 350.

That the statute in question is penal in its character cannot be doubted. The penalty is twice the excess of interest. The case is, therefore, not at all like those in which vested rights acquired under civil remedies provided by the Legislature have been held to be unaffected by a repeal of the statute under which these rights have been obtained.

People v. *Supervisors*, 4 Barb. 64; *Knox* v. *Baldwin*, 80 N. Y. 610.

If the statute were not penal, the Legislature could not devest the right to the action and recovery; but it has been repeatedly decided and is settled law that the Legislature has full control over the usury laws of the State.

Curtis v. *Leavitt*, 15 N. Y. 153, 154.

Mr. **Joel L. Walker,** for respondent:

The Statute of 1870 was a statute of indemnity; the right of action was given to enable the one who paid the illegal interest to enforce restitution of what the bank had wrongfully taken from him; and in this view the Legislature had not the power to repeal it. The right to the money claimed was vested in the plaintiff by law, from the moment the illegal interest was paid.

The statute gives the right of action not to some public officer for the use of the public, nor to an informer, but to him who was wronged by the extortion. It emphasizes the purpose to make his estate good in case of his death, by giving the right of action to his legal representatives. The words of the statute, in saying it may be "recovered back," look only to indemnity.

The action is penal in its nature and involves the purpose not only to redress an injury but also to punish a wrong; and the penalty is given only to the party who suffered loss by the wrong, by way of reparation.

See 1 R. S. part 2, chap. 4, title 3, §§ 3, 4, p. 772.

The entire Act is confined to the single purpose of regulating the rights as against each other of the parties to the paper discounted.

Per Curiam:

We are of opinion that the effect of the Act of 1880, chap. 567, was to repeal the penalties imposed by chapter 163, of the Laws of 1870, and that consequently this action, which was brought under the Act of 1870, could no longer be maintained, the Act of 1880 containing no provision saving pending actions or existing rights of action.

The provisions of the General Repealing Act of 1828, §§ 6 and 7, related only to the Acts repealed by that statute, and had no effect on subsequent legislation. *Mongeon* v. *People*, 55 N. Y. 613.

If the Act of 1870 was repealed by the Act of 1880, the subsequent legislation cannot affect this case, for it could not revive an extinguished cause of action.

The judgment must be reversed and complaint dismissed.

All concur, except **Danforth,** *J.*, not voting.

Samuel W. NASH, *Respt.*,
v
MANUFACTURERS & TRADERS BANK,
Appt.

Same decision as in preceding case of *Nash* v. *White's Bank of Buffalo.*

Margaretta REMSEN *et al*, *Appts.*,
v.
George M. WHEELER, *Respt.*, Impleaded with the City of Brooklyn.

1. **Assessments for water rates,** levied **against vacant lots in Brooklyn,** under section 24, chapter 396, Laws of 1859, *held* **illegal and void** and not a lien or cloud, for the reasons that the statute fails to provide for notice to the lot owners of the levying of such assessments or any opportunity to be heard in reference thereto, and that no notice was in fact given to such owners.
2. Where **vacant lots,** belonging to minors, had been **sold to enforce** such **illegal assessments,** and certificates of such tax sales were outstanding, and a

proceeding was had under section 8, chapter 114, Laws of 1883, **to enable** the **owners** of the lots **to sell a part of** the **land** to obtain money to pay off the incumbrances, and the **purchaser paid** to the **city** the **amount of** such outstanding **illegal tax sale certificates** on account of the purchase money, *held*, that the doctrine of voluntary payment did not apply as against the lot owners where the money so paid had not been delivered to the holder of the certificates, and that, while it remained in possession of the city, an **action was maintainable by** the **lot owners** to compel the delivery thereof to them.

(*Finch* and *Andrews*, JJ., *dissent.*)

(Decided June 7, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Kings Special Term in favor of defendants in an action to restrain defendant City from paying over certain moneys to defendant Wheeler and to compel it to pay the same to plaintiffs. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **A. P. Bates**, for appellants:

The assessment and water sales were void. The assessment was void, therefore the sale was also. The assessment was levied April 12, 1867, and was levied in the namé of George A. Powers as owner. He never was the owner. The owners from 1831 to 1882 were the executors of Thomas Poole, deceased.

The fee was in them in trust. This is the third of the express trusts created by statute.

2 R. S. p. 1106, § 55, 6th ed.

During the trust the fee is in the trustees and the survivors of them.

2 R. S. p. 1109, § 73.

The assessment should have been against them, naming them as trustees and executors of estate of Thomas Poole, deceased; otherwise it was void.

Trowbridge v. *Horan*, 78 N. Y. 439; 2 R. S. 989, §§ 1, 2, 3, 7th ed.; *Chapman* v. *Brooklyn*, 40 N. Y. 372; *Crooke* v. *Andrews*, 40 N. Y. 547; *Nat. Bank of Chemung* v. *Elmira*, 53 N.Y. 49; *Newell* v. *Wheeler*, 48 N. Y. 486; *Marsh* v. *Brooklyn*, 59 N. Y. 280; *Merritt* v. *Portchester*, 71 N.Y. 312.

The lands sold were vacant property; the assessment could then only be against the owner as owner.

When assessed against the occupant, it must name him as occupant.

DuBois v. *Webster*, 7 Hun, 371.

None of the water Acts provide for a notice. The rates are all unconstitutional, and may be attacked collaterally.

Stuart v. *Palmer*, 74 N. Y. 183; *Lang* v. *Kiendl*, 27 Hun, 66.

No notice can be implied.

74 N. Y. 186; *Guest* v. *Brooklyn*, 79 N. Y. 624.

It does not follow, from the assessments being void, that plaintiffs or even Lynch made a voluntary payment and cannot recover. There can be no voluntary payment, if the assessment or tax be regular on its face. It then has the force of a judgment, the payment is coerced by law.

Bank of Commonwealth v. *Mayor*, 43 N. Y. 188, 189; *Peyser* v. *Mayor*, 70 N.Y. 497; *Bruecher* v. *Portchester*, 2 Cent. Rep. 90, 101 N. Y. 240.

A voluntary payment cannot be made without the freedom of exercising the will.

Scholey v. *Mumford*, 60 N.Y. 501.

Even Lynch was not by the order of the court justified in paying this money, because the assessments being void were no liens or clouds on the property.

Chase v. *Chase*, 95 N. Y. 373; *Re Jones*, 18 Hun, 329; *Clark* v. *Davenport*, 95 N.Y. 477.

A payment ceases to be voluntary when a party is in a straight or under duress, and has to pay to carry out a contract or to save his property from loss.

Bruecher v. *Portchester*, 2 Cent. Rep. 90, 101 N. Y. 240; *Brundage* v. *Portchester*, 31 Hun, 129; *Horn* v. *Town of New Lots*, 83 N. Y. 100.

In the case at bar the money was deposited also under a contract of sale in order to get the sale through, for plaintiffs to make payment of liens held by the City against their other property, under section 8, chapter 114, Laws 1883.

When there is no jurisdiction of the assessing officers who impose a tax or assessment, money paid on same may be recovered back.

Chapman v. *Brooklyn*, 40 N. Y. 380, 381; *Newman* v. *Supervisors*, 45 N. Y. 686, 688; *Strusburgh* v. *Mayor of N. Y.* 87 N. Y. 452; *Horn* v. *Town of New Lots*, 83 N.Y. 100; *Bruecher* v. *Portchester*, 2 Cent. Rep. 90, 101 N. Y. 244.

If vacation be necessary, it may be had in the action.

Jex v. *Mayor*, 4 Cent. Rep. 781, 103 N. Y. 536.

Taxes illegally assessed, even when void on their face, may sometimes be recovered back.

Newman v. *Supervisors*, 45 N.Y. 684; *Chapman* v. *Brooklyn*, 40 N.Y. 381; *Brehm* v. *Mayor*, 6 Cent. Rep. 195.

If the assessments and water rates were valid, the payment by Lynch would be involuntary.

Bank of Commonwealth v. *Mayor of N. Y.* 43 N.Y. 188, 189; *Peyser* v. *Mayor of N. Y.* 70 N.Y. 497; *Bruecher* v. *Portchester*, 2 Cent. Rep. 90, 101 N.Y. 240.

Mr. **Jesse Johnson,** for respondent:

If the payments by Lynch were voluntary, no action lies by anyone to recover them back.

4 Abbott, New Dig. parts 113, 114, 115, p. 383; *New York etc. R. R. Co.* v. *Marsh*, 12 N.Y. 308; *Windbiel* v. *Carroll*, 16 Hun, 101; *Flower* v. *Lance*, 59 N.Y. 603, 610.

The cases predicated upon coercion were cases where chattels were seized, or threatened to be seized, and the owner was liable to lose possession of the same by reason of the collector's levy.

Swift v. *Poughkeepsie*, 37 N.Y. 511; *Bank of Commonwealth* v. *Mayor of N. Y.* 43 N.Y. 184; *Union Nat. Bank* v. *Mayor of N. Y.* 51 N. Y. 638.

The office of registrar of arrears is an office of record (Laws 1873, § 3, p. 1374); and these assessments, water rates and sales stood there, presumptively a lien on these lands.

The statute under which the payment in

question was made is the last portion of section 8, p. 1320, Laws of 1873.

As the findings state it the amount paid was paid to redeem. The statute provides that "Such redemption discharged the land" from the lien of the assessment or water rate.

So, according to the findings, prepared by both plaintiffs and defendant, and by the bill of complaint itself, the payment was made to obtain the discharge of this land.

The discharge desired was from the claim of Wheeler; the City had no claim; it had sold its claim to Wheeler; it received this money for Wheeler; it had no right to receive it for anyone else.

The money having been paid to the City for Wheeler, and its payment having had the effect of at once discharging his liens, the money now clearly belongs to him.

The payment having been made by Lynch, and he being now the owner of the land, he is the only party that can bring an action to cancel the lien and reclaim the money.

Atlantic Dock Co. v. *Mayor of N. Y.* 53 N. Y. 64.

The plaintiffs could not have maintained an action to cancel these sales.

Marsh v. *Brooklyn*, 59 N. Y. 280.

Earl, *J.*, delivered the opinion of the court:

This action was brought to restrain the City of Brooklyn from paying over to the defendant, Wheeler, the sum of $1,986.05, and to compel it to pay the same to plaintiffs as the owner thereof.

The facts as alleged in the complaint and found by the trial judge are substantially as follows:

The plaintiffs, four of whom are infants, were the owners of a tract of land in the City of Brooklyn which had been incumbered by taxes, assessments, water rates and certificates of tax sales to a large amount. In 1883 proceedings were instituted in the supreme court in behalf of the infant plaintiffs, for the sale of a portion of the land in order to obtain money to pay, under section 8, chapter 114 of the Laws of 1883, such taxes and assessments as could be paid thereunder to the City of Brooklyn on the balance of the land; and the result of such proceedings was a sale, in which the adult plaintiffs joined, to one Lynch in September, 1883.

The order confirming the sale, and directing the deeds to be given, directed the special guardian of the infant plaintiffs and the adult owners to receive the consideration money payable by Lynch as stipulated in his contract with them "excepting thereout such sum or sums as said Lynch shall pay in the discharge of taxes, water rates and assessments and sales for each of the same, in order to free said premises or any portion thereof from the liens of the same or the clouds thereon."

Lynch, thereafter, among other payments, paid to the registrar of arrears of the City of Brooklyn, to redeem a portion of the land purchased by him from a sale thereof under assessments for flagging sidewalks, the sum of $1,171.20; and he also paid the sum of $814.85, to redeem land purchased by him from sales thereof for the water rates assessed thereon from the years 1864 to 1870 both inclusive.

These payments by Lynch to the registrar of arrears were deducted out of the consideration money which by his contract he was to pay the plaintiffs for the land deeded to him. The assessments for the water rates were all levied against vacant land, and no notice was given to the owners of the fee at any stage of the levying of such assessments. The sums so paid to the City of Brooklyn are now held by it; but it claims no ownership of the same or any part thereof, or any lien thereon. The defendant Wheeler claimed to hold the certificates of the tax sales and to be entitled to the money thus paid to the City of Brooklyn.

The plaintiffs claim that all the assessments were illegal and the sales invalid; and the defendant Wheeler claims that the various taxes, assessments and water rates and the tax sales were legal and valid, and that he was the owner and holder of the certificates and liens for assessments and water rates, and that the money paid to the City on account thereof was a voluntary payment, and that the title to such money was in him.

The City interposed no answer and made no defense to the action. The trial judge defeated the plaintiffs on the ground that the money was voluntarily paid to the City for the use and benefit of Wheeler and that the plaintiffs had no ownership of the money nor right to obtain or have the same. And upon the same ground substantially the judgment of the special term was affirmed by the general term, as appears by the opinion there pronounced.

If these assessments for flagging and water rates were legally imposed, and the sales under them valid, then the plaintiffs have no standing to maintain this action.

We agree with *Judge* Finch, for the reasons stated in his opinion, that it does not appear in this record that the assessments for sidewalk flagging were invalid; but we are of opinion that the assessments for water rates were invalid and that the sales under the same were wholly unauthorized and illegal.

In the City of Brooklyn there was a system of water works and a board of water commissioners; and section 24, chapter 396, of the Laws of 1859, provides as follows: "The said water board shall, in every year, by resolution, fix the price which shall be assessed * * * upon every vacant lot situated upon any street, lane, alley, or court through or into which distributing pipes shall have been laid, until the bonds issued for the construction of the said works, with the interest thereon, shall have been paid, and thereafter they shall be adjusted so as to, with other provisions of this Act for income from said works, meet the expense of repairs, maintenance and extension of the works. * * * Such sums so assessed, together with percentages for defaults * * * shall be a lien upon the said premises respectively, and the same may be collected and enforced in the same manner as taxes are collected and enforced against land in said City."

The lots of the plaintiffs were vacant, and hence were assessed and assessable for water rates under this section. As no use of the water could be made upon vacant lots, it must have been intended that whatever assessment was made upon them under this section was to be apportioned according to the value of the lots, or the benefits to them, or the cost of bringing the water to them respectively. It cannot be supposed that it was the legislative intent or the practical operation of the section that a vacant lot worth $1,000 should be assessed for water rates as much as one worth $100,000.

Unless this section requires the assessment for water rates upon vacant lots to be imposed and apportioned according to values, benefits or costs, it could not be justified as a scheme of taxation, and would be obnoxious to constitutional objections. Therefore, in reference to the imposition of these assessments, as in reference to the imposition of other assessments and taxes, the lot owners were entitled at some stage of the proceeding to a notice and an opportunity to be heard; and unless the law gave them the right to notice and an opportunity to be heard before the board which was authorized to impose the assessments, it was unconstitutional and void for the reason stated in *Stuart* v. *Palmer*, 74 N. Y. 183.

Our attention has been called to no statute which required the water board to give the lot owners any notice of the levying of these assessments or any opportunity to be heard in reference to them. No notice was in fact given; and the assessments were therefore wholly illegal and void, and they did not become a lien upon the lots or a cloud upon their title. While it may be unfortunate for the City of Brooklyn to have its system for the imposition of assessments for water rates upon vacant lots thus condemned, it is better that it should be done now before greater complications and more mischief may come from such illegal assessments and void sales made for their enforcement. The rules laid down in *Stuart* v. *Palmer* are salutary and important, and, for the protection of personal rights and private property, must be enforced in all cases to which they are applicable.

It is claimed, however, on the part of the defendant Wheeler, that, notwithstanding his tax certificates may be illegal and void, he is still entitled to receive this money from the City. He contends that the money paid to discharge the assessments for water rates did not belong to these plaintiffs but belonged to Lynch; that they have no concern with it, and that their remedy is against Lynch for the unpaid balance of the purchase money. But the record shows that the money was paid by Lynch for them. They consented that the requisite sum should be deducted from the consideration money payable to them, and applied upon these assessments, and after the payment was made they allowed it and received the balance.

By bringing this action they have ratified the payment so far as concerns Lynch, and upon the facts as they now appear they would certainly fail in an action against him to recover the same amount of money as unpaid purchase money. So even if Lynch under the terms of the order made by the court which is above set out was not strictly authorized to make the payment, yet they allowed him to make it out of their money and subsequently ratified his action. Wheeler cannot therefore dispute that this money was the money of the plaintiffs and was in effect paid by them.

The further point is made that this money to discharge the assessment was voluntarily paid to the City for the use and benefit of Wheeler, and that therefore the plaintiffs cannot claim it. But the money has not reached the hands of Wheeler. It is in the possession of the City, which is a mere depositary, and this action is brought to prevent its payment to Wheeler. Until the money reaches his hands and thus becomes his it could not be deemed a voluntary payment to him. The City may be deemed to be the agent of both parties in reference to the money. It has reached its treasury through some mistake either on the part of the plaintiffs or of Lynch; and until the payment has become effctual by delivery to Wheeler, we do not think the doctrine of voluntary payment is applicable on his behalf, and the plaintiffs can reclaim it. The City does not set up voluntary payment to it; nor does it claim the money.

If it is deemed important that Lynch should be made a party to this action to protect his rights or to conclude him by any judgment which may be rendered therein, he can be made a party before the new trial which we are constrained to grant.

The judgment should be reversed and a new trial granted, costs to abide event.

Ruger, *Ch. J.*, **Rapallo** and **Peckham,** *JJ.*, concur; **Finch,** *J.*, reads dissenting opinion for affirmance, in which **Andrews,** *J.*, concurs; **Danforth,** *J.*, not voting.

Finch, *J.*, *dissenting:*

The plaintiffs, some of whom were infants, became the owners of a number of Brooklyn lots which were heavily incumbered by taxes, assessments, water rates and certificates of sale. The enactment of the Law of 1883 permitted a redemption at very reduced expense and the plaintiffs desiring to avail themselves of the opportunity determined to sell a portion of the lots to obtain the means of saving the remainder. Of course it was to be expected that any possible purchaser would stipulate to reserve from the purchase price whatever sums would be necessary to clear and perfect his title beyond all doubt and question and without peril of litigation over any apparent incumbrance.

Such a purchaser the plaintiffs found in James D. Lynch, who agreed to pay for the property a certain sum "Excepting thereout such sum or sums as said Lynch shall pay in discharge of taxes, water rates and assessments and sales for each of the same, in order to free said premises or any portion thereof from the liens thereof or from clouds thereon."

The adult plaintiffs agreed to this stipulation, and the proposed contract (having been reported to the court in proceedings for the sale of the infants' interest) was deemed just and best for their welfare, and a guardian appointed to transfer their title upon the terms of the contract. Code Civ. Proc. § 2358.

That contract signified the vendors' consent that Lynch might use so much of the purchase money as was needed to pay off not only liens but clouds; not merely valid taxes, but apparent liens, not void on their face, but in truth invalid. To that extent his payments bound them exactly as if they had made them themselves; and if they were voluntary payments as to him they were equally so as to them. The lands had been sold to one Andrew S. Wheeler on the 9th of March, 1869, for $366.38, on an assessment levied for the expense of "flagging sidewalks on the west side of Fifth Avenue."

The case contains no evidence of any kind, and the findings do not tell us under what law the assessment was made, or whether the flagging charged for was wholly in front of plaintiffs' premises or an estimated part of a general expense. We are told only that the taxes were "levied against George A. Powers as owner." The case does not show when the assessment was levied, nor that at that date George A. Powers was not the owner of some freehold estate or interest therein. The findings show that one Thomas Poole was seised in fee of the property in 1831, and died in that year, leaving a will by which he devised the premises to his executors in trust to permit his daughter Eliza to occupy them during her life, or in trust to rent the lands during the same period and pay the rents to her; and at her death the will gave the fee to her issue who might then be living.

Eliza died in 1882, after all the assessments complained of were made, and either had a life estate which she could have transferred to George A. Powers, or the executors had one which they could have conveyed to him. In either event he would have been liable to assessment as owner; and so we cannot say that the assessment was invalid for that reason, which is the only objection made. There may be others but it is not our duty to search for them. The appellants have rested their case as to the alleged invalidity of this assessment upon the sole ground that it was made against one who was not at the time the owner. They have failed to prove the fact upon which the error claimed rests and we need go no further in the inquiry, and especially not when no adequate basis for such inquiry is furnished.

The plaintiffs, therefore, made no case in any view of the subject as to the assessment for flagging. It may have been shown on the trial that George A. Powers had a lease for the life of Eliza and so an estate of inheritance or some conveyance of the remainder. The briefs indicate that some lease to him was proved and was made the subject of comment at general term. The complaint charged that all the sales were illegal because "levied or charged to a person or persons as owner or owners of said premises who were not the owner or owners thereof nor the occupant thereof." There is not only no finding that George A. Powers was not owner, but none that he was not occupant, and the original charter of Brooklyn (Laws 1854, p. 864, § 30) provides that land occupied by a person other than the owner may be assessed in the name of the occupant.

The finding that the water rates were levied against vacant property is a finding as to the form of the assessment but is not a finding that the lots were actually vacant, and especially not that they were so when the flagging assessments were levied, the date of which is not shown. We think their invalidity was not established, and the plaintiffs' action must fail as to them.

We come now to the water rates which are found to have been levied against vacant property and against George A. Powers as owner, against unknown owners, and against one Sammis as owner. We are referred in the appellants' brief to the Brooklyn Water Act as the only authority for these assessments. Laws 1859, chap. 396.

We are aware of no other. Three forms of water rates seem to be contemplated and may be described as "regular rents," "special rates" and assessments against vacant property. §§ 18, 24.

The first two are to be fixed by ordinance of the common council, but the third by the water commissioners.

We must assume from the findings that the rates here assailed were levied against the property as vacant and therefore by the water commissioners. Section 24 (*supra*) authorizes them to "fix the price which shall be assessed" "upon every vacant lot situated upon any street, lane, alley, or court through or into which distributing pipes shall have been laid," and makes the "sums so assessed" and the "percentages for default" a lien upon the lands and to be enforced like other assessments.

No notice to anyone and no opportunity to be heard is given by the Act; and it is wholly immaterial whether the water is used or not; and the plaintiffs contend that for such defect the Act is unconstitutional and the water rates absolutely void. *Stuart* v. *Palmer*, 74 N.Y. 183.

These water rates, at least as to vacant property, are called assessments and are in their nature such; and it is difficult, if not impossible, to see how they can be sustained. But the question is a very important one and need not here be decided, since if we concede the appellants' claim in that respect, it does not save their action. If the Act under which the water rates were assessed is unconstitutional, they were void on their face, and did not even constitute a cloud. Under his contract, therefore, Lynch had no authority to pay them out of the purchase price; and when he did so, simply paid his own money to the City for purposes of his own with which the plaintiffs have no concern.

Lynch remains liable on his contract for the balance unpaid and may be sued for it by the plaintiffs, but the money he needlessly paid was his own which he could use in that manner if he pleased. It was not plaintiffs' money in any sense, or withheld under the contract. If, therefore, appellants are right as to the constitutional question, it still does not enable them to maintain this action. They sue to recover money which is not theirs and to remove a cloud which is not such. They are not helped by the finding that they have settled with Lynch and adopted and ratified his payments if that is what the finding means. The adult plaintiffs could bind themselves by such an agreement, but when they did Lynch's payment to the City became theirs; the payment was voluntary and without the shadow of compulsion and cannot be recovered back.

The infants if they are not bound have not lost their money. It remains in the hands of their vendee, who is bound under his contract to pay it to them as an unpaid part of the purchase price.

The judgment should be affirmed, with costs.

Daniel G. DORRANCE, Jr., *Respt.*,
v.
Robert J. DEAN *et al.*, *Appts.*

1. Where a **commission merchant,** to whom grain has been consigned for sale,

has possession thereof as the apparent owner and **delivers it to a warehouseman, who makes advances** on it to him, such warehouseman may keep the grain as security for such advance as against the true owner thereof, provided he did not at the time know that the claimant was the true owner; but **if the warehouseman knew** that the **commission merchant was using** the **claimant's property to raise money** for himself, he stands in the commission merchant's place and **cannot hold** the grain.

2. The **Factors' Act** (Laws 1830, chap. 179) was intended to protect persons dealing in good faith with the apparent owners of property and has no application to a case where protection would secure to a wrong doer the fruits of fraud.

(Decided June 7, 1887.)

APPEAL from a judgment and order of the Supreme Court at General Term in the Second Department, affirming a judgment of the Kings Circuit in favor of plaintiff and an order denying a motion for a new trial in an action for the conversion of corn. *Affirmed.*

The facts material to the questions decided appear from the opinion.

Mr. **Edward S. Hatch,** for appellants.

Mr. **H. Morrison,** for respondent.

Danforth, *J.*, delivered the opinion of the court:

The plaintiff, being the owner of certain corn, alleged and proved that the defendants had converted it to their own use, to his damage $2,829.60. The defendants at the time of the conversion were warehousemen and bankers. They proved in substance that they received the corn from the firm of Littell & Co., commission merchants, advanced money to them on account of it, and insisted that they were entitled to hold the corn until this advance was repaid.

It appeared that the plaintiff had consigned the corn to Littell & Co. for sale. They therefore had possession and were the apparent owners; and the trial judge charged the jury that the defendants could keep the corn as security for the money so advanced, provided they did not at the time know that the plaintiff was the owner of the corn; on the other hand if they knew that Littell & Co. were using the plaintiff's property to raise money for themselves, then the defendants could not hold the corn, and stood in Littell & Co.'s place. To this part of the charge the defendants excepted.

It presents the only point in the case, and to sustain it the appellants rely upon the Factors' Act, Laws 1830, chap. 179.

That Act was to protect persons dealing in good faith with the apparent owners of property, and has no possible application to a case where protection would secure to a wrong doer the fruits of fraud.

Many other propositions have been argued for the appellants, but they are raised by no exception and are not warranted by any evidence to be found in the appeal book.

The trial judge in denying a new trial, and the general term in affirming the judgment, properly disposed of the case.

The judgment and order appealed from should, therefore, be affirmed.

All concur.

John SCHENCK, *Respt.*,
v.
George RINGLER *et al.*, *Appts.*

Where **appellant's default** in a suit has been **regularly taken,** and the **case** upon which it would have to be argued **contains no exception** worthy of consideration, and the question as to the verdict being excessive is not reviewable here, the **motion to open the default** will be **denied,** with costs.

(Decided March 25, 1887.)

MOTION by appellants to open a default, dismissing their appeal from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Queens Circuit in favor of plaintiff in an action for damages for personal injury through negligence. *Motion denied.*

The order dismissing the appeal was entered on February 17, 1887, on failure of the appellants to file the return, under rule 2 of the court of appeals.

Mr. **Isaac Keegelman,** for the motion.

Mr. **Matthew Marx,** opposed.

Per Curiam:

The default herein was regularly taken, and the counsel for defendants ask to have it opened and the case restored.

We have looked into the return upon which the case would have to be argued in this court. It is very brief and not an exception in it worthy of a moment's consideration.

The question as to the verdict being excessive cannot be reviewed here. Under these circumstances *the motion to open the default should be denied, with $10 costs.*

All concur.

Hugh F. McLACHLIN *et al.*, *Respts.*,
v.
James E. BRETT *et al.*, *Appts.*

1. While an **executory contract for** the purchase and **sale of goods** remains unexecuted it **creates no debt** to the seller **against which there can be a set-off.** Hence when a third party, claiming to be the real owner of goods so sold, brings suit against the purchaser for the price thereof, the purchaser cannot set off a claim held by him against the original seller on the ground that the plaintiff by seeking to enforce the contract of sale has become liable also for its burdens,—the purchaser having received notice of the true ownership of the goods, before delivery.

2. Where **goods** are contracted to be **bought of one as a principal,** the **right** of the purchaser **to a set-off against**

such **seller is lost, if** it appears that he is in reality an agent only and the **real principal** is **disclosed** before the goods are delivered or payment made.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Circuit on a verdict for plaintiffs in an action to recover a balance due for lumber belonging to plaintiffs, sold by defendants. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **Esek Cowen,** with *Mr.* **Joseph W. Howe,** for appellants:

In order to entitle plaintiffs to recover they were bound to prove not only that Hall & Co. *sold* the lumber to the defendants as the agents of McLachlin Brothers, but at the time of the sale the defendants knew or had sufficient information to fairly infer the existence of an actual agency, or that the circumstances were such as fairly to put the defendants on inquiry.

Story, Agency, § 444; *Rabone* v. *Williams*, 7 Term Rep. 360, note; *George* v. *Clagett*, 7 Term Rep. 359; *S. C.* 2 Smith, L. Cas. 185; *Warner* v. *McKay*, 1 Mees. & W. 595; *Henry* v. *Marvin*, 3 E. D. Smith, 71; Dunlap's Paley, Agency, 328, 329; *Taintor* v. *Prendergast*, 3 Hill, 72; *Hogan* v. *Shorb*, 24 Wend. 458.

All the lumber was bought prior to the knowledge on defendants' part that plaintiffs were the real owners.

The court, in charging the jury and in ruling upon the proposition of the defense, relied upon the case of *Wright* v. *Cabot*, 89 N. Y. 574, which was in part twice quoted to the jury. In that case the sellers had, during four months of negotiation prior to the sale to the defendants, disclosed their agency; and the case was not an authority for the position it was cited to support.

The contract, deal or transaction in this case was complete when, first, the defendants entered into a binding contract with Hall & Co. to take from them 900,000 feet of lumber; and, second, when Hall & Co., without the knowledge or consent of the defendants, elected to fill that order with the plaintiffs' lumber. The contract was then made and the liabilities of the several parties fixed. As the undisclosed principals of Hall & Co. the plaintiffs were parties to the contract of sale, and could enforce it against the defendants.

Story, Agency, §§ 418, 420.

Mr. **Edward C. James,** for respondents:

As to the right of an undisclosed principal to sue, see:

Wright v. *Cabot*, 89 N. Y. 570; *Taintor* v. *Prendergast*, 3 Hill, 72; *Leverick* v. *Meigs*, 1 Cow. 645, 663–670; *Union India Rubber Co.* v. *Tomlinson*, 1 E. D. Smith, 364.

As to the right of a purchaser to offset agent's indebtedness, see:

Wright v. *Cabot*, 89 N. Y. 570, 574, 575; Paley, Agency, p. 331; 2 Pars. Cont. p. 743; Barbour, Set-off, pp. 135–6; *Moore* v. *Clementson*, 2 Camp. N. P. 22; *Rabone* v. *Williams*, 7 Term Rep. 360, note; *Hogan* v. *Shorb*, 24 Wend. 463; *Pratt* v. *Collins*, 20 Hun, 126, 128.

The factor must have sold the goods as his won.

2 Pars. Cont. 743; *Brown* v. *Morris*, 83 N. C. 251, 254.

The owner must have authorized the factor to sell them as his own, or consented thereto.

2 Pars. Cont. 743; Wharton, Cont. § 1023; Story, Agency, § 390, note; *Brown* v. *Morris*, 83 N. C. 251; *Miller* v. *Lea*, 35 Md. 396; *Borries* v. *Imperial Ottoman Bank*, L. R. 9 C. P. 38.

If the character of the seller is in doubt, the purchaser is bound to make inquiries.

Miller v. *Lea*, 35 Md. 326; *Wright* v. *Cabot*, 89 N. Y. 570, 574; *Bliss* v. *Bliss*, 7 Bosw. 346–7.

The purchaser must have been misled to his prejudice.

Wright v. *Cabot*, 89 N. Y. 570, 574; *Henry* v. *Marvin*, 3 E. D. Smith, 71, 74; *White* v. *Jaudon*, 9 Bosw. 415.

Finch, *J.*, delivered the opinion of the court:

The material facts in the case are substantially undisputed. For some years previous to 1875 the defendants had been in the habit of purchasing lumber in Canada of Hall & Co., dealing with that firm as owners and in their own name. In the process a large indebtedness had accrued in favor of the defendants, which the parties expected would be reduced by the sale of a quantity of shooks consigned by Hall & Co. to the defendants to be sold by them on commission. While the shooks remained unsold, and the indebtedness referred to stood unbalanced or unaffected by their proceeds, and on or about September 23, 1875, the defendants made a contract with Hall & Co. for the sale and delivery to them of 600,000 feet of specified lumber upon a credit of three months. The order was very soon increased to 900,000 feet which, at the agreed price, would have amounted to more than the outstanding debt, irrespective of the proceeds of the unsold shooks.

This contract of purchase and sale was made binding by telegrams and letters which sufficiently manifested the terms of the agreement. The agreement was of course executory and remained to be performed, the respective parties having only the right to compel performance or recover damages for a breach. Before any of the lumber arrived at New York, and before title to any of it had vested in the defendants, the latter were in substance informed that the lumber shipped and on the way was not the property of Hall & Co., but was owned by other parties for whom Hall & Co. were acting as agents. While some criticism is expended upon the manner and tenor of this notification, we deem it quite sufficient to charge defendants with a knowledge that Hall & Co. were not the owners of the lumber with which they were proposing to fulfil their contract. The defendants accepted the lumber with this knowledge. It turns out that the insolvency of Hall & Co., and a seriously diminished return from the sale of the shooks, have left a portion of the debt due from Hall & Co. unpaid, which balance the defendants claim to offset in this action brought by the real owners of the lumber; and whether that offset should be allowed or rejected, as the courts below have determined, is the principal question presented by this appeal.

The reasoning of the learned counsel for the appellants is founded substantially upon the validity and binding force of the executory contract of purchase and sale at its date. He answers the authorities which deny the right of offset when notice of an agency and different ownership is given "before the contract is completed;" *Moore* v. *Clementson*, 2 Camp. N. P. 22; "before they are delivered or paid for;" Barbour, Set-off, pp. 135–6; "before the factor delivers goods in his own name;" *Rabone* v. *Williams*, 7 Term Rep. 360, note; "by something which transpired before the contract was completed;" *Hogan* v. *Shorb*, 24 Wend. 463; by insisting that they relate to cases in which the sale and delivery are concurrent acts and there is no contract without the delivery: and he claims that in the present case the rights of the parties were fixed when the contract itself was made; that the right of set-off at once accrued and when the principal sued and took the benefit of his agent's contract he was liable also for its burdens.

We think the error of this reasoning lies in the assumption that the defendants obtained a right of set-off at the moment the contract was made. We are unable to admit that proposition. The contract was executory. While it remained such it created no debt due to Hall & Co., against which there could be a set-off. Out of that contract a debt due from the defendants might or might not arise; and until it did there was nothing upon which a counter demand could be applied. The defendants were not at once liable for the purchase price of the lumber. Until its delivery or tender, in accordance with the contract terms, the vendees were not bound to pay or give their note, and until those conditions performed created a debt there was none so existing as even to raise the question of offset.

If the vendors did not perform the vendees would owe them nothing for the lumber, but on the contrary would merely have a further claim for breach of contract. At the date of the contract the added fact must be noted that the real claim of the defendants was unknown and unliquidated, and could not be finally ascertained until the proceeds of the shooks were determined by a sale. The debt was only liquidated in part. It was subject to reduction by the property already received from Hall & Co., but the proceeds of which were unknown. The right of off-set, therefore, did not and could not arise at the date of the contract, and sprang up, if at all, at the date of delivery. But, before that, notice of another ownership intervened. When the lumber came, and the vendee saw that the vendor, on a contract made with him as owner, was seeking to perform as agent, and instead of fulfilling his own obligation was substituting performance by another, such vendee could refuse the substituted performance in any case where his rights or interests would be injuriously affected by the change.

Brett & Co. had been long dealing with Hall & Co. as owners, and in the process mutual accounts had been steadily debited and credited and applied one upon the other. When the purchase was made, the balance, so far as ascertained, was largely against the vendors and may have been made either as to quantity or price for that very reason. In such a case the vendees undoubtedly had a right to refuse to come under obligations to the new creditor and did not break their contract with Hall & Co. if they stand upon such refusal. But, being at liberty to refuse, and to demand performance by Hall & Co., under the existing circumstances and relations, in strict accord with their contract, they were also at liberty to accept the lumber with the necessary consequence that the whole purchase price should become due to the real and disclosed owner, and none of it to Hall & Co. except as agents for that owner.

And so it follows that the authorities stand upon just principles when they assert that the set-off is lost if the principal is disclosed before the goods are delivered or the payment made. The vendee is not then acting in the dark, and has his liberty of action remaining, at least, where his interests may be affected by the change of creditors, and so can have no equity to use the goods of one man to pay the debt of another. If he refuses, as he may, his contract relation with his vendor remains, and all his rights and remedies under it. But if he accepts, he cannot complain that his rights are changed and harmed, since the acceptance is his free and voluntary act, made with full knowledge and without being misled.

Certain questions of evidence remain to be briefly considered. One of the defendants was asked whether he *ever* knew, or supposed, or suspected that Hall & Co. were not the principals in the transaction. The question was certainly too broad. It could not have been truthfully answered in the negative, for the witness admits that he heard of plaintiffs' claim directly from them in April, 1876. Indeed, he was permitted to answer that he knew of no such agency before February of that year, which covered the material portion of the time.

He was also asked who he *understood* to be the owner of the lumber at the time of the sale and delivery. The facts as to the notice given were proved. His understanding or misunderstanding of them could not alter what they disclosed. The letter of February 10, 1876, was not objected to because written by Cooper. When offered it was shown to the witness and he was asked "Is that the signature of Brett, Son & Co. by Cooper?" and answered, "It is." The objection was immaterial and incompetent, and as being subsequent to this lumber transaction. There was no suggestion that the letter was not that of the firm, or was written without their knowledge or authority, which appears to be the present ground of complaint.

Other questions we have examined, but need not discuss.

The judgment should be affirmed, with costs.

All concur.

Jay ANTHONY, *Respt.*,

v.

Joseph LEERET *et al.*, *Appts.*

Plaintiff was employed by defendants, in making wooden boxes, on the second floor of their manufactory. The lumber used was planed on the floor below, and passed up to the second floor through a trap door made for the purpose, over which plaintiff had to pass in getting the lumber. The employees of defendants on the lower floor had been instructed by the foreman not to push the trap door open from below, but to wait until it was opened from above. The door was, however, on a certain occasion pushed open from below by one of such employees, and the plaintiff, who was at the moment passing over the door, fell through the opening and was **injured.** The plaintiff was well acquainted with the location and use of the door. *Held*, on the facts, that the **negligence of** plaintiff's **coemployee** was the **proximate cause of** the **injury, and** that the **employers** were **not liable** therefor, the plaintiff having assumed the hazard of the situation by continuing in the employment with knowledge thereof.

(Decided June 7, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Fourth Department, affirming a judgment of the Onondaga Circuit on a verdict for plaintiff of $5,000 damages in an action to recover for personal injuries alleged to have been caused by negligence. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **T. K. Fuller,** for appellants:

The immediate and sole cause of the plaintiff's injuries was the careless, unauthorized and negligent act of a coservant, engaged in the same general employment; and the plaintiff cannot recover.

Faulkner v. *Erie R. Co.* 49 Barb. 324; *Henry* v. *Staten Island R. Co.* 81 N. Y. 373; *Crispin* v. *Babbitt*, 81 N. Y. 516; *Slater* v. *Jewett*, 12 N.Y. Week. Dig. 129; *Stringham* v. *Stewart*, 27 Hun, 562; *Marvin* v. *Muller*, 25 Hun, 163; *Karl* v. *Maillard*, 3 Bosw. 591; *Malone* v. *Hathaway*, 64 N. Y. 5; *Wright* v. *N. Y. Cent. R. R. Co.* 25 N. Y. 562; *Hofnagle* v. *N. Y. Cent. etc. R. R. Co.* 55 N. Y. 608; *Murphy* v. *Boston etc. R. R. Co.* 88 N. Y. 146.

Plaintiff, by accepting and continuing in the service of the defendants, with the knowledge of the construction, location and use of the trap door, assumed the risks arising therefrom.

Gibson v. *Erie R. Co.* 63 N. Y. 449; *Evans* v. *Lake Shore etc. R. Co.* 12 Hun, 289; *DeForest* v. *Jewett*, 88 N. Y. 264; *Owen* v. *N. Y. Cent. R. R. Co*, 1 Lans. 108; *Stoutenberg* v. *Dunbar Box & Lumber Co.* 13 N.Y. Week. Dig. 445; *Salters* v. *Del. & Hud. Canal Co.* 3 Hun, 338; *Kelley* v. *Silver Spring Co.* 34 Am. Rep. 615; *Lovejoy* v. *Boston etc. R. R. Corp.* 28 Am. Rep. 206.

The servant is bound to see patent and obvious defects in machinery or other instrumentalities of the business, and when he goes into the service of a person or continues therein, knowing that the instrumentalities employed are unsafe or dangerous, he takes the risk of their use upon himself, and cannot hold the master responsible for injuries resulting therefrom.

Wood, Master & S. § 335; *Dynen* v. *Leach*, 26 L. J. 222; *Brown* v. *Accrington Cotton Spinning Mfg. Co.* 3 Hurl. & C. 511; *Seymour* v. *Maddox*, 16 Q. B. 332; *Assop* v. *Yates*, 2 Hurl. & N. 768; *Senior* v. *Ward*, 1 Ell. & Ell. 385; *Stafford* v. *Chicago etc. R. Co.* 114 Ill. 244; Shearm. & Redf. Neg. § 94; *Wonder* v. *Baltimore etc. R. R. Co.* 32 Md. 411; *Clark* v. *Barnes*, 37 Hun, 389; *Kennedy* v. *Manhattan R. Co.* 33 Hun, 457; *Hough* v. *Texas etc. R. R. Co.* 100 U. S. 213; (Bk. 25, L. ed. 612); *Priestley* v. *Fowler*, 3 Mees. & W. 1; *Hayden* v. *Smithville Mfg. Co.* 29 Conn. 548; *Keegan* v. *Western R. R. Corp.* 8 N. Y. 175; *Skip* v. *Eastern Counties R. Co.* 24 Eng. L. & Eq. 396; *Loman* v. *Brockway*, 22 How. Pr. 472; *Wright* v. *N. Y. Cent. R. R. Co.* 25 N. Y. 562; *Haskin* v. *N. Y. Cent. etc. R. R. Co.* 65 Barb. 129; affirmed, 56 N. Y. 608.

The rule that a master is bound to furnish suitable and safe machinery for his servants is clear; but it is also settled by authority that the master may, as against his servant, choose his own appliances, and that if the risk be apparent to ordinary observation or as obvious to the servant as to the master, the servant assumes it.

DeForest v. *Jewett*, 88 N. Y. 264; *Gibson* v. *R. Co.* 63 N. Y. 449; *White* v. *Sharp*, 27 Hun, 96; *Evans* v. *Lake Shore etc. R. Co.* 12 Hun, 289; *Stoutenberg* v. *Dunbar Box & Lumber Co.* 13 N. Y. Week. Dig. 445; *Kesley* v. *Sanderson Steel Co.* 20 N. Y. Week. Dig. 192; *Powers* v. *N. Y. etc. R. R. Co.* 98 N. Y. 274; *Haas* v. *Buffalo etc. R. R. Co.* 24 Week. Dig. 69.

A servant cannot call upon his master to make alterations to secure greater safety in appliances with which the servant is familiar.

DeForest v. *Jewett*, *Kesley* v. *Sanderson Steel Co.* and *Gibson* v. *Erie R. Co. supra.*

When a servant accepts service with knowledge of the character and position of structures, from which employees might be liable to receive injury, he cannot call upon his master to make alterations to secure greater safety, or in case of injury hold him liable.

Gibson v. *Erie R. Co.* 63 N. Y. 449; *Sweeney* v. *Berlin & Jones Envelope Co.* 2 Cent. Rep. 457; *S. C.* 101 N. Y. 520; *Williams* v. *Delaware etc. R. R. Co.* 39 Hun, 432.

As showing that this case should be disposed of upon the ground of the risk being assumed by plaintiff, attention is respectfully called to the striking analogy which it bears in its facts and circumstances to the following cases, which were disposed of upon that ground:

Karl v. *Maillard*, 3 Bosw. 591; *Gibson* v. *Erie R. Co.*, *DeForest* v. *Jewett*, and *Sweeney* v. *Berlin & Jones Envelope Co. supra; Kennedy* v. *Manhattan R. Co.* 33 Hun, 457.

Messrs. **Waters & McLennan,** for respondent:

The fact that the defendants constructed a way for their employees to travel in, and required them to use that way, the way being solely for defendants' own use and convenience, and maintained in the area beneath it a pit, would seem to bring the case within the principle of *Congreve* v. *Smith*, 18 N. Y. 79, requiring the defendants to keep the way over the pit absolutely safe, and hence render them liable for any neglect to keep the way absolutely safe.

The rule that an employee takes the natural risks of his employment has no application if the employer omits to provide a safe working place, so that the injury is not entirely caused by the negligence of the fellow servant, but, in part, at least, is the result of that omission of duty. In such a case the negligence of the coservant will not exonerate the employer from the consequences of his own default.

Ellis v. *New York etc. R. R. Co.* 95 N. Y. 546, 552.

The defendants owed to the plaintiff the duty of furnishing him with a safe and proper place in which to prosecute his work, and safe and secure appliances, and skillful and competent workmen to assist him.

Pantzar v. *Tilly Foster Iron Min. Co.* 99 N. Y. 368; *Stringham* v. *Stewart*, 1 Cent. Rep. 779, 100 N. Y. 516; *Plank* v. *N. Y. Cent. etc. R. R. Co.* 60 N. Y. 607.

No one of these duties can be delegated by the master to any servant so as to exonerate the master from responsibility to another servant who has been injured by its nonperformance.

Pantzar v. *Tilly Foster Iron Min. Co.* 99 N. Y. 368.

Neither is the master excused from such liability by the fact that the negligence of a fellow servant of the plaintiff may have contributed to the injury.

Stringham v. *Stewart*, *supra.*

The degree of care and vigilance which the defendants owed to the plaintiff is expressed by the phrase, "the highest degree of care and prudence; the utmost human skill and foresight."

Coddington v. *Brooklyn C. R. R. Co.* 2 Cent. Rep. 913, 102 N. Y. 66; *Kelsey* v. *Barney*, 12 N. Y. 425.

The duty of keeping the pit covered while plaintiff was necessarily using the way as a way and as a working place, and until notice that it was about to be changed into a hauling place, was a duty of the master which could not be delegated; the defective construction made this duty imperative.

Fuller v. *Jewett*, 80 N. Y. 46.

The rule that the servant assumes all the perils which belong to the work itself does not and should not apply to accidents or injuries resulting from extrinsic causes, and circumstances which cannot be foreseen by him, and which, by the exercise of ordinary care and caution, he could not anticipate and prevent.

Ryan v. *Fowler*, 24 N. Y. 410.

The rule which excuses a master from liability to a servant for injuries caused by the negligence of a coservant presupposes that the master has performed the duties which the law imposes upon him, and that no negligence in this respect contributed to the injury.

Stringham v. *Stewart*, *supra.*

The negligence of Schmidt was defendants' negligence and the acts of the servant were defendants' acts, whether he failed from lack of ability or lack of vigilance.

Mott v. *Consumers Ice Co.* 73 N. Y. 543.

Andrews, *J.*, delivered the opinion of the court:

The plaintiff by the lamentable accident which is the subject of this action, has sustained a most severe and probably permanent injury. The question which we are to determine respects the liability of the defendants on whose premises it happened and between whom and the plaintiff existed at the time the relation of master and servant. The basis of the claim to charge the defendants with the consequences of the accident is negligence. The jury have found upon this issue in favor of the plaintiff. We are called upon to determine whether the evidence supports a recovery and justifies the judgment rendered.

The defendants were engaged in the manufacture of boxes and other articles from wood, and for the purposes of their business occupied a building of two stories, in which the various processes of dressing rough lumber, cutting it into suitable lengths and forms, and manufacturing the same into boxes and other articles, were conducted. The planing machines were on the first floor and the men employed in this department were in charge of a foreman. The saws and cutting machines were on the second floor over the planers, and the lumber after it had been planed in the room below was passed up by men employed in that room to the upper room through a trap door in the floor of the second story, and there piled on either side the space between the trap door and the north and south walls of the building, leaving a space or alley way between the ends of the piles.

The cutting machines were near the north wall, and the planed lumber was taken from the piles to the cutting machines and cut into the lengths and forms required. The west side of the second story was used as the nailing room, in which workmen were employed in putting together pieces obtained from the cutting room and making them into boxes. Each nailer procured the pieces he needed for his particular work by passing from the nailing room through a door in the partition dividing the nailing room from the cutting room, and thence through the passage way made by the two piles of lumber to the cutting machine, where they selected an armful of pieces and took them by the same passage way to the nailing room.

The trap door was in the passage way. It was constructed of two thicknesses of boards with cleats, was quite heavy, weighing, as stated by one witness, fifty pounds, and swung to the north, and in this door on the top was a staple and ring for raising it from above. The opening in the floor was about three feet square. The trap door was firm and solid, and it is not claimed that it was out of repair or was in any way defective.

The plaintiff was a nailer in the box room and had been engaged in this business in this place for twenty-two months prior to the accident. On the occasion of the injury he was returning from the cutting room through the passage way to the nailing room, carrying in arms a large load of pieces, and was in the act of stepping upon the trap door when it was suddenly and without notice thrown open from below, and he fell with his load to the lower floor, sustaining the injuries complained of.

The trap door was placed in the floor seven or eight years before the accident. It was conveniently located for the purpose designed, and was placed there to avoid the necessity of carrying the planed lumber to the second story by the stairways on the outside of the building. It was shown that about two years prior to the accident in question a boy fell through the opening, but fortunately he was not injured. It does not appear how the door came to be open on that occasion. This incident, however, led to instructions being given to the workmen that the door should never be opened from below. Before this the men in the planing room would sometimes open the door by pushing against it from the under side with a board, although it was difficult to do this by reason of the height of the floor and the weight of the door. But after the boy fell through, the men employed in the planing mill were instructed not to open the door from below, but to rap on the door when they desired to have it opened and wait until someone opened it from above, or to send a person from below to open it. The general uniformity of the practice thus enjoined is apparent from the plaintiff's own statement that during the whole twenty-two months of his employment he had never known the door to be opened from below except on the very occasion of the accident in question. On this occasion the door was thrust open by one Schmidt, a workman in the planing room, who four or five days before had entered the service of the defendants and had been set to work in the planing department. He testifies that he had been instructed by the foreman when he desired to have the door opened "to shake the door and wait until somebody came to open it;" that on this occasion he wanted to send lumber upstairs and rattled the door and then stopped; and, the witness continues: "I don't know how long, and then I pushed it up because they did not come quick enough upstairs; I did not like to wait so long; it was not an easy matter to push it open; it would take a man to throw that door open; it was a heavy door. I took a piece of board and put the end of it against the door and then I gave two or three raps with the board and waited a little while and there didn't anyone come; then I gave a little hitch, and then another, and then over it went."

The evidence is undisputed that the plaintiff was fully informed as to the location and use of the trap door and the manner of its construction. He testifies that he had passed over it hundreds of times. In respect to the care taken by himself he says, "I used to think about the trap door a good deal. I dont think I thought any more about it than I had for a long time; I was always pretty careful about the trap door and always watched it."

As bearing upon the knowledge of the defendants, of the dangerous location of the trap door, it was shown that when it was constructed they were warned against placing it in the passage way, and that they knew of the incident of the boy falling through the opening at the time it happened.

Upon the facts disclosed in the evidence, of which the foregoing statement is a summary, we are unable to perceive any ground upon which the defendants can be held liable. The immediate cause of the injury was the negligence of a coservant. If Schmidt had obeyed the instructions of the foreman, the accident would not have happened. He was a person of mature years, and it is not claimed that he was deficient in capacity or intelligence, or that he did not comprehend the situation and understand the instructions given him. His own account of his conduct shows that he violated his instructions from his impatience, because there was not a prompt response by persons above to his signal for opening the door. His disregard of instructions designed for the safety of persons using the passage way was the fault which immediately caused the accident.

The general rule that a master is not liable to a servant for an injury occasioned by the negligence of a coservant, is admitted by the learned counsel for the plaintiff; and indeed the general doctrine upon the subject is so well settled that it admits of no argument. But it is claimed that the negligence of the defendants co-operated with that of Schmidt, in producing the injury. If this claim is well founded, the plaintiff is entitled to recover; because for a wrong or injury occasioned by the joint or co-operative agency of two or more persons, all the *tort feasors* are separately or jointly liable, and there is no implied contract growing out of the contract of service that the servant shall take the risk of the master's negligence, or that the latter shall be exempt from responsibility to the servant for his own personal wrongs. The negligence of the defendants, if any exists, must be found either: 1, in the location of the trap door in the passage way; or 2, in failing adequately to protect or guard it.

It is a complete answer to the claim of negligence in these respects that the plaintiff had full knowledge of the situation and of the arrangements for the protection of persons using the passage way, and that by continuing in the employment he assumed the risks and hazards incident to the situation, and especially such hazards as might result from the nonobservance by coemployees of directions designed for the protection of persons using the passage way. The dangers to which the plaintiff was exposed were known and obvious. It is not the case where an inexperienced or uninstructed employee may know the facts, but may be incapable of drawing the proper inferences, or appreciating the dangers. The plaintiff was as fully competent to understand risks from the location of the trap door and its use, and from negligent conduct of persons employed in the planing room, as were the defendants. The location of the trap door in the passage way was not *per se* a wrongful act. The defendants had a right to arrange their own premises in any way which suited their convenience, and were not bound to change the arrangement to secure greater safety to the employees. If the trap door was not open to observation, or its existence was not known to those whose duty required them to use the passage way, or if the defendants had omitted to give proper instructions to those employed in the planing room, a different question would be presented. The general rule that the servant takes the risk of obvious dangers connected with his employment, has been so fully considered in recent cases that further discussion is unnecessary. *Gibson* v. *Erie Railway Co.* 63 N. Y. 449; *De-Forest* v. *Jewett*, 88 N.Y. 264; *Sweeney* v. *Berlin & Jones Envelope Co.* 2 Cent. Rep. 457, 101 N. Y. 520. We are of opinion that the application of settled principles to the circumstances of this case requires a reversal of the judgment.

Judgment reversed and a new trial granted.

All concur.

Ella T. ROCHE, *Respt.*,
v.
BROOKLYN CITY & NEWTOWN R. R. CO., *Appt.*

In an action for damages for a **personal injury** caused by negligence, **evidence of** a simple **declaration of** the **plaintiff** (not an expression or manifestation of pain), made sometime **after** the **injury, that she was** then **suffering pain,** or that the injured part of her body (showing it) pained her very much—**is** hearsay and is **not admissible** as in any degree corroborative of her testimony as to the extent of her pain.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Kings Circuit on a verdict for plaintiff in an action to recover for injuries received through alleged negligence of defendant. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **Samuel D. Morris,** for appellant.

Mr. **George W. Roderick,** for respondent.

Peckham, *J.*, delivered the opinion of the court:

The only question in this case arises upon the admission of the testimony of a third party that the plaintiff, some days after the happening of the accident which caused her injury, complained that she was suffering pain in her injured arm. The witness did not testify that on these occasions the plaintiff screamed or groaned or gave other manifestations of a seemingly involuntary nature, and indicative of bodily suffering; but he proved simple statements or declarations made by plaintiff, that she was at the time of making them suffering pain in her arm. The plaintiff was herself sworn and proved the injury and the pain. The condition of the arm the night of the accident was also proved—that it was very much swollen and black all around it, and subsequently red and inflamed, and continued swollen and inflamed more or less for a long time.

The defendant challenges the evidence of complaints of pain thus made, upon the ground that it was incompetent; and the argument made was that the evidence as to the injury and its extent could not be thus corroborated by mere hearsay.

Prior to the time when parties were allowed to be witnesses the rule in this class of cases permitted evidence of this nature. *Caldwell* v. *Murphy*, 11 N. Y. 416; *Werely* v. *Persons*, 28 N. Y. 344.

These cases show that the evidence was not confined to the time of the injury, or to mere exclamations of pain. The admissibility of the evidence was put, in the opinion of *Judge* Denio, in 11 N. Y. *supra*, upon the necessity of the case, as being the only means by which the condition of the sufferer as to enduring pain could in many instances be proved.

Substantially the same class of evidence was admitted in England and for the same reason. See cases cited in 11 N. Y.

In Massachusetts, too, the same rule was applied. *Bacon* v. *Charlton*, 7 Cush. 581, cited and approved in *Roosa* v. *Boston Loan Co.* 132 Mass. 439.

After the adoption of the amendment to the Code permitting parties to be witnesses, the question under discussion was somewhat mooted in *Reed* v. *New York Cent. R. R. Co.* 45 N. Y. 574, by Allen *J.*, in the course of his opinion, although the precise point was not before the court. The question there under discussion was as to the correctness of permitting the plaintiff to prove his declarations, made at the time when he was doing some work, to a third person, as to the state of his health. That is not exactly like the case of complaints made, not as to a state of health, but as to a then present existing pain at the very spot alleged to have sustained injury and proved so by other evidence; still, the remarks of *Judge* Allen on this kind of evidence in general, bear strictly upon the matter herein discussed. He reviewed in his opinion some of the above cases and others, and claimed that the courts had admitted the evidence from the necessity of the case, as being the only method by which the condition of the party could be shown fully and completely, not only as to appearances but also as to suffering. But there was no agreement by the court upon that branch of the case, the judgment going upon another ground.

The case of *Hagenlocher* v. *Coney Island etc. R. R. Co.* 99 N. Y. 136, decides that even since the Code, evidence of exclamations indicative of pain made by the party injured is admissible. The case does not confine proof of these exclamations to the time of the injury.

The question was asked of the plaintiff's mother "How long after injury was your daughter confined in the bed?" *Ans.* "She was for about four weeks." Q. "What expressions did she make or what manifestations showing that she suffered pain?" This shows there was no confinement of the evidence to the time of injury. The evidence given, however, was of screams when the plaintiff's foot was touched, and of her exclamations of pain when even the sheet was permitted to touch the foot. The evidence was permitted upon the ground that it was of a nature which substantially corroborated the plaintiff, as to her condition.

Having thus admitted evidence of this kind, since the adoption of the Code amendment permitting parties to be witnesses, the question is whether there is such a clear distinction between it and evidence of simple declarations of a party that he was then suffering pain, but giving no other indications thereof, as to call for the adoption of a different rule. It seems to us that there is.

Evidence of exclamations, groans and screams, is now permitted, more upon the ground that it is a better and clearer and more vigorous description of the then existing physical condition of the party by an eye witness than could be given in any other way. It characterizes and explains such conditions. Thus, in the very last case cited, it was shown that the foot was very much swollen and so sore that the sheet could not touch it. How was the condition of soreness to be shown better than by the statement that when so light an article as a sheet touched the foot the patient screamed with pain? It was an involuntary and natural exhibition and proof of the existence of intense soreness and pain therefrom. True it might be simulated, but this possibility is not strong enough to outweigh the propriety of permitting such evidence as fair, natural and original corroborative evidence of the plaintiff as to her then physical condition. Its weight and propriety are, therefore, now sustained upon the old idea of the necessity of the case.

But evidence of simple declarations of a party made sometime after the injury, and not to a physician, for the purpose of being attended to professionally, and simply making the statement that he or she is then suffering pain, is evidence of a totally different nature, is easily stated, liable to gross exaggeration and of a most dangerous tendency, while the former necessity for its admission has wholly ceased.

As is said by *Judge* Allen in *Reed* v. *Railroad*, (*supra*), the necessity for giving such declarations in evidence where the party is living and can be sworn no longer existing, and that being the reason for its admission, the reason of the rule ceasing, the rule itself, adopted with reluctance and followed cautiously, should also cease.

With the rule as herein announced there can be no fear of a dearth of evidence as to the extent of the injury and the suffering caused thereby. The party can himself be a witness if living; and if dead the suffering is of no moment, as it cannot be compensated for in an action by the personal representative under the statute; and the exclamations of pain, the groans, the sighs, the screams can still be admitted. But we are quite clear that the bald statement, made long after the injury, by the party that he suffers from pain ought not to be admitted as in any degree corroborative of his testimony as to the extent of his pain.

For these reasons the evidence of Mr. McElroy, as to the plaintiff's declarations of existing pain, when they were walking in the street together, long after the accident, should not have been received.

It was error also to permit the same witness to prove declarations of the plaintiff that her arm pained her very much, even though at the same time she showed her arm and it was swollen and red. The appearance of the arm he could describe, but her declaration that it pained her very badly is mere hearsay and should not have been permitted.

The judgments of the General Term and Circuit should be reversed and a new trial granted, costs to abide event.

All concur except **Danforth,** *J.*, dissenting.

Abner BUCKLAND, Admr., *Appt.*,
v.
William GALLUP, *Respt.*

1. **If an injury to the property of a decedent, or its conversion, happens after his death, although before letters are actually issued, or if a contract is made with an executor or an administrator personally. in regard to the effects or money belonging to the decedent, received by a third person after the death, the executor or administrator may sue in his own name,** and if in any of these cases he may also sue in his representative character he is not required to do so.
2. Only such **causes of action as accrued during** the **lifetime of** the **decedent,** or upon contract made by him, **are of necessity** to be **prosecuted by** his **executors** or administrators **in** their **representative capacity.**
3. The **distinction** is between a cause of action accruing on a contract made with the representative, as distinguished from one devolving on him in that capacity by the creation of the trust or representative relation. The **Code works no change** in these respects.
4. An **administrator de bonis non** appointed after the death of the executrix takes the estate in the condition in which the executrix left it. He is bound by her contracts, and if he sues for the proceeds of the estate or upon any promise made to her, he can occupy no different position.
5. Where the executrix sold the property of the testator and put a portion of the proceeds into the hands of the defendant as her agent, the **administrator de bonis non** of the estate, appointed after her death, may **sue** defendant for such portion **in his own name** as an individual.
6. **Where a plaintiff sues as an administrator, but need not have sued in** his **representative character,** but might have sued in his own name as an individual, and has failed in the suit, **he is personally liable to pay costs.**
7. **Merely describing himself as** executor or **administrator,** either in the summons or complaint or both, or alleging that he sues in that capacity, will **not relieve him from costs** incident to an unsuccessful litigation.

(Decided April 26, 1887.)

APPEAL from an order of the Supreme Court at General Term in the Fifth Department, reversing an order of the Monroe Special Term amending a judgment against plaintiff personally for costs so as to make it apply to him only in his representative capacity as administrator. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **George H. Humphrey,** for appellant:

The order appealed from is reviewable by this court.

1. It effected a substantial right charging plaintiff not as administrator, in which capacity alone he was a party to the suit, but as an individual, with the payment of $166.77 costs.

2. It was a final order against one not a party to the action.

3. It recognized the validity of the judgment as between the parties, in favor of defendant and against the plaintiff as administrator, and

was therefore made in a summary application in the action after judgment.

Code Civ. Proc. § 190, subdv. 3; *Sturgis* v. *Spofford*, 58 N. Y. 103; *Hobart* v. *Hobart*, 86 N. Y. 636; *Crosby* v. *Stephan*, 97 N. Y. 608; *Giles* v. *Halbert*, 12 N. Y. 32.

The intention of section 1814 of the Code of Civil Procedure is unequivocally declared to forbid a suit by an administrator in his own name where the estate is the real party in interest. Had the general term the right to nullify that intention?

The general term says that the plaintiff is in no better position than Matilda Buckland would have been. This statement will not bear a moment's scrutiny. Had an action been commenced by Matilda, who in her own right and as an individual owned the property, it must of course have been commenced in her own name. Every dollar of the proceeds of a recovery by her would have been for her sole and exclusive benefit. Here it was in nowise for the use of plaintiff, but only on account of the estate. In the one case the individual would have been the sole party in interest, putting the avails in her own pocket; in the other, the estate was the real party in interest and the administrator accountable to the surrogate for every dollar recovered. It is exactly this distinction which brings us within the terms of the statute.

Spencer v. *Strait*, 23 N. Y. Week. Dig. 458.

The general term is in error in assuming that the cause of action accrued wholly after the death of the testator. The cause of action accrued by virtue of the will. By the tenor of the will the contract sought to be enforced was made by the testator with the plaintiff, for the benefit of the legatees, that out of any property remaining after the death of Matilda Buckland they should have $1,000. It was to enforce that contract that plaintiff demanded of the defendant enough to pay those legacies. The demand to be sure was necessary to complete this cause of action; but the gist of it was the provision of the will giving to the legatees that sum. Here, upon a contract made by the testator, the cause of action became perfect after his death. Plaintiff claimed no right to any property, save as it was derived from the will.

The decision of this court, therefore, in *Thompson* v. *Whitmarsh*, 1 Cent. Rep. 4; *S. C.* 100 N. Y. 35, cited by the general term, instead of being against us is directly in our favor.

Here the right to sue did not grow out of any action of the administrator, but out of an obligation imposed by the will and created by the testator when he executed that instrument. Had the action been trover upon the executor's own possession, the general term would be right. But here it was founded upon the title of the testator to goods once owned and possessed by him, and out of whose proceeds he bequeathed the sum of $1,000.

Ketchum v. *Ketchum*, 4 Cow. 87.

If, as we have shown, the action was necessarily prosecuted by plaintiff, as administrator, he is not, as he should not be, chargeable with costs.

Ketchum v. *Ketchum*, 4 Cow. 87; *Tilton* v. *Williams*, 11 Johns. 403; *Bedell* v. *Barnes*, 29 Hun, 589; Code Civ. Proc. § 3246.

Messrs. **J. & Q. Van Voorhis**, for respondent:

When an executor brings a suit at law upon a cause of action, which does not belong to him in his representative capacity, and is defeated, the defendant in the suit becomes entitled, as a matter of right, to a judgment for costs, against the executor personally; and the latter is not relieved from personal liability by the fact that he brought the suit in his representative character.

Holdrige v. *Scott*, 1 Lans. 303; *Bedell* v. *Barnes*, 29 Hun, 589; *Fox* v. *Fox*, 5 Hun, 54; *Bostwick* v. *Brown*, 15 Hun, 308; *Feig* v. *Wray*, 64 How. Pr. 391; *Lyon* v. *Marshall*, 11 Barb. 242; *Ferrin* v. *Myrick*, 41 N. Y. 315; *Brockett* v. *Bush*, 18 Abb. Pr. 337; *Smith* v. *Patten*, 9 Abb. Pr. N. S. 205.

The cause of action set forth in the complaint did not belong to the plaintiff in his representative capacity, and the defendant was, therefore, rightfully entitled to the judgment for costs.

Causes of action which arise out of the transactions of a decedent pass to his legal representative, and thus come to belong to him in his representative capacity; whereas, those which arise in connection with the estate after the death of the testator or intestate are not regarded as belonging to the representative in that capacity.

Holdrige v. *Scott*, 1 Lans. 303; *Mercein* v. *Smith*, 2 Hill, 213; *Merritt* v. *Seaman*, 6 N. Y. 168; *Thompson* v. *Whitmarsh*, 1 Cent. Rep. 4, 100 N. Y. 35; *Cary* v. *Gregory*, 38 N. Y. 127.

The complaint should be construed most favorably to the defendant.

Clark v. *Dillon*, 97 N. Y. 370.

In bringing this action plaintiff stands upon the same footing that his predecessor would have held if the action had been brought by her.

McMahon v. *Allen*, 4 E. D. Smith, 521; *Conklin* v. *Egerton*, 21 Wend. 433; *Bain* v. *Pine*, 1 Hill, 615.

It is conceded that defendant's position would have been correct before the present Code: but it is claimed that section 1814 of the Code has made a radical change in the law in respect to the liability of an executor for costs.

It makes no change in regard to what claims shall be considered as belonging to an executor in his individual capacity.

Thompson v. *Whitmarsh*, 1 Cent. Rep. 4, 100 N. Y. 35; *Ferris* v. *Disbrow*, 22 Week. Dig. 330; *Bingham* v. *Marine Nat. Bank*, 41 Hun, 378.

Danforth, *J.*, delivered the opinion of the court:

The plaintiff describing himself both in the title and body of the complaint as "administrator, etc. of Warren Buckland, deceased," demanded judgment against the defendant for the sum of $2,000 and costs of the action. The defendant answered, denying the material allegations of the complaint, and, upon trial before a referee, had judgment dismissing the complaint, with costs against the plaintiff in his individual capacity. Upon the plaintiff's application the special term ordered an amendment so that the judgment should direct the costs of the action "to be paid out of any assets in his hands as administrator." Upon appeal to the general term this order was reversed; and from the order of reversal the plaintiff appeals to this court.

The special term regarded the question as controlled by section 1814 of the Code of Civil Procedure, which declares that an action by an executor or administrator "upon a cause of action belonging to him in his representative capacity—must be brought by him in his representative capacity;" while the general term, looking at the cause of action as one arising out of a transaction which occurred after the testator's death, held that it did not belong to the plaintiff in his representative capacity within the meaning of that section.

This difference of opinion necessarily leads to an inquiry whether the cause of action upon which the plaintiff sues is, within the meaning of the Code, one "belonging to him in his representative capacity." That capacity was created by statute, to carry into effect the wishes of the decedent, and by virtue of it an executor takes as of the time of the death of the testator, and as it were from his hand, his personal property, so that there is no interval of time when it is not the subject of ownership by the testator up to the time of his death; and from that moment by the person named, not as an individual, but as a representative.

The statute characterizes the property received as assets, requires it to be inventoried, and for those assets so inventoried and for any increase, the executor is to account. It includes among other things, debts secured by mortgage, bonds, notes and things in action. He and his sureties are liable for the full value of all such property of the deceased, received by the executor and not duly administered; and if the cause of action accrued in the lifetime of the testator, any suit respecting it must be in the name of the executor as such. He then sues in the right of the testator, and can bring such actions only as the testator himself might have maintained.

On the other hand, if an injury to the property, or its conversion, happens after the death of the decedent, although before letters are actually issued, or if a contract is made with an executor or an administrator personally, in regard to the effects or money belonging to the decedent, received by a third person after the death, the administrator might sue in his own name, and if in any of these cases he may also sue in his representative character he is not required to do so. *Valentine* v. *Jackson*, 9 Wend. 302; *Merritt* v. *Seaman*, 6 N. Y. 168; *Patterson* v. *Patterson*, 59 N. Y. 574; *Lyon* v. *Marshall*, 11 Barb. 242.

When he sues in the right of the testator he pays no costs, because the law does not presume him to be sufficiently cognizant of the nature and foundation of the claims he has to assert, and in all these cases it is necessary for him to sue in his representative character, and expressly to name himself executor. Toller, Exrs. 438.

But if he may bring the action in his private capacity, then if he fails he is liable for costs.

As the statute stood (2 R. S. 615, § 17) before the Code, costs were not as of course given in favor of a successful defendant against executors or administrators, necessarily prosecuting in the right of their testator or intestate; but it was held that an executor suing upon a cause of action which accrued after the death of his testator, and failing, was personally liable for costs. *Burhans* v. *Blanchard*, 1 Denio, 626.

In that case the distinction is said to be well settled between cases in which an executor must sue in that character, and those in which he may prosecute in his own right, whether the action be in tort or on contract. The final test is whether it accrued before or after the death of the testator. In that case, and in cases there cited, and in many later ones, it is shown, as well upon principle as authority, that only such causes of action as accrued during the lifetime of the decedent or upon contract made by him were of necessity to be prosecuted by his executors or administrators in their representative capacity.

In *Patchen* v. *Wilson*, 4 Hill, 57, the contract sued on was by the intestate in his lifetime; and the action was necessarily brought in a representative capacity, and although it failed, the plaintiff was not charged with costs. The same case shows that an action for the conversion of property after the testator's death may be brought in the executor's own name, and that the letters testamentary may be used as part of his chain of title.

The same rule applies here. The distinction is between a cause of action accruing on a contract made with the representative, as distinguished from one devolving on him in that capacity by the creation of the trust or representative relation. The Code works no change in these respects. On the contrary, the provisions of section 1814 imply that a person while executor may have causes of action of more than one kind; for it declares that those which belong to him in "a representative capacity," shall be prosecuted in that capacity. They are thus contrasted with all others, and as clearly distinguished as if one class devolved on A and the other on B. So, in construing the section, it has been held that the phrase "representative capacity" includes only those causes of action which accrued during the lifetime of the decedent. *Bingham* v. *Marine Nat. Bank*, 41 Hun, 377.

The demand there in suit arose upon a certificate for moneys belonging to the estate and deposited with the defendant by administrators. The court held that the action could be maintained by the bailors as individuals or as administrators, upon the ground that the section did not include a demand accruing to the personal representatives through a disposition of the funds or property of the estate after the decease of the testator or intestate; citing in support of this view, *Thompson* v. *Whitmarsh*, 1 Cent. Rep. 4, 100 N. Y. 35.

In that case it appeared that Thompson, as executor, having received property of the estate, sold it to the defendant, and afterwards in his own name, as an individual, sued for the price; and the court held the action to be well brought, and that the defendant could not successfully set up against the demand a debt due to him from the testator. The defendant relied upon section 1814 of the Code; but it was held that the phrase "representative capacity," as there used, related to debts which belonged to the testator and came to the executor through his representation of the deceased, rather than as the result of his own action, and therefore required an action for their enforcement to be in his representative name.

In each of those cases, *Thompson* v. *Whitmarsh* and *Bingham* v. *Marine Nat. Bank*, the cause of action never existed in favor of the decedent, but grew out of the contract or dealing of the executor; and it was held that the suit was properly brought in the name of the individual.

The inquiry then is as to which of these two classes the cause of action in the present case belongs. As already stated the action is to recover a sum certain. The right to such or any judgment depended upon the following facts: William Buckland died in 1873, leaving real estate worth about $4,000, and a small amount of personal property, all of which he gave by will to his wife, Matilda, and appointed her his executrix. She received letters, reduced the estate to possession, paid the testator's debts, sold the real estate, taking in payment one bond and mortgage of $1,000 and one of $4,437.50. The $1,000 bond and mortgage she delivered to the defendant about the time it was executed, "in order that he might collect the interest for her, and for safe keeping." She sold the other bond and mortgage, and of its proceeds loaned the firm of William Gallup & Co. $2,600, taking the note of that firm therefor.

At the time of Matilda's death the note was in the possession of her sister, and she subsequently delivered it to the defendant, Gallup, the brother of Matilda. The bonds, mortgages and note were payable by their terms to Matilda Buckland personally and individually. The defendant had no other property in his hands belonging to Matilda, and no property in which the estate of Warren Buckland ever had any interest unless it was said note and bond and mortgage. These were the plaintiff's facts. He alleged, however, that the property belonged to the estate of Warren Buckland; that the legacies remain unpaid; that after the death of Matilda he was appointed administrator *de bonis non* with the will annexed of Warren Buckland, and demanded the above property of the defendant, who refused to deliver it.

The referee held and decided that the note and bond and mortgage belonged to the estate of Matilda Buckland and not to the estate of Warren Buckland. If there is disclosed a cause of action belonging to the plaintiff in his representative capacity, then the order below is wrong, for the conditions do not exist which make him chargeable for mismanagement or bad faith. Code, § 3246.

But on the other hand merely describing himself as executor, either in the summons or complaint or both, or saying that he sues in that capacity, will not relieve him from costs incident to an unsuccessful litigation. If, on the facts stated in support of the motion, there was anything for him to do in his official capacity, it was because his predecessor Matilda left some part of the estate of Warren Buckland unadministered. He succeeded to her power and duties only. The course of administration was merely interrupted by her death; and upon his appointment, while he became the legal representative of Warren Buckland, he could only take the estate in the condition in which the executrix left it. So far as any of the goods or effects of the testator remained *in specie*, he, as administrator *de bonis non*, could take them, but this rule applies to such only as are distinguishable. He was bound by her contracts; and if he sues for the proceeds or upon any promise made to her, he could occupy no different position. She sold the property and loaned a portion of the proceeds; and as to another part she put it in the hands of the defendant as her agent, in each case, upon the plaintiff's construction of the will, necessarily remaining liable to the estate she represented and liable to account for the whole. I am unable to see that the case differs at all from the one cited, *Thompson* v. *Whitmarsh*, *supra*.

The learned counsel concedes that had an action been commenced by Matilda, "it must of course have been commenced in her own name," but he puts this admission upon the fact that she "in her own right and as an individual owned the property." If she did, and such is indeed the plain reading of the will, as well as the judgment of the court, obviously the plaintiff could have no right of action in any capacity. It is only on the supposition that it was part of the estate of Warren Buckland that he has any standing in the litigation. But, confessedly, the property, as it came from Buckland's estate, was changed in form, converted into money and transferred by the act and agreement of his then executrix, the plaintiff's predecessor. She converted the assets and had become (if any liability at all was created) personally liable for them. She stood exactly in Thompson's position in the case referred to, and reached that position by the same method of business. In no view can the cause of action then created, or as it is stated in the complaint, be said to be one belonging to the plaintiff in his representative capacity. It did not come to him by devolution from the testator.

As the plaintiff, therefore, need not have sued in his representative character, and has failed, he is personally liable to pay costs.

The order appealed from is to that effect and should be affirmed.

All concur, except **Rapallo & Earl**, JJ., dissenting.

SYRACUSE SAVINGS BANK, *Respt.*, *v.* Erastus F. HOLDEN *et al.*, *Appts.*, and Annie G. Burton *et al.*, Infants, etc. *Respts.*

Held, that a **deed** between Emily Howland of the first part and "Cornelia H. Burton, wife of Henry B. Burton of Syracuse, N. Y., in trust for Annie G. Burton, Grace Burton and Burr Burton, with power to sell and convey or mortgage without the appointment of a guardian, of the second part" (said Annie G., Grace and Burr Burton being infants); and granting the land, etc., to the party of the second part and "to their heirs and assigns forever," etc., **created a valid general trust power** under the statute, intended to be executed **wholly for the benefit of** the **infants**; that the land passed to and vested in the infants, subject to the exe-

cution of the power; and, hence, that mortgages thereon given by Cornelia H. Burton to third parties to secure debts of her husband were not a valid execution of the power and were void.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Fourth Department, reversing a judgment of the Onondaga Special Term adjudging a mortgage valid on an issue between defendants, under section 521 of the Code of Civil Procedure, as to the surplus, in an action to foreclose a prior mortgage. *Affirmed.*

Reported below, 36 Hun, 168.

The facts and questions raised appear from the opinion.

Mr. **Louis Marshall,** for appellants:

The instrument in question does not create a valid express trust under the Statute of Uses and Trusts. This proposition is conceded by all parties interested in the case.

Syracuse Savings Bank v. *Porter*, 36 Hun, 168.

The instrument created a passive trust; and therefore, under the provisions of sections 47 and 49 of the statute, as the trust intended to be created became nugatory and failed, the deed is to be considered as though it were made directly to the person in whom the right to the possession and profits was intended to be vested. These persons were the children who took the property, subject to such conditions as were imposed by the deed.

Syracuse Savings Bank v. *Porter*, 36 Hun, 168.

The distinction is recognized in the authorities between a power to sell and a trust to sell. The former can be coupled with a passive trust. The latter can be created in connection with a trust for other purposes. This instrument must therefore be treated as though it had created a passive trust, to which a power is annexed. The authorities recognize such instruments, and distinguish them from trusts, naked powers, and mixed trusts and powers.

Perry, Trusts, §§ 18, 20; Warville, Abstracts, p. 257; Lewin, Trusts, p. 19.

The Revised Statutes do not permit a conveyance of property to one in trust for another without further specifications or directions. They prohibit trusts of this character, and provide that if a conveyance is made to one or more persons, to the use of or in trust for another, no estate or interest, legal or equitable, shall vest in the trustees.

1 R. S. 727, §§ 45, 49, 55.

As the trust is invalid, the intent of the grantor in creating it must fail; but as her design to give the possession, rents and profits to the children was valid, the statute carries it into effect by vesting the legal estate in them.

Rawson v. *Lampman*, 5 N. Y. 456; *Wright* v. *Douglass*, 7 N. Y. 568, 570; *Downing* v. *Marshall*, 23 N. Y. 366, 379, 380; *N. Y. Dry Dock Co.* v. *Stillman*, 30 N. Y. 174, 193, 194.

If the title passed to the children of Cornelia H. Burton, then it is physically and logically impossible that this instrument created a power in trust; for then, according to all the authorities and the provisions of the statute, the title would have been in Mrs. Howland, the grantor. This could not be the case if the title was in the children.

1 R. S. 729, §§ 58, 59.

The trust attempted to be created being a passive trust the title went directly to the children who were named as *cestuis que trust*, and it therefore did not remain in Mrs. Howland.

Downing v. *Marshall*, and *N. Y. Dry Dock. Co.* v. *Stillman*, *supra*.

It having been determined that this instrument did not create a power in trust, and that the title to the land in question was vested in the children subject to the execution of the power to sell and mortgage, created by the deed, that power must be treated as a power beneficial to the donee, and Mrs. Burton, the donee of the power, was therefore empowered to execute the mortgage in question.

1 R. S. 732, §§ 73, 79; *Jennings* v. *Conboy*, 73 N. Y. 230.

The power in question being a beneficial one to the donee, she had the right to execute the mortgage, whether the consideration went for the benefit of Mrs. Howland, the children, herself, or any other person; and it was executed in proper form, even if it should be considered a power in trust.

White v *Hicks*, 33 N. Y. 383, 392; *Warner* v. *Conn. Mut. Life Ins. Co.* 109 U. S. 357 (Bk. 27, L. ed. 962).

Even if it should be assumed that the instrument in question created a power in trust, the appellants are entitled to enforce their mortgage against the property upon which they are liens, since the coal delivered subsequent to the execution of the mortgage was parted with in good faith.

R. S. title *Uses and Trusts*, § 66; Id. title *Powers*, § 102.

Messrs. **Hancock & Munro,** for respondents Burton *et al.*:

Under the Revised Statutes express trusts may be created only for four purposes: 1, to sell lands for the benefit of creditors; 2, to sell mortgages or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon; 3, to receive the rents and profits of lands and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the first article of this title; 4, to receive the rents and profits of lands, and to accumulate the same for the purposes and within the limits prescribed in article 1, title II, 3 R. S. 7th ed. 2181, § 55.

Evidently the intention of the grantor was to impose upon the trustee the duties and obligations authorized by the second and third subdivisions above cited. But as she failed to define and specify the purposes of the trust as required by the statute, the deed is void, in so far as it was intended to create an express trust under the Revised Statutes.

The deed creates a valid power in trust in Cornelia H. Burton, to manage, sell, convey, mortgage or rent the property in question for the benefit of the *cestuis que trust*.

3 R. S. 7th ed. 2182, § 58; *Smith* v. *Bowen*, 35 N. Y. 83; *Clark* v. *Jacobs*, 56 How. Pr. 519; *De Peyster* v. *Clendening*, 8 Paige, 295; *Irving* v. *De Kay*, 9 Paige, 521; affd. 5 Denio, 646; *Hotchkiss* v. *Elting*, 36 Barb. 38; *Hagerty* v. *Hagerty*, 9 Hun, 175.

As this deed creates a general power in trust, the title to the lands in question, subject to the execution of the power, remains in the grantor, Mrs. Howland.

"In every case where the trust shall be valid as a power, the lands to which the trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power."

3 R. S. 7th ed. 2182, § 59; *Ford* v. *Belmont*, 7 Robt. 97–109; *Clark* v. *Crego*, 47 Barb. 599–614; affd. 51 N. Y. 646; *Fellows* v. *Heermans*, 4 Lans. 230; *Heermans* v. *Burt*, 78 N. Y. 259; *N. Y. Dry Dock Co.* v. *Stillman*, 30 N. Y. 174; *Blanchard* v. *Blanchard*, 4 Hun, 287–290.

Under the statute the trustee under such a conveyance as this takes no title or estate whatever in the lands.

3 R. S. 7th ed. 2182, § 58.

A power in trust must be executed in accordance with the intention of the grantor; otherwise, a conveyance by the trustee carries with it no title; and any person interested in the trust estate may dispute the validity of such a conveyance.

Smith v. *Bowen*, 35 N. Y. 83; *Clark* v. *Jacobs*, 56 How. Pr. 519; *Clark* v. *Crego*, 47 Barb. 599, 614; *Russell* v. *Russell*, 36 N. Y. 581; *Wetmore* v. *Porter*, 92 N. Y. 76, 83–85.

The mortgagees must claim under Mrs. Burton's title, and are chargeable with notice of the contents of her deed, and of the equities existing in favor of Mrs. Howland and the infant defendants.

Story, Eq. Jur. § 400; *Anderson* v. *Van Alen*, 12 Johns. 343; *People* v. *Open Board*, 92 N. Y. 98; *Williamson* v. *Brown*, 15 N. Y. 354.

The deed in question does not create a "beneficial power."

"A general or special power is beneficial when no person other than the grantee has, by the terms of its creation, any interest in its execution."

3 Rev. Stat. 7th ed. 2189, § 79.

Again; the statutes of powers, as construed by the courts, provide that a general beneficial power vests the absolute ownership in the donee of the power.

Freeborn v. *Wagner*, 49 Barb. 43, 54, 55.

Is there anything in the deed to indicate that the grantor intended the conveyance for the benefit of Mrs. Burton or such third person as her whim or caprice might lead her to favor? If not, the limitation of her estate by the words "in trust for Annie G. Burton," etc., must control; and she can sell, convey or mortgage only for the benefit of the infants.

Dominick v. *Michael*, 4 Sandf. 374–396.

Nor can the power be exercised or not wholly in her discretion. It imposes an obligation upon her; an active duty which, when opportunity offers or necessity requires, the statute compels her to perform, and the performance of which the beneficiaries can enforce.

3 R. S. 7th ed. 2191, § 96; *Clark* v. *Crego*, 47 Barb. 599; *Van Boskerck* v. *Herrick*, 65 Barb. 250.

In *Hotchkiss* v. *Elting* the terms in which the trust and power of sale were created (with the exception of certain reservations to the grantor) were almost precisely the same as in the deed under consideration. It was held that the trust considered by itself was a "passive trust;" and had it stood alone, the title would have passed to the beneficiary; but that the fact that the trust was coupled with a power altered the construction of the deed and that the conveyance was thereby changed to a "power in trust," and that the title remained in the grantor.

36 Barb. 38.

In *Smith* v. *Bowen* the legal effect of the language used was the same as in the present case. The instrument was held to constitute a valid power in trust.

35 N. Y. 83.

The only test applied by the courts to determine whether a trust is a passive or an active one is whether a power is conferred upon the trustee by the deed. If so, and if the trust is not within the provisions of the Revised Statutes with regard to express trusts, it is construed as a power in trust, if of such a nature that the statute (3 R. S. 7th ed. 2182, § 58) can be applied. The title remains in the grantor.

Id. § 59; *Kinnier* v. *Rogers*, 42 N. Y. 531; *Smith* v. *Bowen*, 35 N. Y. 83; *Russell* v. *Russell*, 36 N. Y. 581; *King* v. *Whaley*, 59 Barb. 71, 78; *Blanchard* v. *Blanchard*, 6 Thomp. & C. 551.

Earl, *J.*, delivered the opinion of the court:

Prior to March 14, 1867, Henry B. Burton owned certain land in the City of Syracuse, and on that day, through the medium of a third person, he conveyed it to his wife Cornelia H. Burton. On the 8th day of July, 1876, she, without any consideration, conveyed the land to Emily Howland, her mother; and on the 15th day of the same month Mrs. Howland, without any consideration, conveyed the land by a deed which we are now called upon to construe.

The deed purports to be an instrument between Emily Howland of the first part, and "Cornelia H. Burton, wife of Henry B. Burton, of Syracuse, N. Y. in trust for Annie G. Burton, Grace Burton and Burr Burton, with power to sell and convey or mortgage without the appointment of a guardian, of the second part;" and it grants the land with all the rents, issues and profits thereof to the party of the second part and "to their heirs and assigns forever," to have and to hold the same to the party of the second part, "their heirs and assigns," to the sole and only proper benefit and behoof of the party of the second part, "their heirs and assigns forever."

There is no other reference to a trust or power, except that contained in the first clause of the deed above set out.

In the construction of this deed we are enjoined by statute "to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law." 1 R. S. 748, § 2.

Both parties agree that no valid trust was created, as no trust purpose was specified which is mentioned in the statute authorizing the creation of express trusts. 1 R. S. 729, § 55.

A mere formal, passive trust was attempted to be created which the statute executes by vesting the title in the beneficiaries. Secs. 47, 49.

They also agree that a valid general power was created under the statute defining and regulating powers (1 R. S. 732, §§ 74, 77), and we will proceed upon that assumption. They differ, however, as to the nature of the power. The appellants claim that no one but the grantee of the power was interested in the execution thereof, and that, therefore, it was a beneficial power under section 79.

While the deed is quite informal and imperfect in the expression of the intent of the parties, yet we think sufficient appears to show that it was not their intention that Mrs. Burton should execute the power for her own benefit. The conveyance was made in trust for the three persons named, who were the children of Mrs. Burton. They were the real beneficiaries of the grant, and the power to sell and convey or mortgage was probably given because they were infants; and the object was to authorize a conveyance of the land, when desired, without the appointment of a guardian for the infants, and thus to avoid the expense and delay which would ensue if the land were required to be sold or mortgaged only by a compliance with the statutes regulating the sale and mortgaging of the lands of infants.

The case of *Jennings* v. *Conboy*, 73 N. Y. 230, is not an authority for the contention of the appellants. In that case there was no indication whatever in the will that the power to sell was to be executed for the benefit of any other person than the grantee of the power, and that distinguishes that case from this. Here we find a satisfactory indication that the power was to be executed wholly for the benefit of the infants; and it is therefore, as claimed on their behalf, a general trust power under section 94 of the statutes; and the land passed to and vested in the infants, subject to the execution of the power. Secs. 47, 49, 58, 59.

Therefore the mortgages given by Mrs. Burton to the appellants, to secure the debts of her husband, were not a valid execution of the power, and were void.

The judgment of the General Term should be affirmed with costs.

All concur, except **Andrews**, *J.*, taking no part.

Isaac UNTERMEYER *et al.*, *Respts.*,

v.

Alfred J. BERNHAUER, *Appt.*

1. An **action against a builder** to recover damages **for the breach of a contract to erect a house** for plaintiff **within** the **stipulated time**, where the breach alleged is that defendant after commencing the work abandoned it, whereby plaintiff was deprived of its use and compelled to employ other persons at an increased price to complete it, **is an action for unliquidated damages** for the breach of a contract, in which it is **beyond** the **power of** the **court to** make an **order of reference against** the **objection** of either party.
2. A **bill of particulars**, specifying items of damage, does **not** constitute **an account**. Where there is no account between the parties, in the ordinary acceptation of the term, the cause cannot be referred, although there may be many items of damage.
3. If the **counterclaim** set up in the answer, of which a bill of particulars has been ordered and furnished, will **require** the **examination of** a long **account**, this will **not make** the **action referable**. The character of the action is determined by the complaint; the answer cannot change it.
4. If the plaintiffs prevail in the action, it may never become necessary to try the **counterclaim.** Should the counter claim ever require examination a reference can be ordered as to it, after trial of the issues.
5. Although the **motion for a reference** is made upon an **affidavit** of plaintiffs' attorney which states that the trial of the issues will necessarily involve a long account, and there is no opposing affidavit, still, when the motion is also founded upon the **pleadings** and the several **bills of particulars** and they are all before the court, from an examination of them the **court can judge whether** any **account** will be **involved** in the trial of the issues, and **no opposing affidavit is necessary** to enlighten the court on that point.

(Decided May 3, 1887.)

APPEAL from an order of the Supreme Court at General Term in the First Department, affirming an order of reference made at Special Term, in an action to recover damages for breach of an agreement to erect a dwelling house. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **Philip L. Wilson,** for appellant:

On a motion for a reference the pleadings will control, as to the character of the action.

Welch v. *Darragh*, 52 N. Y. 590; *Coleman* v. *Burr*, 93 N. Y. 31.

The trial of the issues raised by the complaint and answer do not involve the examination of a long account, within meaning of section 1013 of the Code.

Camp v. *Ingersoll*, 86 N. Y. 433; *VanRensselaer* v. *Jewett*, 6 Hill, 371; *McDonnell* v. *Stevens*, 9 Hun, 28.

Nor can a case be referred, even though the trial should require an examination of a long account, if that account is not the immediate object of the suit.

Kain v. *Delano*, 11 Abb. Pr. N. S. 29; *Read* v. *Lozin*, 31 Hun, 286; *Brink* v. *Republic Fire Ins. Co.* 2 Thomp. & C. 550; *Camp* v. *Ingersoll*, 86 N. Y. 433.

Nor can a case be referred, if the trial involve difficult questions of law.

If this counterclaim and reply raises an issue as to value of the work at all, the main issues are certainly the contract, the breach.

These being determined under the authority of *Brink* v. *Republic Fire Ins. Co.*, *Read* v. *Lozin*, above cited, and *Evans* v. *Kalbfleisch*, 16 Abb. Pr. N. S. 13, there might be a reference under section 1015 of the Code of Civil Procedure, but not to try the issues under section 1013.

The building of this house is one single transaction, and a reference cannot be ordered merely because the details which make up this transaction are numerous.

The value can be proven in gross, and must be so proven and by expert testimony; the materials cease to have a distinct value, except as embodied in the building.

The case, if it came down to proof of value of the work, is within the rule laid down in *Farrell Foundry & Machine Co.* v. *Anvil Horseshoe etc. Co.* 11 N. Y. Week. Dig. 350; *Felt* v. *Tiffany*, 11 Hun, 62; *Martin* v. *Windsor Hotel Co.* 70 N. Y. 101.

Mr. **Samuel Untermyer,** for respondents:

The statement in the moving affidavit "that the trial of the issues will necessarily involve a long account" being undisputed, the order is not appealable.

Welsh v. *Darragh*, 52 N. Y. 590; *Continental Note Co.* v. *Industrial Exhibition Co.* 1 Hun, 118; *Hossack* v. *Heyerdahl*, 60 N. Y. 684.

The contention is that the action is not upon the account but upon the contract, and therefore section 1013 is not applicable.

The only object of the action is to recover damages, and the proof of such damages in this case necessarily and directly involves the examination of long accounts. If the defendant's contention be correct, no common-law action for damages for breach of contract can ever be referred, because the proof of damages will always be claimed to be incidentally and not directly involved.

The account on the plaintiffs' part consists here of particular items of damage, all of which are sought to be recovered, and those items of damage are directly the subject and the sole subject of the plaintiffs' claim.

In *Camp* v. *Ingersoll*, 86 N. Y. 433, cited by the appellant, the action was not to recover any portion of the moneys shown by the account, but to recover the value of certain shares of stock; and in order to ascertain the value of those shares of stock it became necessary incidentally to take an account of the assets of the corporation.

In the case at bar the immediate and only object of the plaintiffs is to recover the damages set forth in their account, and the immediate and only object of the defendant is to recover as damages, the amount of his counter claim.

Section 1013 does not restrict the right to refer to actions of account, in which the account and its correctness is the sole subject of contest. On the contrary the right to refer is expressly extended to all actions on contract in which an examination of an account is directly involved.

If the defense shall be sustained, the contract sued upon will be declared abrogated and rescinded; and in that event the claims of both the plaintiffs and of the defendant would necessarily be directly upon the accounts themselves to recover the reasonable value of the work and materials furnished.

The trial of the issues in this action necessarily involves the examination of long accounts on both sides and a reference was properly ordered on that account.

Place v. *Cheesebrough*, 63 N. Y. 315; *Welsh* v. *Darragh*, 52 N. Y. 590; *Schermerhorn* v. *Wood*, 4 Daly, 158; *Kennedy* v. *Kenna*, 49 How. Pr. 308.

None of the facts alleged in the answer of the defendant, by which it is sought to avoid the written contract, will rob the court of its right to order a reference.

The nature of the action is determined by the complaint and not by the answer. If the complaint sets out, as it does in this case, an action on contract, not even allegations of fraud would change the nature of the action.

Welsh v. *Darragh*, 52 N. Y. 590; *Eldridge* v. *N. Y. etc. R. Co.* 32 N. Y. 631; *Patterson* v. *Stettauer*, 7 Jones & S. 413; *Williams* v. *Allen*, 48 How. Pr. 357; *S. C.* 2 Hun, 377.

Rapallo, *J.*, delivered the opinion of the court:

This is an action brought against a builder to recover damages for the breach of a contract to erect for the plaintiffs a dwelling house in the City of New York, within a stipulated time. The contract price of the work was $25,500, payable in installments. The contract was dated October 21, 1884, and by its terms the defendant agreed that he would fully inclose the building so as to protect it against the weather, on or before the 20th of December, 1884, and would complete it for occupancy on or before the 30th of April, 1885; that he would commence the construction of the building immediately upon the execution of the contract, and would at no time, between the commencement of the work and its completion, cease to work thereon with a sufficient force, etc.

The breach alleged in the complaint is that the defendant, after having commenced the erection of the building under this contract, ceased work thereon and abandoned the work, before its completion, whereby the plaintiffs were deprived of the use of the building and were compelled to employ other persons to complete the contract, at a cost exceeding the contract price, and sustained damages to the amount of $7,000.

The defendant, by his answer, denies the alleged breach; sets up that the agreement was unconscionable, and was executed by mistake and under duress; that it was prepared by the plaintiffs, who are lawyers, and did not fairly embody a previous verbal agreement under which the defendant had undertaken the job and commenced the performance of the work, and that he was coerced into its execution after having made and contracted for large expenditures on the building; that the plaintiffs themselves violated the contract, and also that the plaintiffs are indebted to him for a balance due for work and labor on the building, which he sets up as a counterclaim; and he demands judgment that the contract be declared void and deemed to have been executed under duress of property, and also for his counterclaim.

The plaintiffs moved for a reference of the action; and the court at special term made an order referring all the issues therein to a referee for hearing and determination. On appeal to the general term that order was affirmed, and the defendant now appeals.

The case presented by the complaint is clearly one in which both parties are entitled, under the Constitution, to a trial by jury; and consequently it was beyond the power of the court to make an order of reference against the objection of either party. It was simply an action for unliquidated damages for the breach of a contract, and in no sense involved any amount.

A bill of particulars was furnished by the plaintiffs, under an order of the court; and by this bill the plaintiffs specified eight items of damage which consisted of loss of interest on the value of his property, loss of occupancy of the building, damage to the building, occasioned by the defendant's failure to inclose it; and increased cost of completing it. These items of damage did not constitute an account. It has repeatedly been held that when there is no account between the parties, in the ordinary acceptation of the term, the cause cannot be referred, although there may be many items of damage. *Camp* v. *Ingersoll*, 86 N. Y. 433.

This rule has been applied in actions on policies of insurance where there are many items of loss. It is contended that the counterclaim set up in the answer, of which a bill of particulars was also ordered and furnished, will require the examination of a long account. Even if this should be assumed, it would not make the action referable.

"The character of the action is determined by the complaint. The answer cannot change it. If the action is a referable one the answer cannot make it nonreferable;" Per Church, *Ch. J.*, in *Welsh* v. *Darragh*, 52 N. Y. 590; and on the same principle, if the action is nonreferable a counterclaim set up in the answer cannot make it so, as was held by this court in *Townsend* v. *Hendricks*, 40 How. Pr. 143.

The defendant has a constitutional right to trial by jury on the issues presented by the complaint and answer, and he does not waive that right by setting up, in addition to his defenses, a counterclaim. If the plaintiffs prevail in the action, it may never become necessary to try the counterclaim. Should the counterclaim ever require examination a reference can be ordered as to it after trial of the issues. *Townsend* v. *Hendricks*, *supra*, p. 164.

The plaintiffs rely upon the fact that the motion for a reference was made upon an affidavit of one of the plaintiffs' attorneys, which states that the trial of the issues will necessarily involve a long account, and that there was no opposing affidavit. But the motion was also founded upon the pleadings and the several bills of particulars, and they are all now before the court. From an examination of them the court can judge as well as the attorney whether any account will be involved in the trial of the issues; and no opposing affidavit is necessary to enlighten us on that point.

The order should be reversed and motion denied, with costs in both courts.

All concur.

Theodore BRINCKERHOFF *et al.*, *Appts.*,
v.
Henry BOSTWICK *et al.*, *Respts.*

An **action by a stockholder of a bank** in behalf of all others similarly situated, **against directors** of the bank, to call them to account **as trustees**, held to be an equitable action to enforce a common-law, as distinguished from a statutory, liability, and hence **triable by the court**, or if issues properly framed are tried by a jury, they are to be reviewed by the court as in equitable actions, although the ground of the liability of the defendants is negligence and fraud.

(Decided May 13, 1887.)

APPEAL by plaintiffs from an order of the Supreme Court at General Term in the Second Department, reversing an order of the Dutchess Circuit granting plaintiffs' motion to strike the cause from the circuit calendar, to be tried as an equity action by the court without a jury. *Reversed.*

Reported below, 43 Hun, 458.

This action was commenced January 10, 1880, by Theodore Brinckerhoff, one of the stockholders of the National Bank of Fishkill, in behalf of himself and the other stockholders, against the trustees of the bank, to call them to account as trustees. The bank and its receiver, who was also one of the trustees, having neglected and refused to prosecute the trustees, were also joined as defendants.

A demurrer to the complaint interposed by defendants was sustained at special term and the judgment of the special term was affirmed on appeal to the general term; see 23 Hun, 237; but on appeal to this court such judgments were reversed and the demurrer overruled.

See 88 N. Y. 52.

The defendants by writ of error, then removed the action into the United States Supreme Court, which court dismissed the writ and remanded the cause.

See 106 U. S. 3 (Bk. 27, L. ed. 73).

The cause came on for trial March 24, 1884, when the plaintiffs were nonsuited and the complaint dismissed upon the ground that the cause of action was barred by the three years' limitation of the Code, § 394.

From the judgment of dismissal the plaintiffs appealed to the general term, where the same was affirmed.

See 34 Hun, 352.

Plaintiffs then appealed to this court, where the decisions of the courts below were reversed and a new trial directed, the court holding the cause of action governed by the ten years' limitation of the Code, § 388.

See 99 N. Y. 85.

On the cause being remitted to the supreme court, plaintiffs moved for an order appointing a referee. The special term denied the motion, and the plaintiffs appealed to the general term, where the order of the special term was affirmed. Defendants then placed the cause on the Dutchess Circuit Calender for the December Term, 1885, and on the same being moved for trial, plaintiffs objected and moved that the cause be stricken from the calendar to be tried as an equity action by the court without a jury. This motion was granted, with leave to defendants to apply for an order framing issues as to the alleged misconduct, to be tried by a jury. From the order granting the motion, defendants appealed to this court at general term, where the order was reversed and plaintiffs appealed to this court.

The facts appear from the opinion.

Mr. **O. D. M. Baker,** for appellants:

The legal relation between the directors and stockholders of the bank is that of trustees and beneficiaries.

Kane v. *Bloodgood*, 7 Johns. Ch. 129; Angell & Ames, Corp. §§ 312-314; *Robinson* v. *Smith*, 3 Paige, 222; *Cumberland Coal Co.* v. *Sherman*, 30 Barb. 571; *Butts* v. *Wood*, 37 N. Y. 318; *Heath* v. *Erie R. R. Co.* 8 Blatchf. 347; Perry, Trusts, § 207; *Jackson* v. *Ludeling*, 21 Wall. 616 (88 U. S. bk. 22, L. ed. 492); *Casserly* v. *Manners*, 9 Hun, 695; *Hun* v. *Cary*, 82 N. Y. 65; 1 Morawetz, Corp. § 237.

It was so adjudicated in this action, when here before.

Brinckerhoff v. *Bostwick*, 88 N. Y. 52; 99 N. Y. 185.

The directors of a corporation are liable to the stockholders for losses resulting from their negligence or misconduct.

1 Potter, Corp. § 324.

The action is equitable in form and was brought against the directors of the bank, in their character as trustees for the stockholders, to obtain from them an account of their dealings with and disposition of the corporate funds and property intrusted to their management, and to compel them to make good the losses resulting from their alleged negligence and breaches of trust.

The burden of the case is and will be with the defendants, until they have accounted and given evidence tending to excuse the conceded losses resulting from their management.

Marvin v. *Brooks*, 94 N. Y. 71.

No constitutional or other right to a trial by jury exists in this case.

I. Before the Code this cause would have stood upon the equity side of the court, and would have been heard and disposed of according to the practice of the court of chancery.

The established procedure against directors, managers or trustees of corporations to compel them to make good the losses resulting to the corporation and stockholders from their negligence or fraud, was by an accounting in the court of chancery in England down to 1777, when New York ceased to be a Colony.

Perry, Trusts, § 17 and cases cited.

A court of chancery was established in the Colony prior to 1693, and locally exercised all the authority of the mother court.

"The Governour and Councill are a Court of Chancery and have the powers of the Chancery in England."

4 N. Y. Colonial MSS. 28.

The first Constitution of the State, adopted April 20, 1777, did not create or declare any judicial system, but recognized and continued, with other courts, the court of chancery and its jurisdiction as existing April 19, 1775.

See §§ XXIV, XXV, XXVII, XXXII.

The right to trial by jury in such cases as this plainly did not exist when the first Constitution went into effect, and the provision therein, "XLI. That trial by jury in all cases in which it hath heretofore been used in the Colony of New York shall be established and remain inviolate forever," had no application.

From March, 1814, cases of this character have always been prosecuted on the equity side.

Brumly v. *Westchester Co. Mfg. Soc.* 1 Johns. Ch. 366; *Atty-Gen.* v. *Utica Ins. Co.* 2 Johns. Ch. 371; *Ogden* v. *Kip*, 6 Johns. Ch. 160.

Article VII, § 2 of the Constitution of 1822 provided:

"The trial by jury in all cases in which it has been heretofore used, shall be inviolate forever."

Under chapter 325, Laws of 1825, "To prevent fraudulent bankruptcies by incorporated companies, to facilitate proceedings against them, and for other purposes," it was held that the jurisdiction of the court of chancery had thereby been so extended as to enable that court to entertain a bill against a corporation for a misuse of its franchise.

Atty-Gen v. *Bank of Chemung*, 1 Hopkins, Ch. 673; *Atty-Gen.* v. *Bank of Columbia*, 1 Paige, 511; *Verplanck* v. *Mercantile Ins. Co.* 2 Paige, 438, 451.

In 1832 came the revision of the statutes, with this provision in article second, title four, chapter eight, part three, viz.:

Sec. 38. "The chancellor shall have jurisdiction over directors, managers and other trustees and officers of corporations:

1. "To compel them to account for their official conduct, in the management and disposition of the funds and property committed to their charge;

2. "To decree and compel payment by them to the corporation whom they represent and to its creditors, of all sums of money, and of the value of all property which they may have acquired to themselves or transferred to others, or may have lost or wasted, by any violation of their duties as such directors."

Robinson v. *Smith*, 3 Paige, 222; *Cunningham* v. *Pell*, 5 Paige, 607.

This procedure and these provisions of the statutes were in force when the Constitution of 1848 was adopted.

This is not one of the cases in which trial by jury had then "been heretofore used."

Wynehamer v. *People*, 13 N. Y. 427; *Re Empire City Bank*, 18 N. Y. 199-210; *Sands* v. *Kimbark*, 39 Barb. 108-120; *S. C.* 27 N.Y. 147; *Sheppard* v. *Steele*, 43 N.Y. 53-57; *VanMarter* v. *Hotchkiss*, 4 Abb. App. Dec. 485.

The powers of the chancellor in respect to officers of corporations, specified in subdivision 2, section 33 of the Revised Statutes, became vested and remain in the supreme court under the Constitution of 1848, and the Judiciary Act, chapter 280, Laws 1847, § 16.

II. By the Code the method of trial is made to depend upon the character of the demand for judgment, and the right to trial by jury, aside from specific cases of which this is not one, is expressly limited to "An action where the complaint demands judgment for a sum of money only."

§ 968.

Here the complaint does not demand judgment for a sum of money only. The demand is that the damages sustained by the bank and stockholders, by reason of the acts and omissions of the directors, be ascertained and determined, which can only be done through an accounting by them.

Farwell v. *Importers etc. Nat. Bank*, 90 N.Y. 491.

Code, §§ 969 and 1013, declare the action triable by the court.

III. If the action be considered as one at law the directors must also account and there is no right to trial by jury.

51 Henry III, St. 5; 52 Henry III, chaps.

17, 33; Laws 1788, chap. 4; Rev. 1832; 2 Edmond's Stat. 400, §§ 49–53; *Kelly* v. *Kelly*, 3 Barb. 419; Laws 1880, chap. 245, § 3, subds. 1–2.

Mr. **Milton A. Fowler,** for respondents:

There is but one question before the court: Is this an action on contract or in tort?

If in tort the defendants claim that they have a right to a trial by a jury.

This is simply an action to recover damages from the defendants on account of their alleged fraud, negligence, deceit and dishonesty, while holding office as directors of the Fishkill National Bank. To maintain the action the plaintiffs must first prove such fraud, negligence, deceit and dishonesty.

If the plaintiffs recover judgment, the surviving directors who are made defendants herein are liable to arrest under the execution. And this right to arrest exists without the necessity of obtaining an order of arrest *pendente lite*, for the reason that it is an action "to recover damages for * * * misconduct or neglect in office."

Code, § 549, subd. 2.

This therefore is clearly an action for tort.

In whatever court the action must be brought, the liability, if any exists, is a common-law liability; and the rules relating to common-law actions apply to the trial of this action.

When this case was first before the court of appeals it was held by the court that the jurisdiction of courts of equity, in cases like the one at bar, exists independently of any statutes, and that the statutory enactments relating to such cases, are merely declaratory of a jurisdiction long previously conceded to exist.

88 N. Y. 52, 57–59.

When this case was before the court the second time the court in its opinion says:

"It is not claimed that the liability which the plaintiff seeks to enforce in this action against the directors is one created by any statute; but as we held when the case was here before, it is a common-law liability, springing out of their relations to the bank and the manner in which they discharged, or omitted to discharge, their obligations and duties as directors thereof."

99 N. Y. 185.

In an action for damages for tort, like the present, the defendants have a constitutional right to trial by jury.

N. Y. Const. art. 1, § 2; *McMaster* v. *Booth*, 4 How. Pr. 427, 429; *Townsend* v. *Hendricks*, 40 How. Pr. 143.

The court of chancery never had the right to try, without a jury, an action for damages on the ground of fraud.

Bradley v. *Aldrich*, 40 N. Y. 504, 510, 511; *Barlow* v. *Scott*, 24 N. Y. 40–46; *Hun* v. *Cary*, 82 N. Y. 65; *McMaster* v. *Booth*, 4 How. Pr. 427; 19 Wend. 108; 3 Denio, 380.

Counsel for plaintiffs confused the terms "an action for an accounting" and "an action against directors or trustees to call them to account;" and in some of the cases cited by him, the court has failed to discriminate between the two kinds of action, for the reason that such discrimination was not essential in determining the issues presented.

The *gravamen* of the action is damages for negligence or malfeasance; and the distribution of the damages resulting from the wrongful acts is only an incident. In such case the trial by jury cannot be denied.

Bradley v. *Aldrich*, 40 N.Y. 504–510; *Hun* v. *Cary*, 82 N. Y. 65–79; *Wheelock* v. *Lee*, 74 N. Y. 495, 500; *Davison* v. *Associates of the Jersey Co.* 71 N. Y. 333.

Peckham, *J.*, delivered the opinion of the court:

This action has already been held by this court to be an equitable one. It is brought by plaintiff Brinckerhoff in his own behalf, as stockholder of the bank and in behalf of all others similarly situated, against defendants, who were directors of the bank, to call them to account as trustees for the manner in which they have discharged their trust. Of such actions courts of equity have always had jurisdiction. *Brinckerhoff* v. *Bostwick*, 99 N. Y. 185.

Nothing in the opinion in this case when last here, and reported *supra*, gives color to the idea that the case was regarded otherwise than as an equitable one. The judge it is true, in delivering the opinion, said that defendants' liability was not created by statute but was a common-law liability, springing out of defendants' relation to the bank, and the manner in which they discharged their obligations and duties as directors thereof. The expression "common-law liability" was obviously used in contradistinction to that of a liability imposed by statute, and had no reference whatever to a liability enforceable at common law, in distinction from one cognizable in equity.

Since the first decision of this case by this court (88 N. Y. 52), other stockholders upon their petition have been added as plaintiffs, and the judgment demanded against the defendants is that they may be adjudged to pay the damages sustained by the plaintiffs, and that the receiver may recover, collect and receive the same for the benefit of the creditors and stockholders of the bank, or else that plaintiffs may recover, etc.

Under the allegations of the complaint and upon the very numerous bases of liability respecting the several defendants, it is hard to see exactly what kind of a verdict could be directed as to form, in case the action were to be regarded as a common-law one, and the jury were to give a verdict for the plaintiffs which should cover the whole case and upon which judgment should be entered. The verdict might be for different sums against different defendants, and founded upon distinct liabilities growing out of different acts as to each; and yet the foundation of the verdict in regard to the facts found against each defendant would be problematical in the extreme.

The sums for which defendants might be liable may not only be different, but the total liability of all might exceed the total damage proved, and thus there would be a verdict for different sums against the different defendants and an excess of total liability over the damage proved, and provision would have to be made for such a state of facts in the judgment to be entered, which ought to be based upon a special application, on notice, to the court, and upon its directions then given. All this shows how entirely impracticable would be a reference to a jury of the whole issue as in a common-law action, with a general verdict and a judgment to be entered thereon without any further application to the court.

In *Hun* v. *Cary*, 82 N.Y. 65, there was but one negligent or improper act alleged, that being the purchase of the lot and erection of the building on it under the circumstances proved. The damage was plain; it was of the same amount against all who were liable at all, and a general verdict in damages could properly be given which could be entered without any further application to the court and would be final in regard to the rights of all parties. The court said that under such circumstances it was not error to try the issue there involved by a jury, and that there were no equitable rights to be adjusted and no occasion to appeal to an equitable forum. The difference between the cases is wide and material. The cases cited by defendants' counsel as to the right of trial by jury in cases of fraud, etc., do not apply here.

The case of *Bradley* v. *Aldrich*, 40 N. Y. 504, merely holds that an allegation of grounds in plaintiffs' complaint for equitable relief and nothing else, where proof of such grounds fail, does not permit the court to try an action for fraud without a jury. The former practice of the court of chancery was to dismiss the bill when all ground for equitable interposition failed, even though a cause of action at law appeared to arise out of the transaction. When a party alleges a cause of action of an equitable nature he must prove one, so far as the question of a trial by jury is concerned; and he cannot escape such tribunal by alleging an equitable cause of action and, while wholly failing to prove it, obtain a trial by the court of a common-law action arising out of the transaction. To show that there is an issue of fraud in a case does not necessarily make the case one for a jury, or give a defendant a legal right to such a trial as if it were a common-law action.

An action with an issue of fraud in it could and can now certainly be tried by the court (unless issues were properly framed for trial by jury), even against the desire of defendants, as in an action to set aside a deed or other instrument on the ground of fraud. This action is an equitable one, and the issues to be tried by a jury are to be reviewed by the court in the same manner as in equitable actions; and the plaintiff does not fail to show the equitable nature of this action by proving the allegations of his complaint, even though the ground of the liability of the trustees whom he is seeking to call to account is their negligence and fraud. A court of equity still has jurisdiction of such an action.

The case of *Davison* v. *Associates of the Jersey Company*, 71 N. Y. 333, 340, is of the same general nature as *Bradley* v. *Aldrich*, *supra*. The case was brought to enforce the specific performance of a contract for the sale of land and had been once tried. On the second trial the plaintiff demanded a jury trial on the ground that it appeared on the former trial that defendants had conveyed the lots before the commencement of the action, and that the evidence would now show a cause of action at common law for damages only. The court denied the motion and the denial was upheld in this court, upon the ground that the plaintiff, by bringing his action for a specific performance of the contract to convey, had elected his forum and waived his right to a jury trial, but that the rule was different in the case of a defendant, who could not be deprived of a jury trial in a proper case, because plaintiff demanded equitable instead of legal relief. In other words, if defendants had asked for a trial by jury of the issue as to damages (the equitable relief of a specific performance having passed away by the conveyance of the land by the defendants to other parties), such request would have been granted, and it would have been no answer to such application to show that the action was originally for equitable relief. This case is nothing of the sort.

But without doubt there are issues which ought to be tried by a jury, and the order of the special term very wisely provided for framing issues for such a trial.

The order of the General Term should be reversed and that of the Special Term affirmed, with costs in both courts.

Caroline M. MITTNACHT, *Appt.*,
v.
John KELLERMANN, *Respt.*

1. **No authority was conferred upon a District Court** of the City of New York, by chapter 344 of Laws of 1854, or chapter 484 of Laws of 1862, **to order an action for claim and delivery** to be **transferred** from that court **into** the court of **common pleas.** Hence, an **undertaking** given on the removal of such an action, not being made under any statutory authority, is **void** and cannot be enforced, and, being without consideration, cannot be supported as a common-law bond.
2. The **undertaking was conditioned to pay** any judgment that the court of common pleas should render against defendant. *Held*, that by this was intended a **valid judgment**, and that as the common pleas acquired no jurisdiction by the unauthorized removal and none by subsequent proceedings, the judgment rendered by it was void and not covered by the undertaking, even if the undertaking could be maintained in any view.
3. *Held, also*, that the **sureties** were **not estopped** by any recital in the undertaking from availing themselves of the invalidity of the instrument when sued thereon.

(Decided April 26, 1887.)

APPEAL from a judgment of the General Term of the Court of Common Pleas of the City and County of New York, affirming a judgment of the General Term of the Marine Court, which affirmed a judgment of a trial term in favor of defendant, in an action against a surety for damages for breach of an undertaking given on removal of an action. *Affirmed.*

The facts and questions raised appear from the opinion.

***Mr.* Christopher Fine,** for appellant:

The defendant did not plead the supposed or assumed invalidity or irregularity of the agreement or undertaking, or by plea or otherwise make any pretense that he was induced to make and execute the agreement in question, by coercion, fraud, or even mistake; and he cannot now be heard to make such claim.

Vose v. *Cockcroft*, 44 N. Y. 415, 428; *Re Cooper*, 93 N. Y. 507, 512; *Schreyer* v. *Mayor*, 7 Jones & S. 1, 3; *McKyring* v. *Bull*, 16 N. Y. 297; *Cummins* v. *Barkalow*, 4 Keyes, 514; *Stafford Pavement Co.* v. *Monheimer*, 9 Jones & S. 184–188; *Darlington* v. *Mayor*, 2 Robt. 274; *Potts* v. *Sparcon*, 3 Dow. Pr. Cas. 630; *Barnett* v. *Glassop*, Id. 625: *Codd* v. *Rathbone*, 19 N. Y. 37, 39; *Dubois* v. *Hermance*, 56 N. Y. 673, 674; *Brennan* v. *Mayor*, 62 N.Y. 365, 369.

But even if the supposed illegality of the agreement or undertaking had been pleaded, the defendant would be estopped from denying the recitals therein contained, or the legality of the obligations voluntarily assumed by the obligors.

Sureties will not be permitted to deny that the surrogate had jurisdiction of the case, or to take the bond and issue the letters of administration.

People v. *Falconer*, 2 Sandf. 81, 83, citing: *Pritchett* v. *People*, 6 Ill. 525; *Morse* v. *Hodsdon*, 5 Mass. 314; *Decker* v. *Judson*, 16 N. Y. 440, 442, 448; *Jarvis* v. *Sewall*, 40 Barb. 449, 453; *Field* v. *Van Cott*, 15 Abb. Pr. N. S. 349, 352, 354; citing many cases. *Bowne* v. *Mellor*, 6 Hill, 496; *Cutler* v. *Dickinson*, 8 Pick. 387; *Cecil* v. *Early*, 10 Gratt. 198; *Cox* v. *Thomas*, 9 Gratt. 312.

The defendant who voluntarily becomes surety for a substituted trustee, is precluded in an action on such undertaking from denying his liability as surety, though the proceedings were irregular and erroneous, and upon a direct proceeding (for that purpose) might have been set aside or reversed.

People v. *Norton*, 9 N.Y. 176, 178; *Supervisors of Rensselaer* v. *Bates*, 17 N.Y. 242, 245, 246.

In an action by a sheriff upon a bond given by a deputy sheriff to indemnify the sheriff, etc., the surety in such bond is concluded by a judgment recovered against the sheriff in an action brought against him for the neglect of of the deputy, etc.

Fay v. *Ames*, 44 Barb. 327, 333, 334; *Fake* v. *Whipple*, 39 N. Y. 339, 345.

The defendant is estopped from asserting the invalidity of his own proceedings.

Onderdonk v. *Voorhis*, 36 N. Y. 358: *Kelly* v. *McCormick*, 28 N. Y. 318, 320; *Harrison* v. *Wilkin*, 69 N. Y. 412, 417, 418; *Diossy* v. *Morgan*, 74 N.Y. 11, 13, 14; *Methodist Ch.* v. *Barker*, 18 N. Y. 463. 466; Herman, Estoppel, p. 273, §§ 251, 252, p. 266, § 244; p. 271, §§ 249, 250; *Speake* v. *U. S.* 9 Cranch, 28, 36 (13 U. S. bk. 3, L. ed. 645, 648); Cro. Eliz. 756; *Coleman* v. *Bean*, 3 Keyes, 94; *Hill* v. *Burke*, 62 N. Y. 111, 117; *Franklin* v. *Pendleton*, 3 Sandf. 572, 575.

But the undertaking or agreement in question is a valid instrument and binding upon the obligors.

The recital of the pecuniary or valuable consideration moving to the defendant could not, as matter of law, be contradicted for the purpose of defeating the agreement; nor in fact was any such denial or attempt made.

McCurtie v. *Stevens*, 13 Wend. 527; *McCreu* v. *Purmort**, 16 Wend. 460; *Bank of the U. S.* v. *Housman*, 6 Paige, 526; *Merriam* v. *Harsen*, 2 Barb. Ch. 232, 267; *Barnum* v. *Childs*, 1 Sandf. 58.

The undertaking having been voluntarily executed, its validity did not depend on the lawfulness of the order of removal.

Skellinger v. *Yendes*, 12 Wend. 306; *Pervey* v. *Sleight*, 1 Wend. 518, 520; *Flagg* v. *Tyler*, 3 Mass. 304; *Bowne* v. *Mellor*, 6 Hill, 496, 497.

The doctrine that a bond is void, as given *colore officii*, under the provision of the Revised Statutes, applies only to securities executed to the officer, and not to those taken to, and for the benefit of, the parties suing out the process.

2 Rev. Stat. p. 286, § 59; *Cadwell* v. *Colgate*, 7 Barb. 259; *Ring* v. *Gibbs*, 26 Wend. 510; 3 Greenl. (Me.) 615; 8 *Id.* 426; 5 Mass. 541.

The agreement or undertaking in question is a valid contract on the part of the defendant, based upon a sufficient and valuable consideration, and should be enforced.

Methodist Ch. v. *Barker*, 18 N. Y. 463, 466; *Brown* v. *Sprague*, 5 Denio, 545, 552, 553.

The undertaking in question would be valid and of binding force and effect, by virtue of the statute providing for removals of causes from the district courts to the common pleas for trial, where the amount involved over $100, even if such undertaking did not contain a valid consideration.

***Mr.* Jacob L. Hanes,** for respondent:

The original judgment of the marine court, and the several affirmances thereof were right and should stand, because the alleged undertaking upon which the action was brought being to Jacob A. Mittnacht personally and only, and not having been assigned by him to the plaintiff, she had no right to maintain an action thereupon.

The so-called undertaking upon which this action is brought (not being under seal, and being without consideration) could have no legal force or validity, unless it was prescribed by statute.

Post v. *Doremus*, 60 N. Y. 371.

It has, however, never been pretended that said alleged undertaking had any statutory prescription or authorization, otherwise than by the New York District Court Act (chap. 344, Laws of 1857), section 3, subdivision 3. But, as section 3 of that Act first prescribes the instances in which said district courts could have jurisdiction, without including therein actions of replevin, and the other authorizes removal, with prescription of undertaking thereon, only in those actions commenced in pursuance of that section, in which the claim or demand should exceed $100, it is clear that no power or jurisdiction of removal of an action of replevin was thereby given; and any supposed order of removal, or undertaking for removal, in such case must be void.

Curtis v. *Besson*, 6 Daly, 432.

The justice of the district court who received the alleged undertaking, being wholly without jurisdiction so to do, or to make any order of removal thereupon, the respondent is not estopped from his defense that his supposed undertaking was invalid and void.

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*See editorial note and indexed citations, Lawyers' edition. [Ed.]

Ward v. *Syme*, 8 N.Y. Legal Obs. 95; *Mansfield etc. R. Co.* v. *Swan*, 111 U. S. 379 (Bk. 28, L. ed. 462); *Ayers* v. *Watson*, 113 U. S. 594 (Bk. 28, L. ed. 1093). See also *Post* v. *Doremus*, 60 N. Y. 371.

Nor can any recital in the undertaking estop the defense that it was void for such want of jurisdiction.

Ward v. *Syme*, *Post* v. *Doremus*, *Mansfield etc. R. Co.* v. *Swan*, and *Ayers* v. *Watson*, *supra*; *Cadwell* v. *Colgate*, 7 Barb. 253; *Germond* v. *People*, 1 Hill, 343; *Latham* v. *Edgerton*, 9 Cow. 227.

Ruger, *Ch. J.*, delivered the opinion of the court:

In December, 1876, one Jacob Mittnacht commenced an action of claim and delivery for the recovery of personal property in a District Court of the City of New York against John B. Gschwind. Issue was joined in the action, and immediately thereupon the defendant commenced proceedings to remove the case into the Court of Common Pleas of the City of New York. For that purpose he procured to be executed and filed in the said district court an undertaking, signed by himself as principal, and John Kellermann and Frederick Dieterle, as sureties, which undertaking, after reciting the commencement of the action under chapter 344, of the Laws of 1857, the joinder of issue therein, that a trial thereof had not been had, and the application of the defendant to remove the case into the court of common pleas under the provisions of said Act, continues: that now, therefore, we, John B. Gschwind, John Kellermann and Frederick Dieterle, "have and hereby do in consideration of the premises aforesaid, and of one dollar to us in hand paid, jointly and severally promise and agree that we will pay to the plaintiff the amount of any judgment that may be awarded against the defendants by the said court of common pleas in this action."

The district court thereupon assumed to make an order removing the case into the court of common pleas, upon the *ex parte* application of the defendant therein. Thereupon the plaintiff caused said action to be placed upon the calendar of the court of common pleas at a trial term thereof; and when the case was reached, in the regular course of proceedings, moved the same for trial, and, the defendant not appearing, took his default and entered judgment, upon an inquest, for the return of the property described, and, in case that could not be had, for the amount of $250, its assessed value.

No appearance in the action was in any way made in the court of common pleas by the defendant, after its attempted removal there; and it does not appear that he ever took any steps in the original action after obtaining the order of removal.

This action is brought to recover the damages arising out of an alleged breach of the undertaking given on the attempted removal. The grounds upon which liability is contested are that the undertaking was without consideration; that the district court had no authority to order a removal of an action for claim and delivery from that court into the court of common pleas, and that the latter court acquired no jurisdiction of the case by reason of the proceedings to remove it, and has rendered no valid judgment in such action.

It seems to us quite clear that the district court had no authority to order an action for claim and delivery to be transferred from that court into the court of common pleas. By chapter 344 of the Laws of 1857, being an Act to consolidate the several Acts relating to district courts in the City of New York, it is provided by section 3, that such courts have jurisdiction in the following actions:

1. In actions similar to those provided by sections 53 and 54 of the Code of Procedure where the sum named shall not exceed $250.

2. In an action upon the charter, ordinances or by-laws of the Corporation of the City of New York, or a statute of this State where the penalty shall exceed $250.

It is then provided by subdivision 3 of that section that "In any action commenced in pursuance of this section where the claim or demand shall exceed the sum of $100 upon the application of the defendant, the justice shall make an order removing the same, at any time after issue joined, and before the trial of the same, into the Court of Common Pleas, in and for the City and County of New York, upon the defendant executing to the plaintiff an undertaking with one or more sufficient sureties, to be approved of by the justice of the court in which such action is commenced, to pay to the plaintiff the amount of any judgment that may be awarded against the defendant by the said court of common pleas."

It will be observed that this Act conferred no jurisdiction upon the district courts to entertain any actions except those calling for the relief to be obtained by money judgments. It is not claimed that they thereby obtained any jurisdiction of an action for claim and delivery.

By section 17 of chapter 484 of the Laws of 1862, jurisdiction was conferred upon district courts to hear and determine actions for claim and delivery, where the value of the property claimed did not exceed $250. The question whether such an action was removable into the court of common pleas, under section 3 of the Act of 1857, arose in that court in 1876, in the case of *Curtis* v. *Besson*, 6 Daly, 432, where it was held that it was not, the court saying that the Act of 1862 made no provision for such removal, and that the terms of the provisions of section 3 of the Act of 1857, were inconsistent with the theory that such power of removal was intended to be conferred.

They say: "By that section conferring jurisdiction solely of actions for the recovery of money the power of removal is only in such actions (referred to in subdivisions 1 and 2) and the obligation of the undertaking required in such a proceeding is to pay 'the amount of any (money) judgment;' while in a proceeding for the removal of the action for the recovery of the possession of personal property, any such an obligation would be unadapted to the case and would not furnish the plaintiff with the security for the performance of such terms, as the judgment in such an action in favor of the plaintiff would award."

Great weight must be given to the opinions of that court, upon questions affecting its own practice and jurisdiction; and we should be reluctant to overrule its disposition of such cases, especially when they had been long acquiesced in, even if we were not entirely satisfied with the reasons given therefor.

But we are also of the opinion that the decision of that case was a correct exposition of the meaning and intent of the statute referred to.

It follows from these views that the order of the district court removing the original case to the court of common pleas was without jurisdiction, and did not effect such removal; that the court of common pleas acquired no jurisdiction of that action by force of the order of removal, and that all subsequent proceedings in that court were void and of no effect. It also follows, from these views, that the execution of the undertaking in question was not made under any statutory authority; and it cannot be supported upon the theory that it was executed according to any requirement of law.

Although it may be open to some question whether the security in question comes within the provisions of the statute against bonds taken *colore officii* (*Decker* v. *Judson*, 16 N. Y. 439), it yet derives no support from the statute, and must be sustained, if sustainable at all, upon some other theory. The general rule that bonds taken by public officers purporting to be taken under statutory authority, but which are not actually authorized by the statute, or do not conform in all material respect with its provisions, are void, is too well established by authority to be questioned or disputed. *Post* v. *Doremus*, 60 N. Y. 371; *People* v. *Meighan*, 1 Hill, 299; *Homan* v. *Brinckerhoff*, 1 Denio, 184.

Some claim has been made by the appellant that it may be upheld as a valid instrument at common law; but such an instrument, like other contracts made between parties, requires a consideration to support it. This contract has none. It was a unilateral undertaking, executed by defendant in an action, acting in hostility to the plaintiff, and by which he sought to obtain an advantageous position in the litigation against the will of his adversary. If it had force, it was not by any agreement or consent of the parties, but was the act of one party attempted to be imposed upon the other as a compliance with an assumed statutory authority. It was not claimed that it had any other efficacy than such as the statute gave it.

The admission of the receipt of one dollar does not state who received it or from whom it came. Ordinarily such an acknowledgment would import that it came from the obligee; but such an inference cannot legally be indulged when the situation of the parties forbids it. It cannot be presumed that a hostile party in a law suit has advanced money to his adversary to enable a proceeding to be taken which he did not know of and would naturally desire to defeat. This bond was not given as the condition of any favor extended by the court or as the price of any consideration to be granted by the plaintiff, but was an *ex parte* proceeding to compel a removal of the case under the claim of a legal right. The defendant did not ask any favor of the plaintiff, and proceeded regardless of his assent or dissent to the proceeding.

We, therefore, think the bond was invalid, as being wholly without consideration.

Assuming, however, that the bond was given upon a sufficient consideration, we are of the opinion that no breach of its conditions has been shown, and that the court of common pleas has never rendered judgment in the action against the defendant.

Admitting that the court of common pleas had jurisdiction of actions for claim and delivery, it does not appear that they ever acquired jurisdiction of the person of the defendant. No process of that court was ever served upon him, and he never, in any manner, appeared in the action after its attempted removal to that court. The bond was conditioned to pay any judgment that the court of common pleas should render against the defendant. This clearly implies that it should be a valid judgment of that court, and not the expression of an ineffectual opinion. A decision of that court, which it had no authority to make, lacks all of the essential qualities of a judgment. As we have heretofore seen, the court of common pleas acquired no jurisdiction from the order of the district court, and it acquired none by any subsequent proceedings. That court could not, therefore, render a judgment in that action.

The appellant also claims that the defendant should be precluded from raising the questions as to the invalidity of this bond because they have not been raised by answer.

It will be observed that the questions raised all appear on the face of the complaint and lie at the foundation of the action. In any view that we can take of the case no cause of action was stated in the complaint.

The subsequent appearance of the plaintiff in the action in the court of common pleas adds nothing to the force of the bond, for the obligation executed by the sureties was either legal when the contemplated action had been taken upon it, or it was then void. The parties to the action could not, by their voluntary action or agreement, create a consideration for an undertaking which had no existence at the time of its execution.

While it may be assumed that the parties intended to execute an instrument which should be effectual to remove the case to the court of common pleas, we have no authority to say they intended thereby to leave it optional with the plaintiff to remove it or not as he should afterwards elect.

Finally, it is claimed that the defendant is estopped from disputing the jurisdiction of the court of .common pleas by the recitals in the undertaking, and that he thereby admits that it did or would acquire jurisdiction by the order of removal. We do not see what recitals there are in this instrument which affirms such a fact or estops the sureties from availing themselves of the insufficiency or invalidity of the instrument.

It may be inferred from the language of the bond that the defendant intended to claim that by filing such a paper and moving the court to transfer the case, he had, under the Act of 1857, the right to have the case removed into the court of common pleas; but there is no recital therein which he now controverts, and none which directly affirms either as fact or opinion. At the strongest, what was then said amounted only to an inference as to what was the defendant's opinion; and this, honestly entertained and expressed, cannot be the basis of an estoppel or a contract.

The authorities cited by the counsel for the appellant, to the effect that parties to an undertaking are bound by the recitals therein contained, are quite inapplicable to this case, for there are no recitals in this instrument which it is now necessary for him to controvert.

The judgment should, therefore, be affirmed.

All concur.

James F. MOONEY, *Respt.*,
v.
John LOUGHLIN, *Appt.*

In an **action** by a stranger to a contract made by defendant with a certain firm for the doing of work by such firm upon a building under the direction of an architect, to recover **for work necessary for** the **completion of** the **building, claimed** by plaintiff to have been **done by** him by **direction of** the **architect** and **for** the **defendant's benefit,** but which the defendant denied having ordered or authorized, *held*, that there was enough evidence on the plaintiff's side to make out a case, and that therefore the **court of appeals was without jurisdiction to weigh the evidence.**

(Decided May 18, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment entered in Kings County upon report of a referee in favor of plaintiff in an action for work, labor and materials. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **Roger A. Pryor,** for appellant:

The only authority communicated to Keeley was to see that the contract between defendant and Fickett & Co. was carried out by Fickett & Co. Authority to make another contract and with another party is repugnant equally to the object and to the terms of the instrument.

Niles v. *Smith*, 2 Code Rep. 31.

The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor.

Boston Ice Co. v. *Potter*, 123 Mass. 28.

Neither plaintiff's misconstruction of the contract nor common talk and general belief suffices to fix defendant with responsibility for Keeley's acts. It results, therefore, to demonstration that Keeley had no authority under the contract between defendant and Fickett & Co. to employ Mooney.

Craighead v. *Peterson*, 72 N. Y. 279; *Zottman* v. *San Francisco*, 81 Am. Dec. 99.

The judgment is erroneous unless appellant be estopped to deny Keeley's authority or has ratified his employment of Mooney, with such effect as to imply a legal obligation to pay for the work.

Keeley's own declarations are insufficient to establish an estoppel.

Marvin v. *Wilber*, 52 N. Y. 270; *Scott* v. *Stevenson*, 3 Hun, 352; *Howard* v. *Norton*, 65 Barb. 161; *Harker* v. *Dement*, 9 Gill, 7.

It requires some act of the principal to estop him from disputing the power of an assumed agent.

Town of Springport v. *Teutonia Sav. Bank*, 75 N. Y. 397, 407.

But plaintiff admits that Keeley never said he was agent for defendant other than under the contract.

It is indispensable to the binding efficacy of an estoppel that the party urging it should have been ignorant of the actual authority; Bigelow, Estop. 484, 520; *Booth* v. *Farmers etc. Nat. Bank*, 4 Lans. 306; *Veeder* v. *Mudgett*, 95 N.Y. 310; and should have acted upon the fact or representation alleged as an estoppel.

Winegar v. *Fowler*, 82 N. Y. 315; *Waring* v. *Somborn*, 82 N. Y. 604; *Van Deusen* v. *Sweet*, 51 N. Y. 378.

A principal is bound by an act of his agent, in excess or abuse of his authority, only as to third persons who believe and have a right to believe that the agent was acting within and not exceeding his authority, and who would sustain loss if the act was not considered that of the principal.

Walsh v. *Hartford Fire Ins. Co.* 73 N. Y. 10.

Apparent authority operates only by way of estoppel.

People v. *Bank of North America*, 75 N.Y. 548.

Defendant never ratified the employment of plaintiff by Keely.

Ratification is when "the principal, with full knowledge of what has been done by the agent (*Rowan* v. *Hyatt*, 45 N. Y. 138; *Nixon* v. *Palmer*, 8 N. Y. 398; *Ritch* v. *Smith*, 82 N. Y. 627; *Brass* v. *Worth*, 40 Barb. 654; *Smith* v. *Tracy*, 36 N. Y. 84; *Condit* v. *Baldwin*, 21 N. Y. 225; *Murray* v. *Bininger*, 3 Keyes, 109), consents to be bound by it, and unequivocally manifests such intent to the other party."

Keeler v. *Salisbury*, 33 N.Y. 648; *Benninghoff* v. *Agricultural Ins. Co.* 93 N.Y. 495.

Again; ratification from silence does not arise unless the person claiming the ratification has been misled to act by such silence, or has been induced thereby to forego some advantage which he would have otherwise enjoyed.

Guimbillot v. *Abat*, 6 Rob. (La.) 284; *Kent* v. *Quicksilver Mining Co.* 78 N.Y. 159.

Here it is not apparent defendant was aware that the claim was for extra work; Bigelow, Estop. 569; nor that he agreed to be bound by Keely's act, for he refused to pay the claim or to acknowledge its obligation. True, when plaintiff alleged that Keeley had ordered the work, he did not deny Keeley's authority; but first, there is no evidence that he knew the work was outside Keeley's written authority; and this plaintiff was bound to prove; *Nixon* v. *Palmer*, 8 N.Y. 401; Bigelow, Estop. 598; and second, defendant's silence did not mislead plaintiff to his detriment.

Defendant's overture to arbitrate the claim, so far from being a concession of it, is a challenge of it; and his offer to pay one tenth of the bill in satisfaction of the whole was a mere proposition to buy peace, made in the same breath in which he disputed the validity of the demand.

1 Greenl. Ev. § 192; 2 Whart. Ev. § 1090; *Williams* v. *Thorp*, 8 Cow. 202.

Acquiescence in the usurpation of authority by Keeley cannot be inferred from omission of defendant to repudiate the unauthorized act; for the obligation to repudiate arises only upon knowledge of the usurpation—and here is no evidence that defendant knew that the employment of plaintiff was outside the contract, or, otherwise than as servant of Fickett & Co., to perform the extras pursuant to the contract. "The principal, upon being informed of an act in excess of his authority, has a right to elect," etc.

Andrews v. *Ætna Life Ins. Co.* 92 N.Y. 604.

The decision of the general term is based, not alone upon the theory of agency, but upon the ground that as defendant is in enjoyment of the benefit of plaintiff's work, "the law implies an obligation to pay the value of it." It will be observed that the court assumes the building to be the property of defendant, of which there is no evidence. But, upon the postulate on which the case was tried, viz.: that the legal title is in defendant, for the benefit of the church, and that the building is occupied by the church as a hospital, it would not be a valid inference that defendant was in receipt and enjoyment of the benefit of plaintiff's work, with the effect of raising an implied assumpsit on his part to pay for the work. However, a long established and familar rule exempts the owner of real property from the operation of the rule here applied by the court.

Smith v. *Brady*, 17 N. Y. 189; *Reed* v. *Board of Education*, 4 Abb. App. Dec. 24; *Ellis* v. *Hamlen*, 3 Taunt. 52; *Burn* v. *Miller*, 4 Taunt. 745; *Munro* v. *Butt*, 8 Ell. & Bl. 738; *Zottman* v. *San Francisco*, 81 Am. Dec. 105.

To the point that the extra work having been done without authority from defendant, he is not bound to pay for it, *Dobson* v. *Hudson*, 1 C. B. N. S. 652, is an explicit authority.

Mr. **Daniel G. Harriman,** for respondent:

The questions of fact in this action having been settled in favor of the plaintiff, by the referee, and confirmed by the general term below, upon conflicting evidence, cannot now be reviewed by this court.

Code Civ. Proc. § 1337; *Re Ross*, 87 N. Y. 514.

The principal is in all cases bound for the acts of his agent done within the scope of his authority.

1 Pars. Cont. 40; Whart. Ag. § 454; Evans, Ag. 591; Story, Ag. § 127, note.

"A principal is liable to third parties for whatever the agent does or says; whatever contracts, representations or admissions he makes; whatever negligence he is guilty of, and whatever wrong or fraud he commits; provided that the agent acts within the scope of his apparent authority, and provided that a liability would attach to the principal if he was in the place of the agent.

Ewell's Evans, Ag. p. 142 and cases cited.

"When plaintiff had substantially performed his contract the architect was bound to give him the certificate, and his refusal to give it was unreasonable; and it was held that an unreasonable refusal on the part of an architect in such a case to give the certificate dispenses with its necessity."

Nolan v. *Whitney*, 88 N.Y. 648; *Kingsley* v. *Brooklyn*, 7 Abb. N. C. 28.

The authority of an agent to perform all things usual in the line of business in which he is employed cannot be limited by any private instructions not known to the party dealing with him.

Smith, Mercantile Law, 5 G; Story, Agency, 151, 8th ed.; *Armour* v. *Mich. Cent. R. R. Co.* 65 N. Y. 116; *President etc. Westfield Bank* v. *Cornen*, 37 N.Y. 320; *Pechner* v. *Phœnix Ins. Co.* 65 N. Y. 207; *Walsh* v. *Hartford Fire Ins. Co.* 73 N.Y. 10.

The jury, from the acts and declarations of the owner, may find that he accepted the work done as finished and completed to his satisfaction. The owner may waive any stipulations he had introduced into the contract in his own favor, and if he does so, as by accepting the house, as under a completed contract, and without the certificate of the architect, he cannot complain if the builder is allowed to recover.

Smith v. *Alker*, 2 Cent. Rep. 904, 102 N. Y. 87; *Andrews* v. *Ætna Life Ins. Co.* 92 N. Y. 604; *Smith* v. *Tracy*, 36 N.Y. 82, 88; *Keeler* v. *Salisbury*, 33 N. Y. 648.

"A principal cannot avoid his agent's acts as to part of a transaction, and avail himself of them as to the residue."

Merchants' Bank v. *Meyers Steel & Wire & Iron Co.* 2 N. Y. Week. Dig. 214.

A principal cannot retain and enjoy the benefit of a bargain made by his agent, without adopting the instrumentalities by which he consummated it.

Elwell v. *Chamberlin*, 31 N. Y. 611; *Bennett* v. *Judson*, 21 N. Y. 238; *Meehan* v. *Forrester*, 52 N. Y. 277.

Danforth, *J.*, delivered the opinion of the court:

On the 24th of February, 1882, the defendant, of the first part, and Fickett & Co., of the second part, entered into an agreement by which Fickett & Co. undertook to do certain work upon St. Mary's Hospital, in accordance with drawings and specifications made by one Keeley, an architect, and to finish the same to his satisfaction and under his direction. The plaintiff is not a party to that contract, but it is conceded that he did work and furnished materials necessary for the completion of the building, to the amount of $571.76. Not being paid he sued the defendant, alleging that the work was done and the materials furnished for the defendant and for his benefit.

The defendant answered, denying that he, either himself or by any authorized agent, employed the plaintiff to do the work.

Upon the pleadings, therefore, the only issue was as to the liability of the defendant to pay for work and materials, the benefit of which according to the pleadings he enjoys.

The issue was referred to a referee, and he, after hearing the evidence, at the defendant's request, found: *first*, that the plaintiff did the work under the instructions of P. C. Keeley; *second*, that Keeley was the architect of the hospital. He also found that Keeley acted as agent of the defendant, and further found that the defendant subsequently ratified the action of Keeley, accepted and is now using and enjoying the benefits of the plaintiff's work and materials. He found the value as above stated.

Upon appeal to the general term the judgment entered upon the report of the referee was affirmed; and from the decision then made this appeal is taken.

The learned counsel for the appellant contends in the first place that there was no evidence of authority in Keeley to contract with the plaintiff for the work in suit; second, that the defendant never ratified the appointment by Keeley; and lastly that the judgment is wrong because of the admission by the referee of improper evidence, without which the plaintiff's case was not made out; in other words, that the evidence was insufficient to charge the defendant with liability for the plaintiff's claim. He concedes that if there is any conflict in the evidence in regard to the matters in issue, the findings of the referee and the decision of the general term would be conclusive upon this court, and fatal to his appeal.

The only question then is as to the evidence presented by the parties.

That Keeley was the architect and superintendent of the construction of the building referred to is established beyond question. One of the firm of Fickett & Co. testified that the plaintiff was employed to do all the painting on the hospital that they had agreed to do under the contract, but that the work in question was outside the contract and not included in it.

The plaintiff testified that after completing the work now in question, he presented his bill to the defendant, who looked at it and asked him "What appeared to be the trouble? Was not the work done?" Plaintiff said: "It was," and the defendant said: "You know I know nothing about this work. Mr. Keeley looks after all this work for me, and I cannot pay this bill." Plaintiff said: "Why, Bishop; is not Mr. Keeley your agent?" He said, "He is, and therefore I cannot pay you without his signature to your bill; I will see Mr. Keeley and let you know shortly. Please call again." Plaintiff did so, and defendant examined the bill, and asked who ordered the work to be done? and then said: "This should be left to arbitration." "He asked me to leave the bill with him, and I did so. He objected to no part of the bill." The defendant subsequently told the plaintiff: "Mr. Keeley says he never ordered you to do any work." The defendant then advised plaintiff to see Mr. Keeley again.

The plaintiff further testified that the work was done in pursuance of directions received by him from Mr. Keeley; and further that he told Keeley that the things required were extra; and Keeley told him "They will have to be looked after and taken care of. You make them the same as the rest of the work."

Upon cross examination by the defendant, he not only reiterated the testimony before given as to directions received from Keeley, but being asked as to the authority he understood Mr. Keeley to have, answered, "I understood he had entire authority to do more or less work, or have me do anything he saw fit;" and also, "I considered Mr. Keeley's orders as completely binding on the defendant."

Further, in answer to the counsel for the defendant, he said: "I understood he was defendant's agent for all purposes on that building."

The defendant was examined as a witness and proved that Keeley was the architect of the hospital. He denied that Keeley had any authority to act for him outside of the contract, and that personally he never employed Mr. Mooney to do any work on the hospital.

Keeley, examined for the defendant, substantially contradicted the plaintiff, so far as his memory served him. With regard to the extra work as described by the plaintiff, his testimony tends to corroborate the plaintiff concerning the change of color and requiring the panels of the doors to be made lighter, and the stiles darker.

He also testifies that extra work was done besides what was mentioned in the contract, that some was ordered by Sister Ermiliana, who, by the terms of the contract, was authorized to make additions or require deviations from its provisions. He cannot state positively that he himself did not order some extra work.

In any view of the evidence the work was done, the materials were furnished, and now form part of the structure referred to in the contract. If on the defendant's evidence the work was such as the contractor should have performed, on the plaintiff's evidence it was extra work, ordered by the architect, by him deemed necessary in the construction of the building, to the benefit of which the defendant has succeeded, and there seems to be no legal reason why the plaintiff should not be paid according to his claim. It was for the referee to determine which of the two sets of witnesses he would believe, and what inferences he would draw from the facts stated by them. There is enough on the plaintiff's side to make out a case; and that is sufficient to deprive this court of jurisdiction to weigh the evidence.

We think the facts found by the referee are not conjectural merely, but are supported by evidence, and upon those facts the plaintiff was entitled to judgment. The exceptions to evidence have been examined. They are general and not specific in form, and point to no substantial error.

The judgment should be affirmed.

All concur, except **Rapallo,** *J.*, dissenting, and **Earl,** *J.*, not voting.

OAKVILLE COMPANY, *Appt.*,
v.
DOUBLE-POINTED TACK CO., *Respt.*

1. **In an action to reform a written contract for mistake,** where the trial court has found, as matter of fact, upon sufficient evidence that no mistake existed and the substantial purpose of the action is thereby defeated, the **plaintiff cannot** raise the further question of the construction of the contract **and insist** that **its true meaning is** precisely **what it would have been if** the instrument were **reformed as asked.**
2. That is a **purely legal question** which does not belong to the equitable action and can be determined in an action at law on the contract; the remedy at law is adequate, and **no ground exists for** the **interposition of equity.**

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Special Term in favor of defendant in an action to reform a written contract on the ground of mistake. *Affirmed.*

The Oakville Company was engaged in the manufacture of pins at Oakville, Connecticut. The Double Pointed Tack Company, the defendant, carried on business in the City of New York. Previous to the contract in question, the plaintiff, under orders from the defendant, manufactured certain safety pins, for which the defendant held two letters patent. On or about January 7, 1881, a contract was entered into between the two Companies, which, so far as material to this action, was as follows:

It was agreed upon the part of the Oakville Company, in consideration of the assignment to it of the above patents:

1. That it would manufacture the "Miles Safety Pin," and the "Miles All Wire Safety Pin," "but it shall not be obligatory upon the said Oakville Company to manufacture the 'Miles All Wire Safety Pin,' unless there shall be a demand upon the part of the trade for such a pin, and a reasonable profit can be made from its manufacture;" "2, that the said Oakville Company, will sell *and pay royalty on, as hereinafter stated,* not less than 25,000 gross of one or both kinds of the above named safety pins, each and every year during the life of said patents, except during the year 1881, and during said year this rule shall not be enforced; 3, that the Oakville Company shall render to the Double Pointed Tack Company, on or before the 10th day of each month, a statement in writing of the number of gross of safety pins sold by them during the previous month, to be accompanied by a check or New York draft, for four cents per gross upon the sales of such preceding month, the same being the patent fee for the enjoyment of the exclusive right to manufacture under the Miles patents assigned to them, as hereinbefore mentioned; 4, * * * 5, that if the said Oakville Company does not report and pay royalty to the said Double Pointed Tack Company upon at least 25,000 gross of safety pins each year during the life of said patents, except during the year 1881, or fails to render statements, and make payments as above provided, or does manufacture and sell other safety pins * * * then the said Oakville Company will, upon the written demand of the said The Double Pointed Tack Company, or its legal representatives, assign without consideration back to the said The Double Pointed Tack Company, or its legal representatives, both of said letters patents; * * * and the said The Double Pointed Tack Company shall enjoy from the date of such demand all the exclusive rights and privileges under said patents as it would have enjoyed had the above mentioned assignments to said Oakville Company and this agreement not been made."

Plaintiff brought this action to reform the above agreement, alleging that it was not drawn in accordance with the agreement and understanding of the parties preceding the execution of the instrument; that as the agreement was understood to be and intended to have been drawn, the only effect of a failure to sell not less than 25,000 gross of the said pins each year during the life of said patents, was the privilege of the said defendant to demand and receive a reassignment of the said patents, without consideration, and that it was not the intention or agreement of the parties that the plaintiff should pay royalties on any of said pins, except what it should actually sell.

At the trial in the special term, before a justice without a jury, the court found in favor of defendant, and a judgment was entered accordingly. On appeal to the general term where the judgment was affirmed, the court, per BRADY, *J.*, stated the evidence bearing upon the construction of the contract as follows:

"The evidence shows that after much negotiation an agreement was prepared and executed by the parties through their respective officers, Mr. J. H. Bronson, the secretary of the plaintiff, acting for it, and Mr. Putnam, the treasurer of the defendant, acting in its behalf. The provision in the contract which related to the sale of safety pins, and which the defendant sought to reform, was to the effect that the Oakville Company was to sell and pay a royalty on not less than 25,000 gross of one or both kinds of safety pins named in the contract each and every year during the life of the patents relating to such pins, and which were assigned to the Oakville Company, except during the year 1881, during which the rule should not be enforced, the plaintiff insisting that it was neither the agreement nor intention of the parties that it should pay royalty on any pins except what it should actually sell. The difference between the two contracts thus suggested, the one executed and the one to be substituted for it, is apparent and important, because in the contract as executed the obligation is to pay a royalty upon not less than 25,000 gross, while in the other the royalty is to be paid on the pins actually sold.

"The testimony discloses some very extraordinary features. It appears that Mr. Bronson, who acted on behalf of the plaintiff, after interviews and correspondence relating to the subject, copied the agreement which was ultimately declared satisfactory to the defendant, and by Mr. Putnam handed to him for examination, who for this purpose retained it several days. According to the statement of Mr. Bronson, upon his examination in chief, there was no intention or design at any time to contract for the payment of a royalty, except upon pins actually sold, notwithstanding the agreement expressly provides to the contrary, and notwithstanding he admits having copied the agreement signed and must be charged, therefore, with having knowledge of its contents. His cross examination reveals the fact that his positive asservations detailed were not entirely reliable, for the reason that it satisfactorily appears that he saw interlined in the draft contract which was ultimately adopted the words imposing the payment of the royalty upon not less than 25,000 gross of pins. The evidence conclusively shows that the words were interlined when the paper was given to him, and he admitted upon his cross examination that the agreement ultimately adopted, which he sent with a letter to Mr. Putnam, contained the clause that the Oakville Company would sell and pay royalty on not less than 25,000 gross for one or both kinds of safety pins, as already stated; so that it appears from his testimony that while he denies any intention to make any agreement other than that the Company should pay a royalty upon the number of pins actually sold, he admits that he copied the paper containing the interlineation in favor of the defendant, and after having had the paper in his possession for several days, and also that he executed the agreement after having it in his possession for several days prior to its execution. And it may be added that the evidence does not show any objection by him at any time to the clause in question."

Further facts appear from the opinion.

Messrs. **James S. Stearns** and **William E. Curtis,** for appellant:

The proper construction of this contract is that plaintiff only agreed to pay a royalty to the defendant for the pins actually sold by it, and that the only right which plaintiff's failure to sell the 25,000 gross per year confers upon the defendant is the right to terminate the license.

The second article provides that the plaintiff "will sell and pay royalty upon, as hereinafter stated," not less than 25,000 gross, etc. The only provisions for payments thereinafter stated are as follows: the third article provides that the plaintiff shall render each month a true statement in writing of the number of gross sold by it during the previous month, and that this statement shall be accompanied by a check or draft for the royalty "upon the sales of such preceding month." As there is no provision made after the second article or anywhere else, for payment of any royalty except upon actual sales, this contract must be construed to mean that the payment of royalty on actual sales is all that is required.

In other words, if defendant's claim is correct, then the contract stultifies itself. It requires a payment, as thereinafter mentioned, without thereinafter making mention of any such payment. The only reasonable interpretation to put upon this clause is that the payment is to be made upon actual sales, and those are expressly provided for.

The amounts specified in the contract are not intended as a measure of the royalties to be paid.

It has been claimed that if the real agreement was that plaintiff should sell 25,000 gross per year this would amount to the same thing as an agreement to pay a royalty on 25,000 gross per year. In reading the contract, there is a marked distinction between the two. The one would be a positive contract to pay money; but the other would be only a covenant, the breach of which involves very different questions. In this case if there is such a covenant, its breach can carry no greater result than the forfeiture of the license.

If there is any doubt that plaintiff's interpretation of the contract is correct, then the whole contract, and all the circumstances attending the making of it, must be taken into consideration, and everything which may throw any light upon what was the intention of the parties, when the contract was made, can be brought in to explain its true meaning; and the actual intention of the parties will control.

Knapp v. *Warner*, 57 N. Y. 668; *Clark* v. *N. Y. Life Ins. etc. Co.* 64 N. Y. 38; *Parshall* v. *Eggert*, 54 N. Y. 18.

No other construction than that claimed by plaintiff ever entered into the minds of either party until long after the execution of the contract.

The rule for the construction and interpretation of this contract is clearly laid down in this State as follows:

"The rule in ethics is that 'when the terms of a promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time the promisee received it,' and this is the established rule at law as well as in morals. In the language of the books, it is to be interpreted in the sense in which the promisor had reason to suppose it was understood by the promisee."

White v. *Hoyt*, 73 N. Y. 511 and cases cited.

Even if the construction claimed by plaintiff were not sufficiently established, yet the right would still remain to have the contract reformed, on the ground of mistake in reducing the agreement to writing, and the court has ample power to do so, in such a manner that it correctly express the actual agreement entered into between the parties.

Pitcher v. *Hennessey*, 48 N. Y. 423; *Albany City Savings Inst.* v. *Burdick*, 87 N. Y. 46; *Oliver* v. *Mut. Com. Marine Ins. Co.* 2 Curtis, C. C. 277; *Hunt* v. *Rousmaniere*, 1 Pet. 1 (26 U. S. bk. 7, L. ed. 27); *Cuff* v. *Dorland*, 55 Barb. 481; 1 Story, Eq. Jur. § 156.

Mr. **U. W. Tomkins,** for respondent:

Equity will not reform a contract unless the mistake is mutual.

Story v. *Conger*, 36 N. Y. 673; *Nevius* v. *Dunlap*, 33 N. Y. 676; *Jackson* v. *Andrews*, 59 N. Y. 244; *Albany City Savings Inst.* v. *Burdick*, 87 N. Y. 40; *Paine* v. *Upton*, 87 N. Y. 327.

Willard's Equity Jurisprudence, Potter's ed. 64, lays down the following rules as applicable in cases of this kind, where fraud is not alleged: 1, there must be a plain mistake which must be clearly proved; 2, it must have been a mutual mistake; 3, it must have been a mistake of fact; 4, it should be made clearly to appear what the real contract was.

Finch, *J.*, delivered the opinion of the court:

The complaint in this action alleges a mistake in the written contract between the parties, and seeks its reformation so as to correctly express their agreed purpose and intention. The trial court has found as matter of fact that no mistake existed, and upon evidence quite sufficient to support the finding. That of course defeats the action so far as its substantial purpose is concerned.

But the plaintiff seeks to raise a further question over the construction of the contract as originally drawn, and insists that its true meaning is precisely what it would have been if the instrument had been reformed in accordance with the prayer of the complaint. That is a purely legal question, which does not belong to the equitable action before us. It will arise, if at all, when one party sues the other for royalties claimed to be due, and may then be determined properly and correctly and with an effective result. The remedy at law is obvious and adequate, and no ground exists for the interposition of equity.

The exceptions taken to the exclusion of evidence as to what is customary in making similar contracts, and to that of the existing agreement between the defendant and the original patentee, need not be discussed. The ruling of the court in each instance involved no error.

The judgment should be affirmed, with costs.
All concur.

Christian TOBIAS *et al.*, *Respts.*,
v.
Lazarus LISSBERGER, *Appt.*

1. In an action to recover the price of iron rails sold under a contract made in New York, dated February 2, 1881, providing for "**prompt shipment** by sail from Europe, **and for delivery** on dock at the Port of New York," dangers of the sea excepted, precedent to payment, it appeared that the rails were, on February 3, placed **on board a ship at** Stettin, **a** river **port** in Germany, which port was then **closed by ice** and was not open for navigation until April 2 or 3, on which last day the ship sailed for New York, where it arrived after a voyage of the ordinary length, and the rails were tendered to the buyer on June 14, but he then refused to accept or pay for them. *Held*, that the **buyer** was **entitled to such timely delivery as would follow an effective shipment;** that shipment cannot be said to have been made from Europe when the port selected had no passage way or outlet: that the tender was too late, and that the buyer was not bound to receive the rails.
2. *Held further*, that the **buyer** was **not estopped from refusing to accept** the rails when tendered, by the fact that he had been notified by the sellers on March 1, that the rails had been "shipped from Stettin;" on March 19, that the bill of lading was dated February 3, but that they "had no date of the vessel's sailing;" and on May 4, that it was reported that the vessel sailed on April 6;—and had made no objection until the tender of the rails on June 14.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Circuit on a verdict directed for plaintiffs in an action to recover damages for the breach of a contract to purchase iron rails. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **William H. Page, Jr.,** with *Messrs.* **Edward Lauterbach** and **William N. Cohen,** for appellant:

A fair interpretation of the contract requiring "prompt shipment from Europe," imports that the goods should be gotten promptly without the port of shipment, and that they should become extra-European before the obligation of promptness could be dispensed with.

The force of the word "from" as explained by the authorities negatives the idea that "shipment from" means no more than "shipment at" or "shipment in."

Snyder v. *Atlantic Mut. Ins. Co.* 95 N. Y. 196; *De Longuemere* v. *N. Y. Fire Ins. Co.* 10 Johns. 125; *Mey* v. *South Carolina Ins. Co.* 3 Brev. 329; *Bonney* v. *Morrill*, 52 Maine, 252, 256; *U. S.* v. *La Coste*, 2 Mason, 130, 137.

The form of the obligation "prompt" covered the movement of the goods until the dangers of the sea could attach; and this point is reached only when a vessel has left her moorings with intention of sailing.

Pittegrew v. *Pringle*, 3 Barn. & Adol. 514; *Snyder* v. *Atlantic Mut. Ins. Co.* 95 N. Y. 196.

When construction is resorted to, the position of the defendant is further strengthened.

Delaware etc. R. R. Co. v. *Bowns*, 58 N. Y. 573, 581; *Lowber* v. *Bangs*, 2 Wall. 728, 737 (69 U. S. bk. 17, L. ed. 768, 769).

The legal rules on this subject direct that attention should be paid to the manner in which such business is usually conducted, and to the known contingencies attendant upon operations of this character.

Delaware etc. R. R. Co. v. *Bowns*, 58 N. Y. 573.

The rule that a comprehensive application should be given to the effect of the word "prompt" is recognized by the highest authorities.

Lowber v. *Bangs, supra.*

The construction, if doubtful, should be against the plaintiff.

White v. *Hoyt*, 73 N. Y. 511.

The word prompt, when applied to the celerity with which a party shall perform, does not mean that he shall have two months within which to act.

The failure to perform a condition precedent is a bar to recovery.

Pope v. *Porter*, 3 Cent. Rep. 451, 102 N. Y. 366; *Hill* v. *Blake*, 97 N. Y. 216; *Norrington* v. *Wright* and *Filley* v. *Pope*, 115 U. S. 188, 213 (Bk. 29, L. ed. 366, 372); *Bowes* v. *Shand*, L. R. 2 App. Cas. 455.

The following decisions are directly in point: *Hill* v. *Blake*, *Bowes* v. *Shand* and *Norrington* v. *Wright*, *supra.*

Conceding the plaintiffs' construction of the word "prompt," even then, the delay in the ship's departure was foreseeable, avoidable and unreasonable, so that there was a breach by the plaintiff of an implied condition precedent.

The delay was foreseeable, for the plaintiff's case admits that a delay of four weeks was certain, a delay of six weeks probable, a delay of nearly two months possible; that by using any of numerous ports in Germany, England or France, which were sure to have rails and to be open all winter, the goods could have started at once.

It is a question of law for this court to decide on the facts whether or not this delay was unreasonable.

Hedges v. *Hudson River R. R. Co.* 49 N. Y. 223, 225; *Roth* v. *Buffalo etc. R. R. Co.* 34 N. Y. 548, 553.

A strict rule should be applied as to time, according to the principle of *Hill* v. *Blake*, 97 N. Y. 216; *Bowes* v. *Shand*, L. R. 2 App. Cas. 455; *Norrington* v. *Wright*, 115 U. S. 188, 203 (Bk. 29, L. ed. 366, 368).

"In the contract of merchants, time is of the essence."

Norrington v. *Wright*, *supra.*

The defendant had waived no right to repudiate the goods when they were tendered.

The contract had no longer any existence on May 4, when the alleged act of waiver occurred, and the defendant was entitled to consider that no negotiation had ever been entered into.

Pope v. *Porter*, 3 Cent. Rep. 451, 102 N. Y. 366; *Hill* v. *Blake*, 97 N. Y. 216.

Mere silence constitutes no waiver.

Hill v. *Blake*, 97 N. Y. 216, 222; *Ripley* v. *Ætna Ins. Co.* 30 N. Y. 136.

To establish a waiver the plaintiff had the burden of proof to show that the defendant knew all the material circumstances connected with the shipment of the goods.

Peoples Bank v. *Mitchell*, 73 N. Y. 406, 413.

The law is that unless the act be express, this doctrine must rest upon the ground of equitable estoppel.

Ripley v. *Ætna Ins. Co.* and *Hill* v. *Blake*, *supra.*

The severity of the winter, which caused an unusual continuance of the icelocked condition of the Port of Stettin, and prevented the ship and goods from leaving, is no defense to the plaintiffs' failure to perform.

The circumstance which prevented the ship's departure was not an act of God or an inevitable accident.

Kemp v. *Knickerbocker Ice Co.* 69 N. Y. 45; *Booth* v. *Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487; *Delaware etc. R. R. Co.* v. *Bowns*, 58 N. Y. 573; *Read* v. *Spaulding*, 30 N. Y. 630; *Elliott* v. *Rossell*, 10 Johns. 1; *Nugent* v. *Smith*, L. R. 1 C. P. Div. 19.

The facts show that the plaintiffs had an alternative in fulfilling their contract. They could select a ship in any of the numerous ports, certain to be open, and sure to afford an opportunity of buying goods like the rails contracted for.

The plaintiffs having by express stipulation engaged to act promptly would be bound, even were the occurrence in question conceded to be an act of God.

Wheeler v. *Conn. Mut. Life Ins. Co.* 82 N. Y. 543, 551; *Dexter* v. *Norton*, 47 N. Y. 62; *Tompkins* v. *Dudley*, 25 N. Y. 275; *Harmony* v. *Bingham*, 12 N. Y. 99.

The dangers of the seas provided for in the contract do not protect the plaintiffs against the consequences of the event in question, since they can only attach when a ship has weighed anchor with intention of sailing.

Pittegrew v. *Pringle*, 3 Barn. & Adol. 514; *Snyder* v. *Atlantic Mut. Ins. Co.* 95 N. Y. 196.

The evidence of custom should have been admitted.

Evidence of a trade custom is legally admissible, in view of the facts and circumstances of the present case.

N. Y. Cent. etc. R. R. Co. v. *Standard Oil Co.* 87 N. Y. 486, 492; *Fuller* v. *Robinson*, 86 N. Y. 306, 309; *Johnson* v. *De Peyster*, 50 N. Y. 666; *Walls* v. *Bailey*, 49 N. Y. 464; *Dana* v. *Fiedler*, 12 N. Y. 40; *Vail* v. *Rice*, 5 N. Y. 155, 158; *Hinton* v. *Locke*, 5 Hill, 437; *Livingston* v. *Ten Broeck*, 16 Johns. 14; *Pope* v. *Porter*, 3 Cent. Rep. 451, 102 N. Y. 366, 369.

Mr. **Joseph A. Shoudy**, for respondents:

The terms of the contract requiring "prompt shipment by sail from Europe" were strictly and fully complied with. The rails were placed on board the vessel on the day the contract was made, and the bill of lading was given the day following. That this action was prompt will not be denied. That that which was then done amounted to shipment of the rails is equally clear.

Shipment is complete from the moment the goods are placed in the control of the carrier, and the bill of lading given, although the place of delivery may be somewhat distant from the ship.

The Idaho, 11 Blatchf. 222; *S. C.* 93 U. S. 581 (Bk. 23, L. ed. 980); Foard, Shipping, 506, and cases cited; *Pollard* v. *Vinton*, 105 U. S. 7 (Bk. 26, L. ed. 998); Parsons, Mar. Law, 132, note 1.

The fact that the vessel was ice bound, and for that reason unable to sail promptly after its cargo was laden, does not affect the liability of the defendant. The contract, as we have seen, required only prompt shipment. There was no stipulation for prompt sailing. That would have been an entirely different contract. The plaintiffs having fulfilled the conditions of the contract by the shipment of the rails, if any delay thereafter occurred to the prejudice of the defendant, he must look to the ship for his indemnity. The delay in sailing was not occasioned by any fault of the vessel on which the shipment was made. It arose from an act of God which did not render ineffectual the performance of the terms of the contract by the plaintiffs. The duty which was imposed upon the vessel by receipt of the rails, to transport them with reasonable dispatch, was excused by this unforeseen difficulty.

Harmony v. *Bingham*, 12 N.Y. 100, and cases cited at p. 108; *Worth* v. *Edmonds*, 52 Barb. 40; 14 Wend. 215; 9 Wall. 455 (76 U. S. bk. 19, L. ed. 779).

The court properly excluded defendant's offers of evidence to prove the existence of a custom excepting Baltic Ports under contracts for shipments from Europe.

Evidence of commercial usage in contradiction of the letter of the contract is inadmissible.

Simmons v. *Law*, 8 Bosw. 213; *S. C.* 3 Keyes, 219; *Wadsworth* v. *Alcott*, 6 N. Y. 72; *Westcott* v. *Thompson*, 18 N. Y. 367.

The defendant's offer was to show that when parties contracted for shipments from Europe, they did not mean what they in language clearly expressed. Such evidence is never permitted. Usage of the parties cannot be proved to contravene the express stipulation of a contract.

Bradley v. *Wheeler*, 44 N.Y. 495, 504; *Colgate* v. *Pa. Co.* 18 N. Y. Week. Dig. 383.

If appellant desired to take the position that the delay in sailing had released him from the contract, it was his duty to have done so immediately on being informed of the date of sailing.

Martin v. *Great Northern R. Co.* 16 C. B. 179; *McNeven* v. *Livingston*, 17 Johns. 437; *Richardson* v. *Dunn*, 2 Q. B. N. S. 218.

No principal is better settled than that when one, by his words or conduct, has misled another, he is estopped from so changing his position as to prejudice or injure the party so misled. Nor is it necessary that he should have intended to mislead.

Continental Nat. Bank v. *Nat. Bank of the Commonwealth*, 50 N. Y. 575, 582; *Blair* v. *Wait*, 69 N. Y. 113, 116.

Nor is it necessary that the party should have been moved to act affirmatively, in order to claim an estoppel. His claim may arise from having refrained from action.

Continental Nat. Bank v. *Nat. Bank of the Commonweath*, 50 N. Y. 585-6.

Danforth, *J.*, delivered the opinion of the court:

This action is for not accepting certain goods according to a contract made through brokers in these words:

"New York, Feb. 2, 1881.
Sold to Mr. L. Lissberger, New York.
For account Messrs. C. Tobias & Co.
New York.

About one hundred (100) tons old Iron Vignol Rails, for prompt shipment by sail from Europe, and for delivery on dock at the Port of New York (dangers of the sea excepted), at twenty-eight (28) dollars per ton of 2,240 lbs. weight, as per United States Weighmaster's return. Terms of settlement as follows: eighty (80) per cent cash payable when rails are landed on dock, and balance payable on receipt of U. S. Weigher's certificate.

Mann & Jones, Brokers.
Accepted, L. Lissberger."

The complaint, after setting out the agreement, alleges "that the plaintiffs promptly shipped by sail from Europe a lot of about 100 tons of such rails and duly performed all the conditions of the contract on their part, and on the 14th of June, 1881, were ready and willing to deliver, and duly tendered" the rails to the defendant, who refused to acccept or pay for them; that upon notice to defendant they sold the rails on his account, and after applying the proceeds there remained due $345.15, for which, with interest from June 14, 1881, they ask judgment.

The defendant by answer expressly admits the contract, and that on the 14th of June the plaintiffs were willing to deliver, and then tendered to him the rails mentioned in the complaint, and a refusal on his part to accept, and that the plaintiffs after notice sold the same; he denies, however, the other allegations in the complaint, and particularly denies that the goods were promptly shipped from Europe, and says that on the contrary there was a delay of two months, or thereabouts, in such shipment, in consequence of which the goods were of less value in the market than they would have been if promptly shipped; that in this omission the plaintiffs failed to perform the contract on their part, and he therefore refused to accept the rails.

Upon the trial of these issues the plaintiffs read the deposition of the captain of the ship "Brumm," to the effect that his vessel, then lying at Stettin, in Germany, was chartered on the first of January, 1881, for different kinds of goods for New York (Stettin was about forty miles from the sea, situated upon a river); that on the 3d of February, 1881, he received on board from the shippers, Ignatz Rosenthals, Wie & Co., 535 pieces of old rails, deliverable in New York on payment of freight. The bill of lading, then given by him and dated February 3, 1881, was produced by the plaintiffs, is to the same effect, and purports to be indorsed in blank, "Ignatz Rosenthals, Wie & Co."

It also appeared from the captain's testimony that when these rails were shipped the river was frozen fast, the ice being two or three feet thick. It was then expected the ice would break up in March. But the river, which had become closed to navigation about the 20th of January, remained so until the second or third of April, on which last named day the vessel sailed, and after a voyage of the ordinary length arrived in New York.

Usually the ice had broken up at Stettin late in February or early in March, but the winter of 1881 was of extraordinary severity. It was shown in evidence that rails of the kind described in the contract could have been obtained at any time in other European ports, where detention by ice was unknown, ports even in Germany as well as in France and England, and among others London and Liverpool. They seem to have been common in the markets and to be procured easily.

It is stated by the respondents that the only question litigated at the trial was whether the goods were promptly shipped, according to the terms of the contract, and the record sustains that view. The trial judge, against the exception of the defendant, directed a verdict for the plaintiffs. Upon denying a new trial he was of opinion that prompt shipment, under the words of the contract, was within the shipment proven, saying also that "If the defendant wished to provide against a distant port in Europe or any other delaying cause, it was in his power to make it part of the contract;" and failing to do this, he says: "I think the point he makes cannot be sustained." But, he added: "I do not put the decision of the case on the grounds above stated, but upon the ground that after the contract, *after notice of shipment*, the defendant waited until after the arrival here before making the objection now made."

The general term discusses only the ground first stated by the trial judge, and by a divided court sustained his decision.

The minds of the parties met when the sold note was communicated to and accepted by the defendant. It is the only evidence of the contract, and upon its proper construction the rights of the plaintiffs depend. Their action is upon the theory that the contract imposed upon them the obligations of bringing the goods to New York and there having them ready for delivery. They were, therefore, to furnish the rails, either by selection from their own stock, or by purchase or other means; but however obtained, the rails were to be got from Europe by sailing vessel, at the expense and at the risk of the vendors. They were to ship the rails in such vessel as they chose, upon such terms as they and the master could agree upon; they were to land them on the docks in New York, and at that moment only did any duty attach to the defendant, who was then to pay a certain proportion of the price. The vendors were to procure the weighmaster's return, and on its receipt the balance became due.

The plaintiffs then have sold a quantity of iron, and the question arises as to how the condition shall be performed, which will enable them to make delivery and entitle them to demand payment from the vendee. No time is specified, and if there was nothing else in the contract it would undoubtedly be the duty of the vendors to make delivery of the thing sold within a reasonable time, and to determine whether the plaintiffs had been able to do so, the facts and circumstances attending the transaction would have to be considered. But although the contract specifies neither month nor day, nor duration of time, within which or on which they must perform, it does specify the manner of doing the act which makes performance possible.

The contract provides for "prompt shipment," and it is this condition on which all other stipulations hang. So the plaintiffs understood it, and, as we have seen, they alleged as a condition precedent to the right of action that they "promptly shipped" the iron. This implies expedition, admits of less delay than would be permitted under a covenant to act merely within a reasonable time, and in effect the plaintiffs interpret it as meaning "directly" or "at once."

Such, indeed, was their conduct. The contract was made in New York on the 2d of February, 1881, and the plaintiffs rely upon a bill of lading showing that on the very next day, at Stettin, iron rails answering in description to those named in the contract, were put on board a vessel chartered for New York. Therefore, the respondents' contention is that the whole condition is satisfied, and "If any delay thereafter occurred to the prejudice of the defendant, he must look to the ship for his indemnity."

The last position fails when we see that no privity existed between the defendant and the vessel or its master, and that his only contract relation was with the plaintiffs. The sole object of prompt shipment was to secure a speedy arrival for delivery in New York. Until then the goods were at plaintiffs' risk; and only then could the defendant's liability attach. Before that event happened there was to be neither transfer of title nor transfer of possession. It is quite unimportant to inquire how it might be as between the master of the vessel and the plaintiffs or the shipper, one of whom may be assumed to be the owner, and the other, by virtue at least of the bill of lading, entitled to possession.

As to the plaintiffs in the case before us it is more reasonable to construe the condition of prompt shipment as a precedent to delivery, and so relating to the actual commencement of the voyage that the known unnavigable condition of the river could furnish no excuse for the delay. The defendant was entitled to such timely delivery as would follow an effective shipment; in other words, to an exact performance by the plaintiffs of their contract to ship and deliver, not two things separable in their nature, but two steps to a single end. That involves not only a purpose to transport, but an expectation that transportation would commence, if not at once, certainly within a reasonable time. Shipment cannot be said to have been made from Europe, when the port selected had no passage way or outlet. Nor can it be fairly argued even that the iron was shipped "for delivery in New York," if it was apparent to the shipper that the vessel could not leave the docks where it took in freight. Something more than shipment was bargained for, viz.: prompt shipment; and the delivery was to be within such time as, dangers of the sea only excepted, might reasonably follow. Nothing less could have been in the minds of the parties than expedition, or immediate and effective, or beneficial shipment as a step towards delivery. Payment was postponed to delivery, both to be made in New York. The sale was for shipment from Europe, altogether at the vendors' expense and risk, and no exception was provided for save "dangers of the sea," among which a certain and safe confinement in port is not included.

In *Duncan* v. *Topham*, 8 Man. G. & S. 225, the order was for certain goods to be put on board directly. The complaint alleged an order for goods to be delivered within a reasonable time, and the plaintiff failed in his action because the proof did not support the declaration, it being held that "a reasonable time" was a more protracted delay than "directly."

The contract here goes further. "Prompt" is synonymous with "quick," "sudden," "precipitate." Indeed, one who is ready, is said to be prepared at the moment; one who is prompt, is said to be prepared beforehand. Such represents the condition of the plaintiffs. Their immediate loading of the vessel shows that they were prepared beforehand; but if their construction of the contract is correct, the qualifying word might as well be one of postponement and delay. The fault was with the plaintiffs. It was optional with them to ship from any port in Europe. If at the time of shipment the plaintiffs, or their agents, knew or might have known that detention and delay at the place of shipment (and before ground could be broken for the voyage) were unavoidable and to be expected, they must also have known that the delivery could not be made as contracted for, and the subsequent tender was too late. It was not a "prompt shipment," and the defendant was not bound to receive the cargo.

It is now contended, however, by the plaintiffs that the appellant is estopped from denying that the rails were shipped in accordance with the terms of the contract. This might, under some circumstances, furnish a question for the jury. It cannot be said as matter of law that those now relied on have that effect. It appears that the usual length of a voyage from Stettin to New York is forty-nine days. On the first of March the defendant was notified by the plaintiffs that the 100 tons of rails sold to him "are shipped * * * from Stettin;" but the date of sailing was not given, and in answer to defendant's inquiry concerning it, the plaintiffs replied that they were not informed. On the 19th of March they told him the bill of lading was dated February 3, but that they had "no date of the vessel's sailing." On the 4th of May they wrote "according to New York Maritime Register, the Ger. Bk. 'Ferdinand Brumm,' with 100 tons rails sold to you, sailed from Stettin April 6, for New York." The vessel arrived at New York, and on the 14th of June, when tendered by the plaintiffs, the defendant, in writing, refused to receive them, saying the rails were not shipped according to contract.

We find nothing in these letters which would authorize a court to say that the defendant had waived performance by the plaintiffs. There is no evidence that he knew the circumstances attending or causing the delay; none that he was informed that the vessel when loaded was ice bound, nor of its detention from that cause. Moreover, the sole act relied upon in the complaint as a breach of the contract on defendant's part, a refusal to accept the rails tendered, took place, as is there alleged, and is admitted in the answer, on the 14th of June. Then the plaintiffs say they were ready and willing to deliver, and duly tendered the goods, and the defendant refused to receive them. If I am right in my view of the contract, he was under no obligation to do so.

I have not overlooked the argument of the plaintiffs by which our attention is directed to the difference between "shipment" and "sailing," nor failed to examine the definitions and decisions upon which the argument is founded. The context of the cases cited, however, prevent the application of the decisions to the one before us, and while the terms are no doubt well defined, there is no definition nor adjudged case which implies that an agreement to deliver goods after prompt shipment, is satisfied by merely placing them on board a vessel, which, although it should weigh anchor, or cast off moorings, and make other preparations to depart, could not for a considerable period of time—in this case exceeding the customary length of the intended voyage—leave the spot where the cargo was received. Such a shipment would be colorable and deceptive. If it answered the letter of the contract, it defeated its purpose. It would not in fact be the inception of the voyage, and the burden of showing a *bona fide* shipment would not be sustained. In all the cases referred to by the respondents the obligation to ship at or within a certain period was held to be unperformed, unless the ship might also sail at or within the time stated. Nothing less would be beneficial to the purchaser. The evident object of expressing the time of shipment, as declared in those cases, was to provide that the article purchased should come forward at such time as would, in the opinion of the purchaser, make the venture profitable, or as to time of arrival or payment suit his convenience. *Bowes* v. *Shand*, L. R. 2 App. Cas. 455; *Alexander* v. *Vanderzee*, L. R. 7 C. P. 530.

Another class of cases, also cited by the respondents, shows that when goods are sold and are to be delivered on board of vessels, either provided by the purchaser or by his appointment, putting on board is a good shipment, whether the vessel is in condition or is expected to sail, or not. *Fisher* v. *Minot*, 10 Gray, 260; *Newhall* v. *Vargas*, 13 Maine, 105.

The principle on which these cases were decided is not involved here; and the others do not lessen the strength of the appellant's case.

The time and manner and place of shipment might indeed have been accepted by the defendant as in compliance with the contract; and whether it was or not, and whether with full knowledge of the facts there was on his part a waiver of the strict performance of the condition on the plaintiffs' part, were questions for the jury. The trial court therefore erred in directing a verdict for the plaintiffs.

It follows that the judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur, except **Ruger,** *Ch. J.*, dissenting.

J. D. Kurtz CROOK, *Respt.*,

v

Leopold RINDSKOPF *et al.*, *Appts.*

1. In an **action by a judgment creditor to set aside** an **assignment** made by his debtor for fraud, the **burden** is **upon** the **plaintiff** to show by affirmative evidence that the enforcement of the provisions of the assignment will necessarily work a fraud upon the assignor's creditors, or one of them.
2. It is lawful for an insolvent member of a firm to **devote** his **individual property to** the payment of **firm debts,** or a debt owing by him to his partner, to the exclusion of his individual creditors.
3. An **assignment,** like other instruments, is to be fairly construed, and such **construction** given to it as is **consistent with innocence**, in preference to such as would impute a fraudulent intent to the assignor.
4. **Doubtful** and ambiguous **phrases** admitting of different meanings, are to be **construed,** if they can be, so as to authorize a lawful disposition of the property only, although there may be general language in the instrument susceptible of a different construction.
5. The law requires, in the event of an **assignment by a firm of two persons,** that after the payment of the firm debts, the residue shall be divided into **two funds for** the **payment of individual creditors,** unless otherwise provided in the assignment; and where such assignment does not expressly recognize the possible existence of the two funds, the law will supply the omission and order a distribution of the fund, according to the legal rights of the claimants upon it.
6. Upon the satisfaction of the debts of the firm it would be the legal **duty of** the **assignee,** even in the absence of any express provision requiring it, **to determine** the **interest of** the **individual partners in** the **surplus** and devote each share to the interest of its respective owner in accordance with his legal rights.
7. In an action by a judgment creditor of a firm to set aside as fraudulent an **assignment** made **by** the **firm** of all its property, *held*, that, as the provision of the assignment complained of could not in any event have been intended to defraud the **creditors** of the firm, **until** they are **aggrieved** they **have no cause of action.**

(Decided April 26, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, reversing a judgment of the Circuit in favor of defendants in an action to set aside an assignment for the benefit of creditors. *Reversed.*

Reported below, 34 Hun, 457.

The facts and questions raised appear from the opinion.

Mr. **Adolph L. Sanger,** for appellants:

The provision in the assignment providing for distribution among the creditors of the individual partners, after the payment of all the partnership creditors, is to plaintiff's advantage, not his injury. He has, therefore, no standing in court.

Fox v. *Heath,* 16 Abb. Pr. 168; *Scott* v. *Guthrie,* 10 Bosw. 408; *S. C.* 25 How. Pr. 481.

In *Bogert* v. *Haight,* 9 Paige, 297, where the assignment contained a provision for the payment of copartnership debts, and directing the surplus to be paid over to the assignors (there being individual creditors), it was declared that such an assignment was not necessarily fraudulent as to individual creditors; and it was further held that such an assignment was valid as against those who were benefited by it, to wit: the partnership creditors.

See also *Cox* v. *Platt,* 32 Barb. 127, 130; *Morrison* v. *Atwell,* 9 Bosw. 503; *Powers* v. *Graydon,* 10 Bosw. 630, 645-652; *Richardson* v. *Herron,* 39 Hun, 540; *Richardson* v. *Thurber,* 6 Cent. Rep. 799; *Royer Wheel Co.* v. *Fielding,* 2 Cent. Rep. 511, 101 N. Y. 510.

The fact that there is a provision in an assignment executed by partners for the payment of the private and individual debts of the assignors out of the residue remaining after the payment of all the partnership debts, furnishes no evidence of an intention to hinder, delay or defraud creditors; and the legal intendments are all in favor of the validity of assignments in trust for the benefit of creditors, the same as in respect to other instruments.

Turner v. *Jaycox,* 40 Barb. 164; *S. C.* affirmed in 40 N. Y. 470.

Such a provision is not illegal. Even if it appeared in the assignment that each assignor was individually insolvent, and that the property assigned by each was unequal in value, and the debts of each unequal in proportion, still the presumption is that the assignee would do his duty, and not pay the private debts of one partner with the property of the other, in the absence of any express provision to that effect in the assignment.

Eyre v. *Beebe,* 28 How. Pr. 333, 340; *Friend* v. *Michaelis,* 15 Abb. N. C. 366.

O'Neil v. *Salmon,* 25 How. Pr. 246, has no authority to support it and must be deemed reversed by the other authorities which are in direct conflict with its doctrine and which support defendants' contention in the present case.

See *Cox* v. *Platt,* 32 Barb. 127, 130; *Bogert* v. *Haight,* 9 Paige, 297; *Morrison* v. *Atwell,* 9 Bosw. 503; *Turner* v. *Jaycox,* 40 Barb. 164; affirmed in 40 N.Y. 470; *Fox* v. *Heath,* 16 Abb. Pr. 168; *Scott* v. *Guthrie,* 10 Bosw. 408; *Richardson* v. *Herron,* 39 Hun, 540; *Royer Wheel Co.* v. *Fielding,* 2 Cent. Rep. 511, 101 N. Y. 510.

Smith v. *Howard,* 20 How. Pr. 121, rests upon certain *dicta* of *Judge* Bronson in the cases of *Goodrich* v. *Downs,* 6 Hill, 438; *Barney* v. *Griffin,* 2 N. Y. 365, and *Leitch* v. *Hollister,* 4 N. Y. 211, all of which have been either unfavorably criticised or overruled in *Curtis* v. *Leavitt,* 15 N. Y. 114, *et seq.*

And in *Wilson* v. *Robertson,* 21 N. Y. 587, partnership property was appropriated to pay the preferred individual debt of one partner, for which neither the firm nor his copartner was liable,—a reservation for the benefit of such partner or his creditors to the direct injury of the firm creditors, the joint fund being inadequate to satisfy the firm creditors.

Mr. **Edward T. Bartlett,** for respondent:

The inequality of the individual debts of each partner and of his individual assigned estate is fully established. The provision in the assignment in question renders the general assignment void.

O'Neil v. *Salmon,* 25 How. Pr. 246, 249.

A creditor provided for in a prior clause of an assignment may avoid it by reason of a provision authorizing the debtor's property to be applied in part to the debts of another person, for which neither the debtor nor his property was bound.

Smith v. *Howard,* 20 How. Pr. 121.

The right of plaintiff, in case at bar, to attack the assignment is recognized in the reasoning of *Judge* Gardiner in *Leitch* v. *Hollister,* 4 N. Y. 215.

A fictitious debt avoids a general assignment. *Talcott* v. *Hess,* 31 Hun, 282.

The fact, if proved, that after the payment of partnership debts as directed by the assignment there will remain no assets to be paid to or credited to the assignors is no defense to this action.

O'Neil v. *Salmon* and *Smith* v. *Howard, supra; Goodrich* v. *Downs,* 6 Hill, 438; *Barney* v. *Griffin,* 2 N. Y. 365; *Collomb* v. *Caldwell,* 16 N. Y. 485-6.

An assignment by an insolvent is void for actual fraud, if, while he provides for only a part of his creditors, he makes the attempt in the instrument to reserve any portion of the fund to himself.

The clause of the assignment criticised in the case at bar works just that result by devoting a part of the debtor's estate to the payment of debts for which he was not liable.

O'Neil v. *Salmon,* 25 How. Pr. 253; See also *Collumb* v. *Caldwell,* 16 N. Y. 485; *Leitch* v. *Hollister,* 4 N. Y. 211; *Kirby* v. *Schoomaker,* 3 Barb. Ch. 46; *Smith* v. *Howard,* 20 How. Pr. 121; *Wilson* v. *Robertson,* 21 N. Y. 587.

"An assignment void in fact for fraud is void *in toto.* The fraud taints and vitiates the whole."

Hyslop v. *Clarke,* 14 Johns. 458; *Mackie* v. *Cairns,* 5 Cow. 547; *Grover* v. *Wakeman,* 4 Paige, 23; 11 Wend. 187; *Rogers* v. *De Forest,* 7 Paige, 277; *Goodrich* v. *Downs,* 6 Hill, 438; *Barney* v. *Griffin,* 2 N. Y. 365.

It is true *Goodrich* v. *Downs,* above cited, was overruled in *Curtis* v. *Leavitt,* 15 N. Y. 114-124, in so far that it held 2 Revised Stattues 135, § 1, applied to general assignments; but *Judge* Comstock, who wrote the overruling opinion, explains in *Collomb* v. *Caldwell,* 16 N. Y. 485, as follows: "But in overruling the decision in that respect we by no means called in question the doctrine that an assignment by an insolvent is void, if, while he provides for only a part of his creditors, he makes the attempt, in the instrument, to reserve any portion of the fund to himself. Such an attempt has been regarded as establishing what is sometimes termed 'fraud in law;' but more accurately speaking, it affords a conclusive presumption of an actual fraudulent design on the part of the assignor. In this view of the question *Goodrich* v. *Downs* was well enough decided, and the decision considered as depending upon this principle was approved in *Barney* v. *Griffin*, 2 N. Y. 365."

A very recent case holds that when, from the facts, the inference of fraud is inevitable, a finding of no fraudulent intent does not alter the case.

Coleman v. *Burr*, 93 N. Y. 31.

The complaint herein contains two counts: 1, that the assignment is void on its face; 2, that the assignment is void by reason of certain facts alleged. The plaintiff, while reying on the first, proved his case under the latter allegation. That is, he proved the inequality of individual debts and assets. By so doing he relieved his case from any criticism found in *Turner* v. *Jaycox*, 40 Barb. 164, which is relied on by defendants.

Ruger, *Ch. J.*, delivered the opinion of the court:

On the 23d of October, 1882, Leopold Rindskopf and Meyer Rosenthal, composing the firm of Rindskopf & Rosenthal, executed an assignment of all their property, both real and personal, in trust to Abraham Rosenthal to convert the same into money, and, after paying the lawful expenses of the trust, to pay their partnership debts in the order specified in the instrument. It then provided "That with the remainder and residue of said net proceeds and avails, if any there shall be, the party of the second part shall pay and discharge all the individual and private debts of the parties of the first part or either of them, whether due or to become due, provided such remainder shall be sufficient for that purpose; and if insufficient, then the same shall be applied *pro rata*, share and share alike, to the payment of said debts and according to their respective amounts."

It was further provided that if there was any surplus then remaining, it should be repaid to the said assignors or to their executors, administrators or assigns.

The proof established the facts that the assigned estate amounted in value to the sum of $9,360.87, and the firm indebtedness to $14,667.87, and that the individual assets of the members of the firm amounted to $40, of which Rindskopf owned $10 and Rosenthal $30. Rindskopf's absolute individual liabilities amounted to $300, and his contingent liabilities to $4,300, and Rosenthal's absolute individual liabilities to $2,850.

The plaintiff, being a judgment creditor of the firm, brought this action to set aside the assignment, upon the ground that it was made with intent to hinder, delay and defraud the creditors of said assignors and to have the assets of the assigned estate applied to the payment of his debt. Both the assignors and assignee respectively appeared and answered in the action, and the assignee denied all of the allegations contained in the complaint imputing fraud to the assignors, which put the plaintiff to the proof of his case. No attempt was made on the trial to show any fraud in the assignment, except such as was sought to be inferred from the provision relating to the payment of individual debts, considered in connection with evidence tending to show that the individual members of the firm owned individual assets of unequal amounts in value, and were liable in unequal sums upon their respective partnership accounts, also for individual debts.

The trial court found that there was no fraud in fact in the making of the assignment, and as a conclusion of law that the instrument constituted a valid transfer of the property of the assignors to their assignee, and ordered judgment dismissing the complaint.

Upon appeal the general term reversed the judgment and ordered a new trial. As that court did not assume to reverse the judgment upon the facts, its order can now be sustained only upon the theory that the undisputed evidence furnished conclusive proof of fraudulent intent on the part of the assignors in making their assignment. The conclusion of that court was based wholly upon the ground that the clause of the assignment providing for the payment of the individual creditors of the respective assignors, considered in connection with the facts of inequality in the amount of individual indebtedness, of value of individual assets, and of the amount of the respective accounts with the partnership firm, operated as a fraud in law upon the individual creditors of the partner having the largest individual estate, and afforded conclusive evidence of a fraudulent intent on the part of the assignors rendering the assignment wholly void.

Passing over the questions as to whether an intended fraud by one member of a firm in transferring his individual assets, avoids an assignment of the firm assets made by the firm, and whether such a fraud, affecting a distinct portion of the assets devoted to a special class, is inseparable and must, as matter of law, be held to vitiate the entire trust, we will first consider the case upon the theory discussed by the court below. The burden was upon the plaintiff to show by affirmative evidence that the enforcement of the provisions of the assignment must necessarily work a fraud upon the creditors of the assignors, or one of them, and that it could not legally be carried out without producing such a result.

It has in some cases been held that assignors for the benefit of creditors, who contemplate and provide in their assignment for an illegal disposition in any respect of their property, are not at liberty, in an action to set it aside, to show, as proof of innocence of fraudulent intent, that the assigned fund was insufficient to satisfy the prior valid provisions of the assignment, and could not, therefore, be affected by the alleged illegal provision, and are estopped from controverting the existence of the conditions which they had provided for. *Collomb* v. *Caldwell*, 16 N. Y. 485, and cases there cited.

It has, however, been frequently held that it may be shown in rebuttal of an inference of fraudulent intent arising from provisions for the payment of individual debts, that there were, in fact, no such debts or individual assets to be affected by such provision; *Turner* v. *Jaycox*, 40 N. Y. 470; *Bogert* v. *Haight*, 9 Paige, 297; or that the property formerly belonging to the firm had become the property of purchaser making the assignment; *Dimon* v. *Hazard*, 32 N. Y. 65; and other circumstances showing that no fraud, in fact, was intended. *Dimon* v. *Hazard, supra; Hurlbert* v. *Dean*, 2 Keyes, 97.

The principle that a party may be inquired of as to his interest in doing an act, where such interest is material, tends strongly to confirm the proposition that the presumption of fraud arising from the provisions of an assignment may be repelled by parol evidence. *Seymour* v. *Wilson*, 14 N. Y. 567; *Hunt* v. *Johnson*, 44 N. Y. 27.

The plaintiff in this case, anticipating the probable defense, did not rely upon the presumptions of fraud arising from the assignment alone, but undertook to establish the fact affirmatively that, in the actual circumstances of this case, the execution of the provision in question would necessarily operate as a fraud upon creditors. It is unnecessary, therefore, to assail the doctrines enunciated in *Collomb* v. *Caldwell*, 16 N. Y. 485; *Barney* v. *Griffin*, 2 N. Y. 365; *Goodrich* v. *Downs*, 6 Hill, 438; and similar cases, for, conceding them to the fullest extent claimed, the facts of this case do not bring it within their operation.

It is lawful for an insolvent member of a firm to devote his individual property to the payment of firm debts to the exclusion of his individual creditors; *Dimon* v. *Hazard*, 32 N. Y. 65; *Saunders* v. *Reilly, ante*, 59; *Royer Wheel Co.* v. *Fielding*, 2 Cent. Rep. 511, 101 N. Y. 504; *Kirby* v. *Schoonmaker*, 3 Barb. Ch. 46; and it follows from the same principle that he may also apply it to the payment of any debt owing by him to his partners in the firm, and no inference of fraud can legally be derived from such dispositions of his individual property.

This case was decided by the general term, as appears from their opinion, solely upon the ground of a fraud alleged to have been intended by Rosenthal upon his individual creditors. The argument of the respondent is, in brief, that Rosenthal having $20 more individual property than Rindskopf, the law will assume that he, by placing that sum in a common fund with other individual assets and directing the payment of their aggregate individual indebtedness therefrom, intended to commit a fraud upon his individual creditors, because, it is said, if the excess of Rosenthal's individual assets is distributed *pro rata* among each and all of the individual creditors of both parties, according to the amount of their respective claims, that Rindskopf's creditors will necessarily receive something to which Rosenthal's creditors were equitably entitled.

We think this argument, upon the facts of the case, is defective in several particulars. It is not at all certain that such a result would follow in this case, for if Rindskopf's contingent liabilities never became fixed, there would be only $300 of his individual debts to be paid as against $2,850 of Rosenthal's; and in that event private property of Rindskopf's would be taken to pay Rosenthal's individual debts.

We also think the result claimed does not follow from the premises assumed by the court below, but that it would necessarily be produced only by the existence of exact equality of interest in the firm assets by both members or a greater interest in Rosenthal, combined with equality in individual indebtedness, and inequality in the individual property. If there is simply inequality of interest in the firm assets, and inequality in individual assets, one inequality could be easily compensated by a corresponding inequality in the other, and the evidence does not show but that this state of things in fact existed. It does appear that the assignors were equal partners in their firm business; but there is no evidence as to the amount they each originally contributed to the capital of the firm, except that the amounts were about equal. Neither does it appear how much they had respectively drawn from the firm except that the amounts were nearly equal. As the witness says one might have contributed "a little more or a little less than the other."

No statement of accounts between the respective partners has been given showing their liabilities to the firm, or the amount of their respective interests in its assets, and for aught that appears in the case Rosenthal might, on a settlement of the partnership accounts, have owed Rindskopf the exact sum which it is claimed he diverted from his individual assets to the payment of Rindskopf's creditors. This, in the absence of a fraudulent intent, he had a perfect right to do, as he could lawfully pay his debt to his partner in preference to that of any other creditor, if done in good faith; and if he did so in fact, it would relieve the clause in question from any criticism or objection. *Royer Wheel Co.* v. *Fielding*, 2 Cent. Rep. 511, 101 N. Y. 504; *Dimon* v. *Hazard*, 32 N. Y. 65.

Assuming that there was a surplus remaining after the payment of the firm debts, and the assignment required this residue of $40 to be put into a common fund for the payment of the individual debts of both assignors, and that Rindskopf's contingent liability became fixed, it is evident that about $15 of his assets would be paid to Rosenthal's individual creditors, leaving $15 only subject to be diverted from them to the payment of Rindskopf's creditors. The insignificance of this sum, as compared with the amount of individual debts to be paid, and the almost infinitesimal amount of the dividend to individual creditors to be derived therefrom, would seem to furnish a conclusive answer to the presumption of fraud sought to be drawn from the obviously tentative provision in question. It would also seem, in view of the large amount of property transferred and the trivial value of that which might be improperly paid out, that the maxim *De minimus non curat lex* might well have been applied and held to control the determination of the case. *Empire City Bank*, 18 N. Y. 200; *Colman* v. *Shattuck*, 62 N. Y. 363; *Ross* v. *Hardin*, 79 N. Y. 84-93.

We conclude, therefore, upon this branch of the case, upon a consideration of the whole evidence, that, within the authorities cited below, every inference of fraud derivable from the provisions referred to, was effectively answered. *Bogert* v. *Haight*, *Turner* v. *Jaycox*, *Hazard* v. *Dimon*, and *Hurlbert* v. *Dean*, *supra*.

We are also of the opinion that the provisions of this assignment, if fairly construed and enforced according to their natural meaning and import, would not occasion an illegal disposition of the individual property of either assignor. While heretofore there has been some diversity of opinion in the courts, in respect to the proper rule to be applied in the construction of such instruments we think the tendency of modern decisions, especially those of most approved authority, has been to adopt the same rules which obtain in the interpretation of other contracts. *Knapp* v. *McGowan*, 96 N. Y. 87; *Rapalee* v. *Stewart*, 27 N Y. 315; *Benedict* v. *Huntington*, and *Townsend* v. *Stearns*, 32 N. Y. 219, 209.

Among those rules is that requiring such an interpretation as will render the instrument consistent with innocence, and the general rules of law, in preference to such as would impute a fraudulent intent to the assignor, or defeat the general purpose and intent of the conveyance. *Ginther* v. *Richmond*, 18 Hun, 234; *Rapalee* v. *Stewart*, 27 N. Y. 315; *Benedict* v. *Huntington*, and *Townsend* v. *Stearns*, 32 N. Y. 219, 209.

Such transfers are sanctioned by law and are, when made like other contracts, to be fairly and reasonably construed with a view of carrying out the intentions of the parties making them. When authority to do an act is conferred in general terms, it will be deemed to be and to have been intended to be within the limits prescribed by law. *Kellogg* v. *Slauson*, 11 N. Y. 302.

In such cases, as in others, doubtful and ambiguous phrases admitting of different meanings are, in accordance with the maxim *Ut res magis valeat quam pereat*, to be so construed as to authorize a lawful disposition of the property only, although there may be general language in the instrument susceptible of a different construction. *Townsend* v. *Stearns*, *supra*.

If the instrument in question be considered in the light of these rules we think it is not fairly subject to the criticism which has been made upon it. The insolvency of the firm of Rindskopf & Rosenthal necessarily worked its dissolution and a division of the interests of its respective members, except so far as their property was already legally disposed of by the assignment. After satisfaction of the firm debts by the assignee the law would restore each member of the firm to his legal rights in the residue of the property, subject only to the execution of the power conferred upon the assignee to dispose of the same.

It is essential to the argument of the respondents to establish that the language of this assignment contains authority to the assignee from each member of the firm to satisfy the individual debts of the other from the combined individual property. We do not think a proper construction of the instrument justifies the inference of such an authority; certainly no such power is expressly given; and it would be contrary to settled rules to impute such an intention to its respective authors unless the language of the instrument expressly requires it.

The law would require in the event of an assignment by a firm of two persons that, after the payment of firm debts, the residue should be divided into two funds for the payment of individual creditors, and the only defect, if any, in this assignment is that it did not expressly recognize the possible existence of the two funds. We think the law will supply this omission and order a distribution of the fund according to the legal rights of the claimants upon it. It was plainly contemplated in the assignment itself that this division should be made in the eventual surplus, for that is directed to be paid to the parties of the first part, their executors, administrators and assigns.

This provision could be carried out only upon the assumption that a division of the residue had been made between the two assignees, and thus reflects strongly upon the intention of the conveyance in the use of the language criticised. A reasonable construction of this provision would seem to require that the language should be distributively applied, and held to mean that each member of the firm transferred such part of the property as he had a lawful right to convey, and subjected the residue of such part to the payment of such debts as he was individually liable for. The assignment purported to deal with all of the property, and its fair import was to distribute it to those who were legally entitled to it, paying the firm creditors first, and then, in case there were assets applicable to that purpose, providing for the respective individual creditors of the members of the firm. There is no language in the clause in question which expressly forbids such a construction or requires that the property of one should be applied to the payment of the debts of the other, and its whole language would be satisfied by the distribution of the share of each in payment of his individual debts.

Upon the satisfaction of the debts of the firm it would be the legal duty of the assignee, even in the absence of any express provision requiring it, to determine the interest of the individual partners in the surplus and devote each share to the interest of its respective owner in accordance with his legal rights. *Eyre* v. *Beebe*, 28 How. Pr. 333; *Friend* v. *Michaelis*, 15 Abb. N. C. 354.

While the instrument was necessarily the joint act of the firm so far as their joint property was concerned, it was the individual contract of the respective members so far as they dealt with individual property. When providing for their joint interests and property, which constituted the main object of the assignment, they spoke of their joint interest and purpose; but when dealing with their individual interests, although inaptly continuing the use of the phraseology applicable to its earlier provisions, their language must be construed as referring to and expressing only their individual wishes with reference to their individual property and liabilities. In case a surplus arose in the administration of this estate, and it became the subject of judicial controversy among the individual creditors of the members of the firm, it could not reasonably be said that there is anything in the language of the assignment which precluded Rosenthal, or his creditors, from demanding that his individual property should be applied to the payment of his individual debts.

It may be finally said that the effect of the provision complained of could not in any event have been intended to defraud the creditors of the firm; and until they are aggrieved they have no cause of action. *Royer Wheel Co.* v. *Fielding*, 2 Cent. Rep. 511, 101 N. Y. 510; *Dimon* v. *Hazard*, *supra*.

The order of the General Term should be reversed, and that of the Special Term affirmed.

All concur (**Andrews,** *J.*, on the construction of the instrument), except **Danforth,** *J.*, not voting.

William F. BRIDGE, *Appt.*,
v.
George H. PENNIMAN, *Respt.*

1. In an **action to recover back** the **price paid for** certain **shares of** corporate **stock** which the plaintiff alleged he was induced to buy and pay for by representations of defendant which were untruthful, *held*, that the **question, whether** the **plaintiff rescinded** by tendering back the stock without conditions or whether he used the stock and its transfer to defendant as a new consideration for a new contract by which he obtained from defendant a bond of indemnity, with surety, against the liabilities to which he was exposed, **was one of fact for the jury.**
2. The **referee having found as a fact** that the plaintiff did **not** make **an unconditional tender** of his stock, but used it as his own with which to purchase the indemnity received, and the possible questions of law in the case being inextricably involved in and dependent upon the conclusions of fact, *held*, that the **judgment dismissing** the **complaint** should be **affirmed.**

(Decided April 19, 1887.)

APPEAL from a judgment of the General Term of the Superior Court of New York City, affirming a judgment entered upon report of a referee dismissing the complaint in an action to recover back the price paid for certain shares of corporate stock. *Affirmed.*

Reported below, 19 Jones & S. 183.

The facts were stated in the prevailing opinion of the court at general term, as follows:

The plaintiff claimed that the defendant had sold to him twenty-two shares of the stock of the Judd Linseed & Sperm Oil Company, a corporation, for which he had paid the defendant $22,000; also, that the purchase was so induced by the false and fraudulent representations of the defendant, that the plaintiff had a right to rescind the purchase and recover the $22,000; and that he had in fact rescinded.

The defense denied the right to rescind, and the fact of rescission, claiming that the plaintiff had not tendered or returned the stock to the defendant in a manner that would allow the plaintiff to rescind, or in other words, unconditionally.

The most important fact as to the return of the shares to the defendant is that after negotiation or dispute between the plaintiff and defendant, after plaintiff had demanded that defendant should give security as well as his own obligation, as an indemnity against plaintiff's liability as stockholder, etc., the defendant and his wife, the latter expressly charging her separate estate, made a bond to the plaintiff. It recited, whereas, William F. Bridge has transferred or is about to transfer, to George H. Penniman, all his stock and interest in the company specified, and has resigned as president and trustee of the company, in consideration of the premises, and of $1, the said George H. Penniman, and his wife, "do jointly and severally agree to indemnify and save harmless the said Bridge from all claims, debts or demands of whatever name, nature or kind, now existing against said company, or heretofore contracted by it, or on its behalf, also from all claims or demands against him as a stockholder in, or trustee of, said company," etc. The plaintiff upon receiving this bond transferred the stock.

Mr. **William C. Holbrook,** for appellant:

Plaintiff having purchased the entire sixty shares, and taken office in the corporation on the faith of defendant's individual representations, thereby rendering himself liable for certain debts of the corporation, for which he was not previously responsible, as the referee has found, was entitled upon rescinding the contract to indemnity against such debts, in addition to a return of the purchase money which defendant personally received, and in giving the bond of indemnity defendant was doing no more than his plain duty, *i. e.*, of restoring plaintiff to the position he occupied before he acted upon his representations.

Newbigging v. *Adams*, 55 Law Times, N. S. 794.

Even, however, upon the assumption that that case is not entirely decisive of this, plaintiff's right to indemnity should be sustained upon the strength of defendant's promise to indemnify plaintiff from loss should he, when the seed was worked up, decide to surrender his stock and retire from the company, or otherwise stand upon his legal rights.

Pollock, Contracts, pp. 165-7, 497-9; Benjamin, Sales, § 417 and cases cited.

If our contention as set forth in the preceding points is correct, then there was no such condition annexed to the return of the stock as prevented rescission, nor was the taking of the bond of indemnity an arrangement or new agreement, incompatible and at variance with the theory of rescission as found by the referee.

Hammond v. *Pennock*, 61 N. Y. 145-155; Pollock, Contracts, p. 510.

Plaintiff having a legal right to rescind, nothing short of release, or the acceptance of something in satisfaction, would bar such right.

Bowman v. *Teall*, 23 Wend. 309; *Allaire* v. *Whitney*, 1 Hill, 484; *De Bussche* v. *Alt*, L. R. 8 Ch. Div. 286.

The fact that the bond of indemnity was signed by defendant's wife, who was not previously under any liability to plaintiff in respect to his transactions with defendant, and the fact that plaintiff surrendered the entire sixty shares upon receiving such bond, do not militate against his theory of a rescission.

Gunby v. *Sluter*, 44 Md. 237.

Laches in rescinding are not to be imputed to plaintiff. Defendant, in fact, sustained no damage from the fact that plaintiff did not rescind upon the first discovery of the falsity of his statements; and even had he met with injury he would be estopped to assert it, inasmuch as plaintiff, at his request, deferred exercising his right to rescind.

A purchaser who is entitled to rescind a contract for fraud, but who delays doing so for the purpose of affording the vendor, at his request, an opportunity of attempting to make the thing sold of value, and satisfactory to the purchaser, is not precluded by such delay from thereafter rescinding the contract.

Powell v. *Woodworth*, 46 Vt. 378; *Gatling* v. *Newell*, 9 Ind. 572; *Pierce* v. *Wilson*, 34 Ala. 596; *Williamson* v. *N. J. Southern R. R. Co.* 29 N. J. Eq. 311, 320; *Marston* v. *Simpson*, 54 Cal. 189; *Clough* v. *London etc. R. Co.* L. R. 7 Exch. 26, 35; *Pence* v. *Langdon*, 99 U. S. 578 (Bk. 25, L. ed. 420).

So also it is no defense to an action as for rescission that the wrong doer has by his own act made a full restitution impossible. He cannot prevent a restoration as far as is within his power, by showing that he has himself done acts which prevent his being restored to his original position.

Hammond v. *Pennock*, 61 N. Y. 145; *Masson* v. *Bovat*, 1 Denio, 69; *Pearse* v. *Pettis*, 47 Barb. 276; *Colson* v. *Smith*, 9 Ind. 8; *Baker* v. *Lever*, 67 N. Y. 304.

So, too, where one party to a contract makes a positive representation, it is not laches in the other not to proceed immediately to verify that representation; unless he has reason to doubt its accuracy laches cannot commence.

Partridge v. *Usborne*, 5 Russ. 195, 232; *Doggett* v. *Emerson*, 3 Story, 700, 740; *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. Cas. 221.

The referee having found that plaintiff relied upon defendant's representations, that such representations were material and untrue, plaintiff had a right to rescind, even though they were not fraudulent or made with intent to defraud.

Hammond v. *Pennock*, 61 N. Y. 145, 152 and cases cited; Pollock, Contracts, pp. 484-489; *Degraw* v. *Elmore*, 50 N. Y. 1; *Bowen* v. *Mandeville*, 95 N. Y. 237; *Neblett* v. *Macfarland*, 92 U. S. 101-5 (Bk. 23, L. ed. 471, 472. See note).

Mr. **Joseph H. Choate,** for respondent:

Assuming that the plaintiff, as late as November, had a right to rescind, his course was plain. He might do one of three things:

1, to retain the shares and sue the defendant for damages;

2, to proceed in equity for a rescission of the contract of purchase;

3, to return, or offer to return, unconditionally, the twenty-two shares bought from the defendant, and sue for the price paid as money had and received.

Gould v. *Cayuga Co. Nat. Bank*, 86 N. Y. 75; *S. C.* 99 N. Y. 333.

Or, as the court below has said: "A party seeking to rescind a contract must reject it wholly, without imposing conditions."

Welsh v. *Goessler*, 15 Jones & S. 104.

Or, again; an offer to return, on condition that the party rescinding shall be paid a sum of money, is an invalid tender.

Howard v. *Hayes*, 15 Jones & S. 89.

The plaintiff lost by his laches any right of rescission that he might originally have had. The rule is a rigid one that the purchaser who claims to have been defrauded must disaffirm promptly upon ascertaining the fraud; and the proof is clear and the referee finds that in June the plaintiff had fully ascertained that the capital of the company was impaired. He could not speculate in its prospects, business and condition till November, and then disaffirm.

Lawrence v. *Dale*, 3 Johns. Ch. 23; *Lowber* v. *Selden*, 11 How. Pr. 526; *Rosenbaum* v. *Gunter*, 3 E. D. Smith, 203; *Wheaton* v. *Baker*, 14 Barb. 594; *Bruce* v. *Davenport*, 3 Keyes, 474; *Dows* v. *Griswold*, 4 Hun, 550.

Finch, *J.*, delivered the opinion of the court:

That the plaintiff was induced to buy and pay for the stock of the oil company, by representations of the defendant which were untruthful and incorrect, and so, upon a discovery of the facts, was at liberty to rescind the contract and recover back the purchase money is scarcely disputed on this appeal, and may be assumed without discussion.

The real controversy revolves about the inquiry whether the plaintiff did in fact rescind by tendering back without conditions the stock received, or whether, on the contrary, he used that stock and its transfer to the defendant as a new consideration for a new contract, by which he obtained from the defendant a bond of indemnity with the protection of a surety added, against the liabilities to which he had become exposed by his official connection with the company.

This appears to us to be a question of fact. The history of the transaction as detailed by the adverse parties runs upon different lines and is colored by their respective theories. As a consequence, there is to some extent disagreement and contradiction between them; and where the facts themselves are not disputed the inferences derivable from them as to the real nature of the transaction and the true intent and understanding of the parties are extremely divergent and open to wide differences of opinion.

The plaintiff's theory is that when the worthless character of the stock was fully ascertained, the defendant promised to protect his vendee from loss; that the latter tendered back the stock and demanded the purchase money as a clear rescission of the contract; and that the indemnity given stood outside of that rescission, and rested independently upon the duty and liability of the defendant to indemnify, and upon his express promise so to do. This theory has been assailed with the criticism that the plaintiff transferred not only the stock bought of defendant but that purchased of other parties, and received from defendant a bond of indemnity which could not have been compelled and which he was not bound to give either by virtue of his general duty or of any promise which he had made.

It is argued from the terms of the correspondence which passed between the parties that the plaintiff steadily demanded the protection of a surety, the liability of some third person which would supplement that of the defendant, and so was seeking to obtain what he had no right to demand and could not have compelled, and which, therefore, he chose to buy by a transfer of all the stock which he owned.

The theory of the defendant is that the arrangement was made in that way; that the plaintiff by becoming the president of and a director in the oil company stood exposed to a heavy and dangerous liability for its debts in case of disaster, and above and beyond the total loss of his stock; that he realized and conceded that he had not been willfully or purposely deceived; and so concluded as the wisest treatment of the misfortune to lose his stock in exchange for adequate protection against threatened and further loss in addition.

Attention is directed to a letter written by the defendant which, it is claimed, offered to plaintiff a choice of alternatives and meant in substance that in the emergency the defendant would give to the plaintiff all his stock, if the latter would assume the risk of the corporate success or failure and leave the defendant's loss measured only by the stock thus transferred; or, on the other hand, if the plaintiff chose to give his stock to defendant he might end his loss at that point, and the defendant would protect him by adequate security against any further injury. The letter is capable of such interpretation, and it is said presented to plaintiff's mind a choice of alternatives one of which he adopted, and which fully explains and accounts for the transfer made and the bond given in return.

It seems to us apparent that the question thus raised depends almost wholly upon the view taken of the facts and of the conflicting inferences which they originate. The referee has found as a fact that the plaintiff did not make an unconditional tender of his stock, but used it as his own with which to purchase the indemnity received; and refused to find in accordance with plaintiff's theory and version of what occurred. There are facts and inferences in the case from which that conclusion could fairly be drawn, although open to a doubt which manifested itself when the general term affirmed the judgment by the dissent of one member of the court. The possible questions of law in the case are inextricably involved in and dependent upon the conclusions of fact; and accepting them as found by the referee and approved by the general term, it is clear that there was no rescission, but a new contract agreed upon and executed.

The judgment should be affirmed, with costs.

All concur.

Peter BOWE, As Sheriff, *Respt.*,
v.
Charles W. WILKINS *et al.*, *Appts.*

1. Where a **sheriff** has levied upon property by virtue of an attachment, it is his duty, when the **attachment** is **vacated,** to **deliver up** the **property to** the **defendant** or to the person entitled to it.
2. A **bond to indemnify** the **sheriff** for taking property as that of the defendant in an attachment suit and for his keeping it under such attachment, can **not** be construed to **cover a detention by** the **sheriff after** the **attachment** has been **vacated.**
3. **Pleadings** are to be **liberally construed,** with a view to get out the real truth of the case when it will not involve surprise or injustice to either party.
4. When the **new matter** set up **in** the **answer** does **not** constitute **a counterclaim** such new matter **does not call for a reply,** but is deemed controverted by the plaintiff by traverse, or avoidance, as the case may be.
5. When it does not appear from the record what was the precise ground upon which the case was decided, **parol evidence** thereof may be given, provided such ground was within the issues of the case.
6. Where a sheriff has attached property and been indemnified, and, after the **attachment** has been **vacated, has** refused on demand to deliver the property to the owner, and a recovery has been had against him for such refusal, the **sureties on** the **bond of indemnity are** not liable to the sheriff for the amount of such recovery.
7. **When** the **sole ground of recovery against** such **sheriff was** the **demand and refusal, he cannot allege in an action on** the **indemnity bond that he had a right to retain the property** after the demand until service on him of a copy of the order vacating the attachment and until his costs and fees were paid, where his refusal to deliver was not put upon any of these grounds and where he did not set up such defense in the action against himself.
8. Where the sheriff levied the execution against himself on the goods which he had attached and kept in his hands, and sold them on the execution and turned over the money to the attorney for the plaintiff in the execution, *held*, that **issuing an execution without** any **directions** as to what property is to be taken thereon, **implies only an authority to do a lawful act,** and the knowledge of the attorney in the execution as to where the money came from which he took from the sheriff, would be no ratification by the plaintiff in the execution of his prior illegal act in refusing to surrender the goods, much less on the part of the obligors in the indemnity bond, being equally ignorant.
9. An **attempt to defend** the **sheriff** from the consequences of his illegal act in refusing to deliver the goods done without their request or sanction **can not** be set up as **a ratification by** the **obligors in** the **indemnity bond** of such act, when sued by the sheriff on their bond.

(Decided April 19, 1887.)

APPEAL from a judgment of the General Term of the Court of Common Pleas of the City and County of New York, affirming a judgment of the trial term in favor of plaintiff in an action on a bond of indemnity. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **A. Blumenstiel,** for appellants:

The liability provided against in the indemnity bond is only in case that the attachment should remain in full force, or rather against the liability for any seizure or detention under an *existing* attachment, and under any execution which might be issued in the action while such attachment remained in full force, and could not refer to any indemnity for any trespass created by the Sheriff in holding on to property for the taking of which he held no process at the time of the conversion.

Clark v. *Woodruff*, 18 Hun, 419, affirmed in 83 N. Y. 518.

The suit and recovery in the superior court was not for the taking under the execution, but for the detention on the theory of an attachment then having been issued. The execution was issued and the sale was had long after the suit in the superior court was brought. If this is clear, then this indemnity bond could not cover a case where the Sheriff held the property after the process was vacated, because the defendants could not, in law, give an indemnity to a sheriff to hold property without any process whatever; in other words, a party cannot indemnify the sheriff to do a wrongful act; such a bond as that would be void.

Griffiths v. *Hardenbergh*, 41 N. Y. 464; *St. John* v. *St. John's Church*, 15 Barb. 346; *Ives* v. *Jones*, 40 Am. Dec. 421, 423, 426; *Chapman* v. *Douglas*, 5 Daly, 244, 252.

It is not proven in this case that the Sheriff was requested even to hold on to the property after the process was vacated; and even if such request was made by the attorneys for the plaintiffs in the attachment suit, that could not bind the sureties on this bond—

First. Because plaintiffs' attorney was not the attorney for these indemnitors.

Second. Even if he were, he could not bind them by direction of an illegal act.

The sale under the execution without notice to the indemnitors, although the attorneys had notice, is not such a ratification as makes these defendants liable.

Clark v. *Woodruff*, 83 N. Y. 518.

It must be made to appear that the recovery in the action against the Sheriff was for the identical taking under which the bond was given; and if that does not appear distinctly by the record, it can be proven that such recovery was otherwise.

Willett v. *Kipp*, 12 Hun, 474.

The proceedings on the trial of the main action in the superior court clearly show that the verdict and judgment was founded upon the refusal to deliver the property when demanded on December 21. This was in aid of the record, and was allowable.

McKnight v. *Devlin*, 52 N. Y. 399; *Doty* v. *Brown*, 4 N. Y. 71; *Wood* v. *Jackson*, 8 Wend. 9; *Dear* v. *Reed*, 37 Hun, 594; *Agan* v. *Hey*, 30 Hun, 591; *Banfield* v. *Haeger*, 7 Abb. N. C. 318; *Leavitt* v. *Wolcott*, 95 N. Y. 212, 222.

A bond must be construed strictly in favor of the obligors, and a construction given which will relieve them from liability, rather than to hold them; and in this connection, the surrounding circumstances may be examined to see what these defendants agreed to hold themselves liable for.

Clark v. *Woodruff* and *Griffiths* v. *Hardenbergh*, *supra; Blossom* v. *Griffin*, 13 N. Y. 569.

The judgment in the superior court action was clearly right, and the subsequent demand on the 21st day of December constituted a conversion within the terms of the complaint in that action.

Roberts v. *Berdell*, 52 N. Y. 644; *Gillet* v. *Roberts*, 57 N. Y. 33; *Jessop* v. *Miller*, 2 Abb. App. Dec. 449; *Oberwarth* v. *McLean*, 7 Daly, 70.

Mr. **Charles F. MacLean** with *Mr.* **Malcom Graham,** for respondent:

The superior court suit by Galinger was brought for matters indemnified against. The record is in evidence. The complaint shows exactly what that suit was for. It is an action of trespass. The allegation is that on December 11, 1880, "The plaintiff wrongfully entered said store, * * * and wrongfully took possession of said property, and converted the same to his own use."

The removal of the goods did not constitute this cause of action, nor did the refusal to return them; nor would a return of them constitute a defense. Galinger's cause of action was complete when the Sheriff took his goods under an attachment against Mrs. Briggs, and no demand was necessary.

Hicks v. *Cleveland*, 48 N. Y. 84; *Kluender* v. *Lynch*, 2 Abb. App. Dec. 538; *Kuhlman* v. *Orser*, 5 Duer, 242.

It is immaterial whether a second demand was made or not. The plaintiff having a complete cause of action by the taking, whether the Sheriff subsequently refused to return the property or not, he had a right to proceed upon the trespass, even though he might have declared upon the demand and so laid his action in trover.

Livermore v. *Northrup*, 44 N. Y. 107.

The Statute of Limitations runs in such case from the time of the seizure; the cause of action was thus complete.

Snebly v. *Conner*, 7 N. Y. Week. Dig. 93; *Coddington* v. *Carnley*, 2 Hilt. 528.

Parol evidence cannot be admitted to countervail the record in the *Galinger Case*. The record in that case is in evidence and shows plainly that the action is brought for the trespass of December 11, 1880; and as the record is the proper evidence, defendants were not at liberty to go outside of it and show that other matters appeared upon the trial.

Manny v. *Harris*, 2 Johns. 24; *Royce* v. *Burt*, 42 Barb. 655; *Castle* v. *Noyes*, 14 N. Y. 329; *Union Nat. Bank* v. *Kupper*, 63 N. Y. 617; *Beard* v. *Yates*, 1 Thomp. & C. Add. 21; *Nickett* v. *Armstrong*, 6 N. Y. Week. Dig. 73; *Campbell* v. *Butts*, 3 N. Y. 173; *Davis* v. *Talcot*, 12 N. Y. 184.

This rule has no exceptions. It is true that when the grounds of a judgment do not appear, either by the record or the judgment, parol evidence may be received; as, for example, where the extent of the *locus in quo* is in dispute, or upon which of two defenses the action was defeated, or what were the grounds of a nonsuit.

Kerr v. *Hays*, 35 N. Y. 331; *Dunckle* v. *Wiles*, 11 N. Y. 420; *White* v. *Madison*, 26 N. Y. 117.

But none of these cases hold that when the issues appear plainly by the record, parol evidence may be received to show that something else was tried. Even where matters outside the record may be shown, they must be such as "might legitimately have been given in evidence under the issue joined."

Wood v. *Jackson*, 8 Wend. 9.

Even though all that Galinger swore to upon either trial were conceded, yet his alleged second demand was insufficient.

Whitney v. *Belden*, 4 Paige, 140; *Bronner* v. *Loomis*, 17 Hun, 439; *Smith* v. *Dodd*, 3 E. D. Smith, 215; *Sage* v. *Mosher*, 17 How. Pr. 367, 371.

Section 709 of the Code prescribes the sheriff's duties upon the vacation of an attachment; he is to deliver the property to the defendant or to the person entitled thereto, upon reasonable demand, and upon payment of all costs, charges and expenses. It was the duty of the Sheriff to give the attaching plaintiffs an opportunity to take such steps as might be necessary to protect themselves; and they would have had just ground of complaint if the Sheriff had abandoned his attachment and delivered the property to Galinger before entry of the order and before they could possibly have obtained a stay. Had this been done, we should not have found the defendants claiming that Galinger's alleged demand was a "reasonable demand." Until the entry of the order they could not appeal.

Smith v. *Dodd*, 3 E. D. Smith, 215; *Star Fire Ins. Co.* v. *Godet*, 2 Jones & S. 359; *Plato* v. *Kelly*, 16 Abb. Pr. 188; *Gallt* v. *Finch*, 24 How. Pr. 193.

This doctrine that a sheriff has a reasonable time within which to comply with demands upon him exists without the aid of the statute and it extends even to cases of imprisonment.

Watson, Sheriffs, 108; *Taylor* v. *Brander*, 1 Esp. 45.

In this particular case of vacation of attachment, it has in terms been held that the sheriff ought to give the plaintiff in attachment a fair opportunity to litigate his action; and if he does not he will be liable to the plaintiff should the *vacatur* be reversed.

Danforth v. *Carter*, 4 Iowa, 230; *Danforth* v. *Rupert*, 11 Iowa, 547; *Wheeler* v. *Nichols*, 32 Maine, 233; Drake, Attachment, §§ 427, 428.

The Sheriff was not bound to deliver the property to Galinger, even though the alleged second demand should be granted.

The attaching plaintiffs were insisting that the property was not Galinger's; Mrs. Briggs' claim may have been in conflict with Galinger's, and had there been a delivery to Galinger, and she had thereupon brought suit for the property as hers, the delivery to Galinger would have been no defense; the Sheriff and the indemnitors might have been estopped from showing that, although they took it as hers, it was owned by some one else.

Frankel v. *Elias*, 60 How. Pr. 74; *Lambert* v. *Converse*, 22 How. Pr. 265.

Peckham, *J.*, delivered the opinion of the court:

The plaintiff brought this action to recover from defendants some $5,000 which he had paid upon a judgment recovered against him by one Galinger under the following circumstances: in December, 1880, one Harriet S. Briggs was the owner of a stock of goods in a store in New York and on the 11th of that month she assigned them to Galinger for the benefit of her creditors; on the same day William H. Talbot and others commenced an action against Mrs. Briggs and procured an attachment against her property and placed it in the hands of the Sheriff, who levied upon the goods which she had assigned to Galinger and which were claimed by him.

The Sheriff on the 16th took a bond of indemnity signed by these defendants and kept the goods. The condition of the bond was that if the obligors should indemnify the Sheriff from all liability, suits and judgments against him, by reason of the levying, attaching and making sale under or by virtue of such attachment of the property, and for the defense of any action which might be brought against the Sheriff for such taking, then the bond to be void, otherwise valid. This attachment was, on the 21st of December, vacated; and on the 24th of that month Galinger commenced an action to recover from the Sheriff the value of the goods which had been taken by him. The Sheriff gave notice of the suit to these defendants, and at their request he defended it, they being represented by counsel on the trial thereof. The trial resulted in a verdict and judgment against the Sheriff for the value of the goods, which he subsequently paid and then commenced this action to recover from the defendants on their bond the amount he had paid under the Galinger judgment and the expenses he had been put to in defending it. The defendants herein set up in their answer that the Sheriff, after the attachment had been vacated and after due demand had been made upon him, refused to surrender the property attached; and this refusal was without the knowledge or assent of the defendants herein, and that the recovery in the Galinger action was based on this demand and refusal, and that such conduct on the part of the Sheriff was not within the condition of the bond, and consequently they were not liable therefor.

Upon the trial of the action the plaintiff claimed to have proved his case by the production, among other things, of the judgment roll in this Galinger suit. The defendants then, under plaintiff's objection, proved by a parol the ground upon which that suit was decided, viz.: that the Sheriff became liable for a conversion upon the attachment being vacated and his refusal to give up the property upon a demand made after that event. Notwithstanding this evidence the circuit gave judgment for the plaintiff, which has been affirmed by the general term and the defendants have appealed here.

They claim: 1, that the condition of their bond did not cover the facts upon which the judgment was founded in the Galinger suit; 2, that the ground upon which the recovery was based was within the issues raised by the pleadings in that action; 3, that it was proper to show by parol what that ground was.

It is beyond dispute that the recovery in the Galinger suit was upon the sole ground above stated. The evidence upon the trial of this action as to what that ground was is wholly uncontradicted and consists of the stenographer's minutes of evidence upon that trial.

As to the first contention of the defendants: Was this act of the Sheriff within the condition of the bond? We think not. When the attachment was vacated it became his duty, upon reasonable demand, to deliver up the property to the defendant or to the person entitled to it, who in this case was Galinger. Code, § 709.

The bond indemnified the Sheriff for his act in taking the property as that of the defendant in the attachment suit, and for his keeping it under such attachment and refusing to give it up to Galinger or anyone else. The property was originally taken by virtue of the attachment, and the writ was the only justification for its retention; and if in truth it belonged to Galinger, as he claimed, the writ would then furnish no justification for taking or retaining the property. The bond taken was intended to and did cover the risk of this taking and detention under the writ. It cannot be construed to cover a detention by the Sheriff after the writ (which was his sole authority for ever taking and for continuing to keep the property) had been vacated. After such vacation the Sheriff was bound to surrender the property upon reasonable demand and his refusal to do so would be an illegal act, which it cannot be supposed the indemnitors in the bond proposed or assumed to indemnify against, and which if they had, such bond would have been void to that extent. *Griffiths* v. *Hardenbergh*, 41 N. Y. 464.

As to the second claim of the defendants. The basis of the recovery in the Galinger suit was fairly within the issues.

Pleadings are to be liberally construed with a view to substantial justice, or in other words, with a view to get out the real truth of the case when it will not involve surprise or injustice to either party. The complaint in the Galinger suit (which was brought several days after the attachment had been vacated) did allege a wrongful taking from Galinger's possession on or about the 11th of December, and a conversion to the defendant's use. It also alleged a demand made for a return and a refusal by defendant; it then demanded judgment for the value of the property.

The defendant answered by setting up the issuing of the attachment and justified the taking and retention under that writ, and alleged that the assignment from Mrs. Briggs to Galinger was void, as made with intent to hinder, etc., the creditors of the former. This answer did not set up new matter constituting a counterclaim, and did not call for a reply; and, under section 522 of the Code, such new matter was deemed controverted by the plaintiff by traverse or avoidance, as the case might be. Therefore, upon evidence by the defendant that the property was taken and held under the attachment as the property of Mrs. Briggs, the plaintiff could properly prove that it had been vacated, and a demand for the return of the property had bee nmade thereafter and had been refused before suit was amended. If this were proper to put in evidence, the court could then decide upon its effect. It did so decide, and held the defendant liable for his conversion, or, in other words, for his retention of the property subsequent to the time when the attachment was vacated.

The defendants then make the third claim that it was proper to prove by parol the ground upon which the *Galinger Case* was decided.

When it does not appear from the record what was the precise ground upon which the case was decided, parol evidence thereof may be given, provided such ground was within the issues in the case. *Wood* v. *Jackson*, 8 Wend. 9. We have just seen that this ground was within such issues.

The plaintiff herein makes some answers to these several defenses and he says that, as matter of fact, there was but one demand made by Galinger for the goods after they were taken, and that demand was made on the day of their seizure by the Sheriff and he gave some evidence to that effect on this trial. The difficulty with this evidence is that it was not given on the trial of the Galinger suit. The evidence is wholly uncontradicted as to what took place on the trial of that suit and its only possible importance was to show the reason for the decision of the Galinger suit, and that it was decided upon a ground not covered by the bond. As I say, the evidence on that trial was uncontradicted and conclusive, showing that Galinger made a demand after the attachment had been vacated, and that there was a refusal of the Sheriff to give up the property notwithstanding such fact, and that the action was decided on that sole ground.

The plaintiff herein also states that the case does not purport to contain all the evidence taken on the trial of the *Galinger Case*, and that to support this judgment it must be presumed that other evidence was given, and upon a point which was covered by the defendants' bond; but the difficulty is that the language of the court on that trial, as proved by defendants, shows explicitly that the sole ground of recovery was the demand and refusal subsequent to the attachment being vacated. In the face of such language no such presumption can be indulged in.

It is also urged in behalf of the plaintiff that even after the attachment had been vacated and demand made (conceding for this purpose that a demand was made), still the Sheriff was not bound to surrender the property forthwith. He says the Sheriff was entitled to demand service of a certified copy of the order vacating the attachment; and to be paid his costs, fees and charges, before a delivery could be claimed.

Assume that the Sheriff would be entitled to all these privileges, even including his costs (which he as to the latter probably would not be in case of the writ being vacated), yet the evidence on the Galinger trial was uncontradicted, that when Galinger made his demand for a return of the property after the attachment had been vacated, the refusal of the Sheriff to deliver was not put on any of these grounds, but was absolute, unconditional and final, and placed solely upon the ground that he had a bond of indemnity and it was no use to ask for a delivery.

In the light of such facts the claim now made in behalf of the Sheriff comes too late. It would have very likely constituted a defense to the Galinger judgment if proved on that trial as having been a position taken by the Sheriff in answer to the demand for the property after the writ had been set aside. To prove it on this trial was useless, because too late and no answer to the proof of what took place on the Galinger trial and what was the ground of that judgment. Nor is any defense made out by proof of the proceedings, subsequent to the rendition of judgment in the attachment suit. Judgment was therein duly obtained February 12, 1881; and on that day an execution was issued thereon, nearly two months after the commencement of this action.

The Sheriff under that execution proceeded to levy on the goods which he had attached and kept in his hands, and he sold them under such execution, and turned over the money to the attorney for the plaintiffs in the execution, who knew that it came from the sale of those goods. There is no evidence that these defendants ever knew one word as to where the money came from to pay a judgment in an action to which they were not parties, and none that any orders were given by anyone to the Sheriff as to what property to levy on. Issuing an execution without any directions as to how it is to be enforced or as to what property is to be taken, implies only an authority to do a lawful act pursuant to its command; *Welsh* v. *Cochran*, 63 N. Y. 181; and the knowledge of the attorney in the execution, as to where the money came from which he took from the Sheriff, there being no proof of like knowledge by the plaintiffs in the execution, when they received the money from him, would be no ratification, even as to them, of the prior illegal act of the Sheriff in refusing to surrender the goods, much less on the part of these defendants, being equally ignorant. *Clark* v. *Woodruff*, 83 N.Y. 518.

Neither is the defense of the Galinger suit by the defendants, at the notification of the Sheriff, equivalent to a ratification. It does not appear that, at that time, they knew of the demand and refusal after the attachment had been vacated; and the pleadings in the Galinger suit would not necessarily disclose that fact; but even if they at that time did know of such demand and refusal, it nowhere appears that they knew of or approved it when it happened, or that they ever requested or expected the Sheriff to so refuse. An attempt to defend the Sheriff from the consequences of an illegal act, done without their request or sanction, cannot properly be set up as a ratification of such act as between the Sheriff and these defendants.

Upon a careful consideration of all the facts in this case we are reluctantly brought to the conclusion that *the judgment should be reversed and a new trial ordered, with costs to abide the event.*

All concur, except **Ruger,** *Ch. J.*, dissenting.

LONG ISLAND BANK, *Respt.*,
v.
George A. BOYNTON, *Appt.*

1. In an action by the indorsee against the maker, who is also the first indorser of a promissory note payable to his order, and also against the second indorser, the **burden of proving** the **indorsement and delivery of** the **note** by the maker to the second indorser and its indorsement and delivery by the latter to the plaintiff is on the plaintiff, and the trial court does not err in refusing to give the defendant the affirmative.

2. An **usurious contract must be proved as laid,** and it is not error to hold at the trial that an **admission** that it had not been and could **not be so proved has no tendency to defeat a cause of action** which came to the plaintiff **for full value** and without notice of any defect.
3. The **statute against usury** is, like other statutes, to be obeyed, but whoever, desires its aid through the interference of a court must, where the objection to the sufficiency of the pleadings is taken on the trial, make out his title to relief by allegations as well as proof.

(Decided April 19, 1887.)

APPEAL from a judgment of the General Term of the Court of Common Pleas for the City and County of New York, affirming a judgment of the trial term on a verdict directed for plaintiff in an action on a promissory note. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **Thomas Darlington**, for appellant:

The court erred in taking the case from the jury and directing a verdict for the plaintiff.

We have here the corrupt agreement, the notes delivered under and in pursuance of the agreement, the return of the former notes thus paid by renewals by the party with whom the corrupt agreement was made, and the reservation of a sum greater than that allowed by law.

Floyer v. *Edwards*, Cowp. 112; *Scott* v. *Lloyd*, 9 Pet. 446 (34 U. S. bk. 9, L. ed. 188); *Shober* v. *Hauser*, 4 Dev. & B. 91, 106; *Southworth* v. *Bennett*, 58 N. Y. 659.

The court erred in not permitting the defendant to show the true consideration of the notes.

Nat. Bank v. *Lewis*, 75 N. Y. 516.

The court erred in not allowing defendant the affirmative of the issue.

Millerd v. *Thorn*, 56 N. Y. 405; *Murray* v. *N. Y. Life Ins. Co.* 85 N. Y. 236.

The court erred in not permitting the defendant to prove the prior transactions of which this note was given in renewal.

Fiedler v. *Darrin*, 50 N. Y. 437, 444.

Suppose there had been a variance between the allegation and the proof; this ought not to deprive the party of his defense.

Tyng v. *Commercial Warehouse Co.* 58 N. Y. 308; *Catlin* v. *Gunter*, 11 N. Y. 375; *Schermerhorn* v. *Am. Life Ins. etc. Co.* 14 Barb. 131; *Dunham* v. *Gould*, 16 Johns. 375–380; *Henry* v. *Bank of Salina*, 5 Hill, 528–537; *Brown* v. *Mitchell*, 12 How. Pr. 408; *Dagal* v. *Simmons*, 23 N. Y. 493.

Mr. **H. D. Van Orden,** for respondent:

Defendant is bound not only to set up the usurious contract in his answer, specifying its terms and the particular facts relied upon to make usury, but must prove them as alleged.

Western Trans. & Coal Co. v. *Kilderhouse*. 87 N. Y. 430; *Manning* v. *Tyler*, 21 N. Y. 567.

The transaction proved is entirely different from that set up in the answer.

Ahern v. *Goodspeed*, 72 N. Y. 108.

Danforth, *J.*, delivered the opinion of the court:

The action was by the plaintiff as indorsee for value, against Boynton as maker and first indorser of a promissory note payable to his own order, and one Tuttle as second indorser. The complaint alleged the indorsement and delivery of the note by Boynton to Tuttle, and its indorsement and delivery by Tuttle to the plaintiff. The defendant, Boynton, by his answer put in issue these facts. The burden of proving them was of course on the plaintiff, and the trial court did not err in refusing to give the defendant the affirmative.

He also set up that the note in suit had its inception in a corrupt and usurious contract with one F., for a loan of money for which F. was to receive 8 per cent per annum, besides a commission of ½ per cent on the face of the note. The evidence gave no color for the defendant's contention on this point, and the proof offered by him was of a contract totally different from that stated in the answer. Such was even the defendant's position on the trial, but to show that the plaintiff was not surprised at the variance, he offered in evidence papers on which he had on some former occasion unsuccessfully moved at special term for leave to serve a new answer, conforming to the proof now offered, but in no respect like the present pleading.

The usurious contract must be proved as laid, and it was not error to hold that an admission that it has not been and could not be so proved, has no tendency to defeat a cause of action which came to the plaintiff for full value and without notice of any defect.

The appellant cites *Tyng* v. *Commercial Warehouse Co.* 58 N. Y. 308, as against the ruling of the trial court; but in that case no question was made upon the trial as to the sufficiency of the pleadings or the relevancy of the proofs, and it was held that it was within neither the authority nor the duty of an appellate court to deprive the successful party of his recovery upon the grounds of incompleteness or imperfection of his pleadings. In the case before us not only was the objection taken on the trial, but the trial judge to overcome it was required to disregard the decision of the special and general terms and grant indirectly a favor which those courts had upon formal application denied. The statute against usury is, like other statutes, to be obeyed, but whoever desires its aid through the interference of a court must make out his title to relief by allegations as well as proof. This the defendant failed to do.

The judgment should be affirmed.

All concur.

PEOPLE, *ex rel.* ROME, WATERTOWN, & OGDENSBURG R. R. CO.

v.

Warren HICKS.

(*Three Cases.*)

1. In reviewing a **tax assessment against** a **railroad** company it is proper for the court below to consider **reports of** the **company** made under oath and as required by law, as a means of testing its earning capacity.
2. The **court of appeals will rest upon** the **judgments of** the **courts below as to valuations for assessment,** where the value is fairly in dispute, unless it can see that elements proper to be considered have been excluded, or those not proper to be considered have been given force, or some legal error has vitiated the conclusion.
3. Where no notice of the completion of the assessment roll is given as prescribed by section 9 of chapter 269 of Laws of 1880, the **fifteen days during which a certiorari may be applied for** to review the assessment will not be set running, but the writ can be sued out at any time.

(Decided April 19, 1887.)

CROSS APPEALS from orders of the Supreme Court at General Term in the Fifth Department, affirming orders of the Wayne Special Term, modifying and reducing assessments for taxation. *Affirmed.*

Reported below, 40 Hun, 598.

The facts and questions raised appear from the opinion.

Mr. **W. B. Hornblower,** for plaintiff.

Mr. **E. B. Wynn,** for defendant.

Finch, *J.*, delivered the opinion of the court:

These are cross appeals. In the case of the same relator against the assessors of the Towns of Somerset and Wilson recently decided [*ante* 51] we declined to review the conclusion of fact upon the question of value.

It is usual for us, on a motion, to follow the determination of the courts below upon the facts; and unless this court is to become a board of assessors to settle finally disputed valuations all over the State we must confine our review of proceedings instituted under the Act of 1880 to questions of law, and to the inquiry whether legal rules or correct principles have been violated. We have several times dismissed similar appeals, as involving only the discretion of the supreme court in dealing with the valuations of assessors. *People, Ogdensburg etc. R. R. Co.* v. *Pond*, 92 N. Y. 643; *People, Albany etc. Bridge Co.* v. *Weaver*, 99 N. Y. 659.

It is sought to bring to our notice errors of law by treating the reasoning and computations of the opinions as before us, and insisting that no other considerations affected the conclusion reached. The orders entered show only a valuation fixed and determined. Nothing in them or in the record discloses any violation of the correct principles upon which the valuation should be ascertained, or shows that the conclusion of the court was founded solely and alone upon earning capacity. On one side a capitalization, upon the basis of 5 per cent is criticised. But the whole process was tentative, and for consideration in its bearing on the ultimate result, and not conclusive. It was an aid in determining value and a very important one, but simply an assistance to the judgment in connection with cost, location, feeders, and probable increase of business and the like; and no law dictates what calculations the court shall make to enlighten its own ultimate judgment. On the other hand the opinions are searched to detect errors in arriving at net profits. But they are inquired into only as means to an end, and possibly no two minds would agree precisely as to what they were.

We observe that the learned referee made up fourteen different tables of valuation showing the variation in possible methods of computation. All these were before the special and general terms, and were doubtless considered in reaching the result. What may have induced a preference of one over another we cannot accurately know. So far as it is said that the reports of the Company, made under oath and as required by law, should not have been considered, the answer is that they furnish almost the only available means of testing earning capacity. The assessors had a right to refer to them and probably did, and the peculiar character of the proceeding seems to make them *ex necessitate* a source and means of information. To apply rigidly all the rules of evidence to such an investigation might make it fruitless.

Of course, the view we take of our duty may lead to the result that the same line of road will be differently valued in different towns. That is inevitable, so far as assessors are concerned; and it can excite no surprise that general terms should also differ in their valuations. Nevertheless, we shall continue to rest upon the judgment of the courts below, where the value is fairly in dispute, unless we can see that elements proper to be considered have been excluded, or those not proper to be considered have been given force, or that some legal error has vitiated the conclusion. We are better satisfied with the reduced valuations now before us than with those previously affirmed; but so long as the differences are upon judgments of value merely, and where there is room for disagreement, we shall decline to interfere.

There is nothing in the objection that the writ issued to the assessors of the Town of Webster came to late. No notice of the completion of the roll and its delivery to the proper officer, and stating where it could be inspected, was ever given. Laws 1880, chap. 269, § 9.

We have recently held that the omission does not set running the fifteen days during which application may be made for the writ, and leaves it to be sued out at any time.

The orders should be affirmed, without costs to either party against the other.

All concur.

Ernest LUDWIG, *Respt.*,
v.
Louis C. GILLESPIE, *Appt.*

1. When a **contract** not under seal is made **with an agent** in his own name **for an undisclosed principal,** whether he describes himself as agent or not, **either** the agent or principal **may sue upon it.**
2. Where the **action** is brought **in** the **name of** the **agent,** a recovery by him therein and payment of the **judgment** will be a complete **protection** to the defendant **against** any **claim of** the **principal** arising upon the contract.

(Decided April 19, 1887.)

APPEAL from a judgment of the Superior Court of the General Term of the City of New York, affirming a judgment entered upon report of a referee in favor of plaintiff in an action to recover for goods sold and delivered. *Affirmed.*

Reported below, 19 Jones & S 310.

The facts and questions raised appear from the opinion.

Mr. **William Hildreth Field,** for appellant:

Before the Code all actions were prosecuted in the name of the party who held the legal title. If a contract was made with a party as agent, the legal title was in his principal, and any action upon the contract had to be brought in the name of the principal.

Gunn v. *Cantine*, 10 Johns. 387.

If, however, a contract was made with a party described as agent, and was by its terms made payable to such party, then the words of agency were descriptive merely, the legal title was in the agent, and he could sue in his own name. But this decision was put upon the grounds that the contract was, by its express terms, made payable to the agent.

Harp v. *Osgood*, 2 Hill, 216.

The Code changed the rule of parties by enacting that suits should be brought in the name of the real party in interest, excepting that the trustee of an express trust, may sue in his own name; and subsequently the Code enacted that "A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust, within the meaning of this section."

The effect of this enactment in suits brought upon contracts made with agents has been to leave the rule as to proper parties plaintiff the same as before the Code, the courts holding that unless the agent is the trustee of an express trust, the suit must be in the name of the principal, and also, that an agent is the trustee of an express trust only when he is vested with a beneficial interest under the contract, or where the contract is by its express terms payable to him.

Neither of these conditions exists in the present case.

Iselin v. *Rowlands*, 30 Hun, 488; *Considerant* v. *Brisbane*, 22 N. Y. 389; *Funch* v. *Abenheim*, 20 Hun, 1.

Mr. **M. W. Divine,** for respondent:

Where the principal is undisclosed, the agent or factor of the foreign house has all the rights and incurs all the liabilities of a principal.

Story, Agency, §§ 268, 269; *Armstrong* v. *Stokes*, L. R. 7 Q. B. 598; *Elbinger* v. *Claye*, L. R. 8 Q. B. 313; *Hochster* v. *Baruch*, 5 Daly, 440; *Cobb* v. *Knapp*, 71 N. Y. 348.

Whether plaintiff's principals were disclosed or not is wholly immaterial. Plaintiff would still be entitled to maintain this action under the Code, § 449.

Bogart v. *O'Regan*, 1 E. D. Smith, 590; *Harrison* v. *Marshall*, 4 E. D. Smith, 271; *Morgan* v. *Reid*, 7 Abb. Pr. 217; *Arosemena* v. *Hinckley*, 11 Jones & S. 48; *Davis* v. *Reynolds*, 48 How. Pr. 210, affirmed in 5 Hun, 651. See also

Knapp v. *Simon*, 96 N.Y. 284; Story, Agency, §§ 268, 396.

It is not necessary, where the trustee of an express trust sues in his own name, that the complaint should show that other parties are beneficially interested.

Hoagland v. *Trask*, 48 N. Y. 686; *Merchants Bank* v. *Union R. R. & Trans. Co.* 69 N.Y. 373; *Wetmore* v. *Hegeman*, 88 N. Y. 69.

Finally, if it were necessary to set up the agency in the complaint this court will deem the proceedings amended so as to conform to the proof.

Code Civ. Proc. §§ 721, 722, 782; *Pratt* v. *Hudson River R. R. Co.* 21 N. Y. 305; *Bate* v. *Graham*, 11 N. Y. 237; *Lounsbury* v. *Purdy*, 18 N. Y. 515; *Foote* v. *Roberts*, 7 Robt. 17; *Bowdoin* v. *Colman*, 6 Duer, 182.

Danforth, *J.*, delivered the opinion of the court:

The action was to recover $22,251.60 as the price of certain bitumen theretofore sold and delivered by the plaintiff to the defendant. Besides a general denial, the answer set up that the bitumen was sold and delivered by the plaintiff, not on his own account, "but as known agent for the firm of Arles, Dufour & Co., his disclosed principals, under a special contract in writing, and without authority to receive the proceeds of such sales;" and upon this defense the defendant, upon trial of the issues before a referee, asked a dismissal of the complaint. His request was denied and judgment went against him, both upon the report of the referee and at the general term.

The principal point made in his behalf upon this appeal is that the action was improperly brought by the plaintiff in his own name. It appeared that the contract was negotiated by one Clarke, a broker, who in that character made and signed a writing which, so far as is material, was in these words:

"New York, April 25, 1882. Sold for account of Mr. E. Ludwig, Agt., to Mr. L. C. Gillespie,. four thousand (4,000) cases Syrian bitumen," etc.

A time for delivery was specified and the price declared payable thirty days from each delivery. This contract was assented to by both parties, and the referee finds that "There was no proof that the name of Arles, Dufour & Co., was disclosed or mentioned as the principal of the plaintiff in the negotiations for the sale, nor at any time before this contract had been executed and delivered;" but he also finds that at the time of making it, the "plaintiff was in fact the agent of Arles, Dufour & Co., of Marseilles, France, for the sale of imported goods," and that the bitumen was sold and delivered by him, not on his own account, but for, and on account of Arles, Dufour & Co., and as their agent.

The evidence sustains these findings, and the case is thus brought within the well established rule of law that when a contract, not under seal, is made with an agent in his own name for an undisclosed principal, whether he describes himself to be an agent or not, either the agent or principal may sue upon it. *Considerant* v. *Brisbane*, 22 N. Y. 389; *Schaefer* v. *Henkel*, 75 N.Y. 378.

The defendant has received the thing bargained for, and a recovery by the plaintiff and payment of the judgment will be a complete protection to the defendant against any claim of the principal arising upon the contract.

The other questions presented by the appellant relate to rulings by the referee upon offers of evidence, and were properly held by the general term to be without merit.

The judgment should be affirmed.

All concur.

Hannah DIFFENDARFER, *Appt.*,

v.

George W. DICKS *et al.*, Impleaded, etc., *Respts.*

1. **In** an **action by** a **residuary legatee to set aside** an **assignment of** a **claim due** the testator's **estate** made by the administrator with the will annexed, on the ground of fraud, the **plaintiff is entitled to prove** the alleged **inadequacy of** the **consideration** of the assignment and that the estate from which the claim was owing was solvent.
2. In such action it is **error to exclude evidence as to what** the **books of** the **debtor and creditor showed** was the amount of the account assigned.
3. **Where** the **administrator sold** a **claim due** the **estate** of more than $5,000 for $273, in an action to set aside the sale for fraud, the **fullest inquiry** as to the facts should be **permitted** within the rules of evidence.
4. The **jurisdiction of chancery to rescind contracts, for fraud or** mutual **mistake** of material facts, is one of the best settled and most beneficent powers of a court of equity.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Special Term dismissing the complaint in an action to set aside assignment of a claim due to a decedent's estate. *Reversed.*

This action was brought by Hannah Diffendarfer, as sole residuary legatee named in the will of Sarah E. Quinn, deceased, against Geo. W. Dicks, William Apgar, as executor of the will of Thomas Walling, deceased, and Coffman James, administrator *c. t. a.* of Sarah E. Quinn, deceased, to set aside an assignment of a claim of $5,534.30 due from the estate of Walling to the estate of Sarah E. Quinn, deceased, which Coffman James, Quinn's administrator, March 10, 1882, assigned to defendant Dicks for $273; to restrain said Dicks from collecting the claim of the estate of Walling, by action or proceeding at law or otherwise, and to restrain Walling's executor from paying the claim to Dicks, or any person other than plaintiff or Quinn's administrator, and for other relief on the grounds: 1, that the assignment was made for a grossly inadequate consideration and in fraud of the rights of plaintiff, the said residuary legatee; 2, mistake of fact as to the actual amount of said claim; 3, actual fraud on behalf of Quinn's administrator and Dicks, the assignee.

At the trial in the special term, after the close of plaintiff's case, the court granted defendants' motion to dismiss the complaint, and a judgment was entered accordingly.

On appeal to the general term this judgment was affirmed and plaintiff appealed to this court.

Further facts appear from the opinion.

Mr. **J. P. Osborne,** for appellant:

I. As sole residuary legatee named in Quinn's will, the plaintiff may elect either of two remedies: 1, a remedy against the administrator or trustee, to hold him responsible for devastating the estate; 2, a remedy as against the assignee to follow the assets in his hands, or to annul the fraudulent transfer to him.

Fellows v. *Longyor*, 91 N. Y. 331, 332; *Colt* v. *Lasnier*, 9 Cow. 341; 1 Roper, Legacies, pp. 438–440; *Dodson* v. *Simpson*, 2 Rand. (Va.) 297; *Hill* v. *Simpson*, 7 Ves. 152; *McLeod* v. *Drummond*, 17 Ves. 169; *Wilson* v. *Moore*, 1 Myl. & K. 337.

II. The assignment is void and ought to be set aside on the ground that it was made under mutual mistake of fact, as to the actual amount of the claim, and for gross inadequacy of price paid by Dicks, the assignee, to Quinn's administrator.

Kerr, Fraud & Mistake, pp. 189, 296; Story, Eq. Jur. §§ 110, 246; *Pickett* v. *Loggon*, 14 Ves. 214; *Butler* v. *Haskell*, 4 Desau. 651.

Messrs. **William Stone** and **H. D. Van Orden,** for respondents:

Assuming, for the sake of argument, that Dicks, previous to the purchase, knew the value of this claim, he was not bound to disclose his knowledge to the seller.

McFarland v. *Newman*, 9 Watts, 55; *Hargous* v. *Stone*, 5 N. Y. 73, 89; *Graham* v. *Meyer*, 33 Hun, 489; affirmed in 99 N. Y. 611; *Atty-Gen.* v. *Continental Life Ins. Co.* 94 N. Y. 199.

Mere inadequacy of price is no ground for setting aside an executed contract.

Story, Eq. Jur. § 245; *Osgood* v. *Franklin*, 2 Johns. Ch. 1; *S. C.* 14 Johns. 527; *Seymour* v. *Delancy*, 3 Cow. 445; *Udall* v. *Kenney*, 3 Cow. 590; *Worth* v. *Case*, 42 N. Y. 362; *Earl* v. *Peck*, 64 N. Y. 596; *Judge* v. *Wilkins*, 19 Ala. 765.

A party is not bound to use more care in dealing with executors or administrators in their representative character than in dealing with them as individuals.

Field v. *Schieffelin*, 7 Johns. Ch. 150; *Rogers* v. *Squires*, 98 N. Y. 49.

Andrews, *J.*, delivered the opinion of the court:

We concur with the opinion of *Judge* Davis that evidence was improperly excluded on the trial, bearing upon the question of fraud in the assignment and purchase of the claim in favor of the estate of Quinn, against the estate of Walling. This conclusion does not conflict with the authorities cited in the prevailing opinion, which establish that mere inadequacy of price, unaccompanied by fraud, is not a ground for rescinding an executed contract, and that a party is not to be deprived of the benefit of a good bargain, merely because the other party may have acted in ignorance of the value of the thing sold, or of some material fact known to the purchaser, and no undue advantage is taken by the latter, and where there are no special circumstances calling for disclosure. But the jurisdiction of chancery to rescind contracts for fraud or mutual mistake of material facts, is one of the best settled and most beneficent powers of a court of equity.

The case presented by the evidence was that of the assignment by Quinn's administrator to the defendant Dicks, for the consideration of $273, of a claim in favor of that estate against the estate of Walling, amounting to more than $5,000, and which on a reference under the statute, instituted subsequent to the assignment, has been found by the referee to have amounted on June 8, 1883, to $5,534.30. The assignment to Dicks was made March 10, 1882. If the estate of Walling was solvent it is the case of an assignment made by an administrator of a claim in favor of the estate he represented, upon a consideration which was grossly inadequate. The inadequacy of the consideration was one of the facts which the plaintiff was entitled to prove. Whether, standing alone, it would support a finding of fraud is not the question.

The trial judge, we think, erroneously excluded evidence offered to show that the estate of Walling was solvent. It was a material fact bearing upon the question of the adequacy of the consideration. So also evidence was excluded as to what the books of Quinn and Walling showed was the amount of the account against Walling. This evidence was also, we think, improperly excluded. If it had appeared from the books of both creditor and debtor that there was an admitted balance of $5,000 due to Quinn's estate, it would have been a significant circumstance bearing upon the good faith of the administrators of the respective estates; and also, in view of the other evidence, of the good faith of the defendant Dicks.

The way in which the defendant Dicks came into the transaction is peculiar. Quinn and Walling both died in 1880. In March, 1881, the administrator of Quinn wrote the administrator of Walling that Walling was indebted to Quinn in the sum of $273. In November, 1881, the defendant Dicks sent one Condit to Philadelphia with $300 to buy the claim, but James, the administrator of Quinn, then declined to sell it.

In March, 1882, James came from Philadelphia to New York and there had an interview with Apgar, Walling's executor. James informed Apgar that as near as he could make out the claim was $273. The executor of Walling did not inform James that the claim was more than $273, or say anything upon the subject of the amount, but said he would pay the claim if James would make a detailed statement of it. James replied that he could not make a detailed statement, but only a statement of what appeared on the books. Apgar replied that this would not do and that he could not pay it. Thereupon, James went to one Egbert, a nephew of Dicks and a son of Walling's bookkeeper, "of whom Apgar told him," and the two together went to the place where Dicks was employed as a clerk, and found him; and Dicks offered James $273 for the claim, which offer James accepted; and thereupon Dicks took from his desk an assignment already prepared, which James signed, and the $273 was paid.

The complaint alleges that at the time of the assignment Dicks had knowledge or information of the true amount of the claim. In his answer he denies knowledge only, but does not deny that he was informed of the amount. On the trial he testified that he did not know the amount until after the assignment, but admitted that he had testified, on the reference under the statute, that he was informed of the amount in October or November, 1881. If the plaintiff had been permitted to show that Dicks knew, or had reason to believe when he took the assignment, that Walling's estate was solvent, would not a case have been presented calling for explanation on his part? He knew that he was dealing with an administrator. If he knew also the amount of the claim, and that Walling's estate was solvent, must he not have known that the administrator of Quinn, in selling a claim of more than $5,000 for $273, was acting either under a mistake, or in reckless disregard of his trust? If he was acting in collusion either with the administrator of Quinn or of Walling, the transaction was a fraud. How came he to know that the claim was $273, or how did it happen that he prepared an assignment in advance?

We do not say that this transaction may not have been fair and honest; but the circumstances are suspicious, and it was a case where the fullest inquiry as to the facts should have been permitted within the rules of evidence.

The judgment should be reversed and a new trial ordered.

All concur.

Florian FLECKENSTEIN, *Respt.*,
v.
DRY DOCK, EAST BROADWAY & BATTERY R. R. CO., *Appt.*

A street railway company has the paramount, but not the exclusive right to the **use of** its **tracks.**

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Kings Circuit on a verdict for plaintiff for $1,000 damages, in an action to recover for personal injuries sustained through the alleged negligence of defendant's driver. *Affirmed.*

The facts and questions raised sufficiently appear from the opinion.

Mr. **Edmund Randolph** with *Mr.* **John M. Scribner,** for appellant.

The court erred in refusing to charge, as requested by defendant's counsel, that "the defendant was entitled to the exclusive use of its track for the unrestricted passage of its cars, and the plaintiff was bound to keep out of the way of the car, and if the plaintiff was hit while the car was proceeding at a lawful rate of speed, and the plaintiff had notice of its approach in season to get out of its way, the plaintiff cannot recover, and defendant is entitled to a verdict." *Hegan* v. *Eighth Ave. R. R. Co.* 15 N. Y. 382; *Craig* v. *Rochester etc. R. R. Co.* 39 N. Y. 410; *Whittaker* v. *Eighth Ave. R. .R. Co.* 51 N. Y. 299; *Wilbrand* v. *Eighth Ave. R. R. Co.* 3 Bosw. 320; *Adolph* v. *Cent. Park etc. R. R. Co.* 76 N. Y. 535, 536; *Barker* v. *Hudson River R. R. Co.* 4 Daly, 276.

Mr. **Stephen B. Jacobs,** for respondent:

There was no error in the charge of the court or the refusal to charge as requested by defendant.

Caldwell v. *N. J. Steamboat Co.* 47 N. Y. 282; *Smedis* v. *Brooklyn etc. R. R. Co.* 88 N. Y. 13, 19; 2 Rorer, Railroads, p. 1431; *Adolph* v. *Central Park etc. R. R. Co.* 65 N. Y. 554; 76 N. Y. 530; *Cohen* v. *Dry Dock etc. R. R. Co.* 69 N. Y. 170; *Healy* v. *Dry Dock etc. R. R. Co.* 14 Jones & S. 484; *Thurber* v. *Harlem Bridge etc. R. R. Co.* 60 N. Y. 327; *Kelsey* v. *Barney*, 12 N. Y. 429; 1 R. S. §§ 6, 7, p. 695; *Kenyon* v. *N. Y. Cent. etc. R. R. Co.* 76 N. Y. 607; *Green* v. *Erie R. Co.* 11 Hun, 333.

Earl, *J.*, delivered the opinion of the court:

The evidence of the plaintiff tended to show that while he was engaged in trying to remove his team and wagon from the track of defendant's road, one of its drivers carelessly drove one of its cars against him and caused the injury of which he complains. This evidence was controverted on the part of the defendant; and hence, there was a question of fact for the jury, and their decision thereon is not reviewable here.

The trial judge did not err in charging the jury that the defendant did not have the exclusive right to the use of its tracks, but simply the paramount right. Street railways have the lawful right to put their tracks in streets and run their cars thereon. Their cars are confined to the tracks, and cannot turn out to avoid obstacles thereon; hence, they have the right of way, and persons lawfully driving upon the same tracks must not recklessly, carelessly or willfully obstruct the passage of their cars. But such persons are not absolutely bound to keep off or get off from the tracks; they must fairly, and in a reasonable manner, respect the paramount right of a street railway; and if they do this, and without any fault on their part they are injured by carelessness or fault chargeable to the railway, the law affords them a remedy by action for damages.

The judgment should be affirmed.

All concur.

John M. HELCK, Admr., etc., *Appt.*,
v.
Henry REINHEIMER and Henry Reinheimer, Jr., Impleaded, etc., *Respts.*

1. If **defendants in a foreclosure** suit claim by rights which are paramount and not subject to the mortgage and can not be litigated therein, and allege that they are therefore improper parties defendant, it is proper to dismiss the complaint, with costs, as to them.
2. But **if defendants** in such action, instead of taking such ground, **set up** their **paramount rights** in answer to the complaint and ask that they be ad-

judicated upon, **and demand** judgment **that** the mortgaged **premises be freed from** the **mortgage** and that it be discharged of record, and on the trial both parties litigate those questions, and the defendants obtain judgment in their favor thereon, **it is too late for** the **plaintiff, on appeal, to take the ground that** the **complaint should have been dismissed as to them** because the questions could not properly be litigated in the action. **Both parties having consented to litigate, are bound by the judgment.**

3. Where a **deed made in pursuance of an antenuptial contract** conveyed land from the husband to a third party for the use and purpose mentioned in the contract, by which the husband in effect agreed to vest in his wife a life estate in the south half of the land, in case she survived him, with the remainder in fee to his heirs, and in the same contingency to vest in her an estate in the other half during two minorities of his children, with remainder in fee to such children, etc., *held,* that no trust estate and **no estate** whatever was **vested in** the **grantee named in** the **deed, but** such deed was **a mere conveyance** to him **to** the **use of** the respective **beneficiaries** named, **which uses were executed by** the **statute without** any **conveyance.**

4. **Where** the **contract** to carry out the use and purpose of which the deed was made, further **provided** that **if** the **wife died** before the husband without issue all the **land** therein described **was to be conveyed back to the husband,** and she died before him, *held*, that upon her death the deed ceased to have any operation and the whole title remained in him, and the mortgage given by him subsequent to the deed was a valid lien upon the premises.

(Decided April 26, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Third Department, modifying a judgment of the Sullivan Circuit dismissing the complaint in an action to foreclose a mortgage. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **John F. Anderson,** for appellant:

The action was treated on the trial as one solely for the purpose of construing the instrument under which the defendants claimed the premises and its effect upon the mortgage. Having been tried in the court below upon the merits without any exceptions on the part of the defendants, it will be so considered on appeal.

Brundage v. *Domestic etc. Missionary Society*, 60 Barb. 218; *Barnard* v. *Onderdonk*, 98 N. Y. 158–163; *Keeler* v. *Keeler*, 3 Cent. Rep. 324, 102 N. Y. 30.

The court had jurisdiction over the parties, and they submitted their rights to it, and asked for an adjudication.

Barnard v. *Onderdonk*, 98 N. Y. 158; *Jordan* v. *Van Epps*, 85 N. Y. 436.

One asserting a right under the mortgagor is a proper party to an action for the foreclosure of the mortgage.

Brown v. *Volkening*, 64 N. Y. 76; *Bank of Orleans* v. *Flagg*, 3 Barb. Ch. 316; *Keeler* v. *Keeler*, 3 Cent. Rep. 324, 102 N. Y. 30.

After these defendants had asked to have the trust deed declared valid, and the mortgage discharged of record, and had tried the case upon the issues raised by their answer, without an exception, and asked and procured from the court a decision holding, as conclusions of law: 1, that the contract and deed were intended as a marriage settlement for the support and benefit of the issue of said marriage; 2, that said instruments create a valid implied trust in the said Henry Reinheimer, which must be upheld and enforced as such; 3, that the mortgage to Catherine Gunglock conveyed no interest in the mortgaged premises; 4, that the plaintiff's complaint should be dismissed with costs; and these defendants having entered judgment upon that decision accordingly—it was error for the general term to dismiss the complaint as to these defendants because they were not proper defendants in such an action, or because the question litigated was not a proper one in an action to foreclose a mortgage.

Hynes v. *McDermott*, 82 N. Y. 41–48; *Osgood* v. *Toole*, 60 N. Y. 475; *Devyr* v. *Schaefer*, 55 N. Y. 446.

It was not a matter discretionary with the general term after the action had been disposed of in the court below upon the merits.

Cole v. *Malcomb*, 66 N. Y. 368.

The agreement, which is incorporated in the deed and in pursuance of which the deed was made, provides that Jacob Reinheimer will settle and assign the lands and tenements to Henry Reinheimer to the use and behalf of the said Philipena in manner following: in the event of the decease of said Jacob Reinheimer during the lifetime of the said Philipena, the said Philipena shall have the south half of the above named property during her natural life; and after her decease it shall revert to the heirs of the said Jacob Reinheimer.

The granting clause of the deed given in pursuance of this agreement, expresses the intent in the following language:

"I, the said Jacob Reinheimer, do hereby grant and convey to the said party of the third part the lands and tenements in the above named instrument in writing described and specified for the use and purpose also therein mentioned."

The purpose of the instrument is here clearly expressed.

The construction should be as favorable to, and as near the minds of, the parties as the rules of law will permit.

1 Chitty, Bl. book 2, p. 379; *Brown* v. *Murdock*, 12 Abb. N. C. 360.

It is clear, in this instrument, that Jacob Reinheimer did not intend to devest himself of this land, all that he had, during his lifetime. He only intended this deed to be operative, and to give his wife support, in case he died first. Then it would be important to not only reserve the use to his wife, but also to direct to whom it should revert at her decease.

Counsel for the defendant urges that the clause in the second part of the deed, "In the event of the decease of the said Philipena without issue during the lifetime of the said Jacob Reinheimer, all the property then held in trust under this indenture shall be transferred and assigned back to the said Jacob Reinheimer," is repugnant to the clause, "For the use and behoof of the said Philipena Winegarth in manner following: in the event of the decease of the said Jacob Reinheimer during the lifetime of the said Philipena," etc.

In a deed, if there be two clauses so totally repugnant that they cannot stand together, the first shall be received and the latter rejected.

1 Chitty, Bl. book 2, p. 381.

The latter clause was unnecessarily in the deed. It was made for a specific purpose; to take effect in a certain contingency. That contingency did not, and cannot now, happen. The deed is therefore inoperative, and the trust ceased when Philipena died during the lifetime of Jacob Reinheimer.

When the purpose for which an express trust was created shall cease, the estate of the trustee shall also cease.

R. S. Banks' 7th ed. p. 2182, § 62; p. 2183, § 67; *Quin* v. *Skinner*, 49 Barb. 128.

The word revert implies that there was a residue left in the grantor.

This is not one of the trusts authorized by that statute. It does not come under either of the subdivisions.

R. S. Banks' ed. p. 2181, §§ 49, 55.

This instrument is not a power under Revised Statutes, Banks' ed. p. 2182, § 58, for the reason that it does not direct or authorize the performance of any act which may be lawfully performed under a power.

It is a passive trust and is therefore void.

Jarvis v. *Babcock*, 5 Barb. 139; *Hotchkiss* v. *Elting*, 36 Barb. 38; *Verdin* v. *Slocum*, 71 N. Y. 345.

If it is held that this conveyance was limited upon a contingency which cannot now happen, and that it is a power in trust under the statute relating to powers (Revised Statutes, p. 2191, § 102, referring to the Statutes of Uses and Trust, p. 2183, § 67), the purposes of the power have ceased to exist, and the power has also ceased, and the premises revert to the grantor without any conveyance.

Quin v. *Skinner*, 49 Barb. 128, 133; *Hawley* v. *James*, 5 Paige, 318, 457; *Sharpsteen* v. *Tillou*, 3 Cow. 660; *Hutchings* v. *Baldwin*, 7 Bosw. 241.

As to the south half, this deed was void for uncertainty as to the heirs of the said Jacob Reinheimer.

The grantees must be plainly described, capable of contracting, and competent to take the estate.

Jarvis v. *Babcock*, 5 Barb. 146: 4 Kent, Com. 462; 2 Bl. 296; *Verdin* v. *Slocum*, 71 N.Y. 345, cases cited on 347.

If the deed to the north half is a power, it was given only for the purpose of securing to Philipena support in case of the decease of Jacob Reinheimer, during her lifetime. The power was to take effect only upon that contingency; and the purpose of the power having ceased, the power also ceases.

R. S. Banks' ed. p. 2191, § 102.

Mr. **T. F. Bush,** for respondents:

The plaintiff's action must be regarded as an action only for the foreclosure of the mortgage; being a mortgagee out of possession, and not having acquired the title or right of possession by foreclosure, he could not maintain an action in equity to set aside a prior conveyance, or to remove a cloud upon the title.

Moores v. *Townshend*, and cases cited, 3 Cent. Rep. 441.

Rights claimed in priority or hostility to the mortgage cannot properly be litigated in a foreclosure action; and a judgment determining that right is erroneous.

Eagle Fire Co. v. *Lent*, 6 Paige, 637; *Corning* v. *Smith*, 6 N. Y. 82; *Lewis* v. *Smith*, 9 N. Y. 502; *Merchants Bank* v. *Thomson*, 55 N. Y. 7; *Rathbone* v. *Hooney*, 58 N. Y. 463; *Emigrant Industrial Sav. Bank* v. *Goldman*, 75 N. Y. 127.

Since the reorganization of the courts of this State, blending in the same tribunal both legal and equitable jurisdiction, and permitting both legal and equitable controversies to be tried and determined in one action, there would seem to be no doubt as to the power of the court to determine all matters, voluntarily submitted by the parties.

Barnard v. *Onderdonk*, 98 N. Y. 158.

But here the real parties in interest under the trust deed, viz.: Anthony, Lizzie and George Reinheimer, the issue of the marriage of Jacob and Philipena, did not appear and answer. It was therefore not within the power of the court to determine the rights of those parties under that instrument upon the pleadings. Moreover, these children were infants, and their interests could not have been submitted in this action.

The two causes of action could not be joined without consent.

Code Civ. Proc. § 484.

The supreme court *in banc* having determined, in view of all the facts, that the rights of parties dependent on this trust deed ought not to be adjudged in this action, and having awarded to the plaintiff a usual judgment of foreclosure, leaving questions of title to be settled in a proper action for that purpose, after he shall have acquired all the title possible under his mortgage, leaves no ground whatever for appeal to this court.

The trust deed executed prior to the mortgage devested the mortgagor of his title.

It was a conveyance *in præsenti*. The language of the granting clause is "hereby grant and convey to the party of the third part the lands and tenements."

The only event in which the title was to return to the grantor was the death of Philipena, for whose use the conveyance was made, before her husband and without issue. This event can never happen as she died first, leaving issue.

It seems clear from a reasonable interpretation of the instrument that it operated to convey a life estate to Philipena, with a contingent remainder in fee to the children of the marriage.

The grant was to the "use and behoof of Philipena Winegarth." No estate, legal or equitable, vested in the trustee.

3 R. S. 7th ed. p. 2180, § 49.

The beneficiaries of the grant were, therefore, vested with a legal estate of the same quality and duration, and subject to the same condition as their beneficial interest.

Id. § 47.

The creation of contingent remainders, contingent both as to the person and estate limited, to vest in the future, limited in a life estate, is authorized by the revised statutes.

3 R. S. 7th ed. p. 2176, §§ 13, 26, 28, 30.

Presuming from the nature of the instrument that it was designed for the protection and support of the issue of the marriage, courts of equity put it beyond the power of the parents to defeat such intention by requiring the execution of a strict settlement, giving the parents an estate for life, with remainder over to children: and to preserve contingent remainders, limitations were made to trustees *eo nomine*.

Story. Eq. Jur. §§ 983, 984, 991, 992.

Rapallo, *J.*, delivered the opinion of the court:

This was an action to foreclose a mortgage on real estate, executed in the year 1873, by Jacob Reinheimer and his wife Philipena, to the plaintiff's intestate, to secure the payment of money lent. None of the defendants answered except Henry Reinheimer and Henry Reinheimer, Jr. The execution of the mortgage and the amount due thereon were not disputed, but the two defendants who answered set up as a defense that at the time of the execution of the mortgage, the mortgagor Jacob Reinheimer had no title to the mortgaged premises and had acquired none since; that in 1864 he had conveyed said premises to the defendant Henry Reinheimer in trust for the benefit of said Philipena and the heirs of said Jacob, and that said Henry still owned them for the purposes of the trust, and they demanded as relief that the complaint be dismissed, and that the premises be adjudged free from the lien of said mortgage.

The plaintiff then amended his complaint, and alleged that the trust set up in the answer had terminated; that the deed was void, and demanded, in addition to the judgment of foreclosure, that the alleged trust deed be adjudged null and void.

The same answer was then made to the amended complaint, and the issues were tried before the court.

No question of fact was involved, but only the construction and effect of the deed from Jacob Reinheimer and wife to Henry Reinheimer, given in 1864, the defendants contending that it created a valid trust, and that the mortgage created no lien, and the plaintiff insisting that the deed was of no effect.

Neither of the parties made any objection to the trial of this issue in the foreclosure suit, If the objection had been raised that the defendants claimed under a title paramount to the mortgage, it would, according to some of the cases cited, have been the duty of the court to refuse to try that issue. It is not necessary to decide that question now; but if that course had been taken, the judgment rendered would have had no effect upon the rights of either party, so far as the question of the validity or effect of the trust deed is concerned. But instead of taking the objection, both parties submitted their rights, in that regard, to the adjudication of the court.

The court at special term decided that the deed of September, 1864, to Henry Reinheimer and the contract therein recited, were intended as a marriage settlement for the benefit of the children of the marriage between said Philipena Reinheimer, as well as for the said Philipena, and created a valid implied trust for the benefit of said children, and a power in trust in favor of said Henry, and that the mortgage to plaintiff's intestate conveyed no interest in the mortgaged premises, and accordingly rendered judgment dismissing the complaint with costs.

The general term, on appeal from the judgment, decided that the question of the validity and effect of the trust deed should not have been tried in this action, the interests of those claiming under that deed not being subsequent to the mortgage, but being adverse to it, and that the complaint should be dismissed with costs as to the two defendants who had answered, but without any decision on the merits, and that as to the other defendants the usual decree of foreclosure should be granted. Judgment was entered, in conformity with this decision, containing a provision that the judgment should not prejudice any parties who might be interested under the construction of the trust deed or involving its validity or effect.

We do not concur in the view taken by the court at general term. If the defendants had claimed that they had been improperly made parties defendant, because their rights were paramount and not subsequent to the mortgage, and could not properly be litigated in this action, it might, as before stated, have been proper to dismiss the complaint with costs, as to them, for that reason. But in this case instead of taking any such ground, they themselves, in their answer, set up their claims under the trust deed, and asked that they be adjudicated upon, and demanded judgment that the mortgaged premises be freed from the mortgage, and that it be discharged of record; and on the trial both parties litigated the question and the defendants obtained judgment in their own favor thereon. Under these circumstances we think that it was too late to take the ground that the dismissal of the complaint as to them, should be sustained upon the ground that the questions could not properly be litigated in this action. Both parties having consented to litigate, and having actually litigated them in this form, we think they would both be bound by the judgment.

Jordan v. *Van Epps*, 85 N. Y. 435, 436; *Barnard* v. *Onderdonk*, 98 N. Y. 158, 163.

We must, therefore, consider the case as to the two defendants, who are respondents on this appeal, upon the merits. As to the other defendants whose interests are alleged in the complaint to be subsequent and subject to the mortgage, and who have not answered, the judgment will not estop them as to any rights which they may have by title paramount to the mortgage. But as to the two respondents, one of whom is the trustee named in the alleged trust deed, and the other one claiming to be a beneficiary thereunder, a valid judgment can be rendered determining the questions which they have voluntarily litigated in this action.

The deed of September, 1864, under which they claim, is in substance to the following effect: it recites an antenuptial contract between Jacob Reinheimer, then the owner in fee of the mortgaged premises, bearing date the 13th of August, 1863, of the first part, Philipena Winegarth of the second part, and Henry Reinheimer, brother of said Jacob, of the third part; that a marriage is shortly to be solemnized between said Jacob and said Philipena, and therefore it is agreed as follows: first, the said Jacob agrees that in case the intended marriage is solemnized, he and said Philipena will, by a sufficient conveyance, settle and convey the land in question on and to said Henry "*to the use, benefit and behoof of the said Philipena in manner following;*" that *in the event of the decease of the said Jacob Reinheimer during the lifetime of the said Philipena*, she shall have *the use of the south half* of the property during her natural life; and after her decease the same shall *revert* to the heirs of said Jacob Reinheimer; and second, *the use of the other half* of said premises *during* the minority of Henry Reinheimer and Mary Reinheimer, two children of said Jacob by a former marriage; and when they become of age that they shall have the north half of said property conveyed to them, and in the event of the decease of the said Philipena without issue during the lifetime of the said Jacob all the property shall be transferred back to said Jacob; third, the said Jacob agrees to adopt Christ Anton Winegarth, son of his said intended wife, and place him in every respect on equal terms with whatever children may issue from the marriage; and in case there should be no such issue, that said Christ Anton shall be joint and coheir with said Henry and Mary Reinheimer.

After this recital, the deed of September, 1864, proceeds to recite that the marriage has taken place, and in pursuance of the agreements and covenants contained in the antenuptial contract conveys the land in question to Henry Reinheimer for the use and purpose therein mentioned. The legal effect of this deed was, in our judgment, to vest in Philipena, in case she should survive her husband, an estate for her own life in the south half of the land, leaving the remainder in fee to Jacob, and in the same contingency to vest in her an estate, during the minorities of Henry and Mary, in the north half of the premises, with remainder in fee to said Henry and Mary, to vest in them on the death of Jacob in the lifetime of Philipena, and to take effect in possession on their coming of age; that no trust estate and no estate whatever was vested in Henry, the grantee named in the deed, but it was a mere conveyance to him to the use of the respective beneficiaries named, which uses would be executed by the statute, without any conveyance, and that those provisions were not to take effect at all, except in the contingency of Jacob dying during the lifetime of Philipena.

The intention clearly was to provide for Philipena in case she should survive Jacob, and she having died before him the deed, on her death, ceased to operate, and the whole title remained in him. The purpose of the antenuptial agreement, and of the deed, seems to have been only to provide for the case of Jacob dying in the lifetime of his wife, leaving him to take care of and provide for his children in case he should survive her.

There is no provision in the agreement or in the deed for the issue of the marriage, in any event. An intention to provide for them is sought to be implied from the provision in the agreement that in the event of the decease of Philipena without issue during the lifetime of Jacob, all the property shall be assigned back to the said Jacob; but it is impossible to say that this provision is, of itself, sufficient to create any trust in their favor, for there is nothing in the deed providing that if Philipena should die before Jacob, leaving issue, such issue should derive any benefit from the property.

The provision for the adoption of Christ Anton Winegarth gave him no greater rights than those of the children of Jacob, born either before or after the marriage. As their interests were subject to the contingency of Philipena surviving Jacob, they were defeated by her death during his lifetime.

We think the mortgage given to the plaintiff's intestate was a valid lien upon the mortgaged premises and that the deed to Henry Reinheimer ceased upon the death of Philipena to have any operation, Jacob Reinheimer being then living.

The judgments of the General and Special Terms should be reversed, and the usual judgment for the foreclosure of the mortgage and sale of the mortgaged premises should be rendered in favor of the plaintiff, with costs.

All concur.

Christoph SCHWINGER, *Respt.*,

v.

Alonzo B. RAYMOND *et al.*, *Appts.*

1. The **court of appeals can consider no objection** which is **not based upon** some **exception** taken at the time. Hence that court cannot grant relief, however unjust the verdict may be, unless the question is properly presented by an exception.
2. **Whether** or not a **deck load on** a **canal boat** was **properly covered** so as to protect it from rain, **is not a subject for expert testimony:** when the facts in relation thereto have been proved, it is for the jury to determine whether the covering was sufficient.

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Fifth Department, affirming a judgment of the Erie Circuit in favor of plaintiff on the third trial of an action to recover freight. *Affirmed.*

The action was first tried before a referee who held that both parties had violated their contract and that neither could recover from the other. This judgment was reversed by the general term and a new trial ordered. On the second trial, the referee, to whom the case was referred, reported in favor of plaintiff and judgment entered upon such report was affirmed by the general term but reversed by this court and a new trial ordered. See 83 N. Y. 192.

On the third trial at the Erie Circuit, verdict was entered for plaintiff. A motion made at special term, upon a case and exceptions, to set aside the verdict and for a new trial, was denied; and defendants appealed to the general term from the judgment and from the order denying a new trial, where the same was affirmed. See 35 Hun, 666.

They appealed to this court.

Mr. **D. C. Hyde**, for appellants.

Mr. **Geo. M. Osgoodby**, for respondent.

Earl, *J.*, delivered the opinion of the court:

This action was brought by the plaintiff to recover his freight for transportation of 200 barrels of beans on a canal boat from Albion and Brockport to New York City. The defendants allege by way of counterclaim that the beans were transported in such a careless and negligent manner that they became wet and in consequence thereof sprouted, and were greatly damaged.

Upon the trial the plaintiff gave evidence tending to show that the contract was to carry the beans on the deck of his boat, and that he was not to be responsible for any damage to them from moisture, but that he was to furnish lumber sufficient to cover them and that the defendants were to cover them with the lumber thus furnished. The plaintiff claimed, and gave some evidence tending to show, that he furnished the lumber in pursuance of this agreement.

On the part of the defendants they gave evidence tending to show that there was no agreement that the plaintiff should be exempt from any responsibility as carrier; that he was to furnish lumber to cover the beans, and that they were to give directions to the captain of the boat as to covering them with the lumber; that the plaintiff failed to furnish lumber for that purpose; and that the boat entered upon its voyage without any covering upon the beans, and that in consequence thereof they became wet and were greatly damaged.

As to what the contract really was between the parties there was a fair conflict in the evidence; but there was a great preponderance of evidence that the plaintiff did not furnish lumber to cover the beans and that he failed in that respect to keep his contract.

There was no motion, however, to nonsuit the plaintiff at the trial, or for the direction of a verdict, and no exception which brings to us the question whether there was sufficient evidence to sustain the verdict of the jury. The court below had the power to set aside the verdict as contrary to the evidence, without any exception; but in this court we can consider no objection which is not based upon some exception taken at the trial, and the appeal to this court from the order denying defendants' motion for a new trial brings here only questions of law based upon exceptions taken at the trial. Therefore, however unjust this verdict may be upon the facts appearing in the case, we are powerless on that account to give the defendants any relief.

The record contains but one exception taken by the defendants during the progress of the trial before the submission of the case to the jury. While one of the defendants was testifying as a witness he stated that he had heard the testimony of the captain of the boat as to the manner in which he covered the beans; that he was acquainted with the manner of covering deck loads, and had been for fifteen or twenty years; that he had been a shipper on the canal for sixteen or eighteen years, and that the defendants' warehouse was on the canal.

He was then asked this question: "What is a proper and proof way of covering deck loads?" To this there was objection on the part of the plaintiff, and then this question was asked: "I will ask if loose boards on barrels tiered in the manner mentioned by the witness Jacobs, loosely lapping one on the other in that way, lengthwise with the boat, if that will protect deck freight from rain?" To this plaintiff's counsel objected and the objection was sustained and defendants' counsel excepted.

We think the question was properly excluded. Whether the barrels were properly covered by the captain so as to protect them from rain was not properly a subject of expert evidence. The facts were proved, and from them the jury were to determine whether the covering was sufficient. It was not difficult to place all the facts before the jury, and from them they must be supposed to have had sufficient skill and knowledge, dealing with elements as to which all men are adequately informed, to determine whether the barrels were properly covered for protection against rain.

The only other exception which requires any notice whatever is that taken to the refusal of the judge to charge as requested by the defendants, as follows: "If they find from the evidence that it was a part of the contract of affreightment that defendants should perform or help perform the labor of covering the goods with lumber to be furnished by the plaintiff, and that he would not be responsible for the manner in which such labor would be done, nor for protection of the goods by such cover from the elements, and did furnish the lumber, yet that the defendants were entitled to a reasonable opportunity for performance after the production of the lumber, and the proper arrangement of the goods on the deck to receive the cover; and if the captain departed with the goods from Albion or Brockport without a proper cover or the defendants' consent that they might go uncovered, and without giving the defendants such opportunity, the plaintiff waived performance by defendants in that respect, and was bound to care for the goods as though no special contract had been made."

In reply to this request the court said: "It is unnecessary, I think, as my charge covers it."

This was a clear intimation to the jury that the request was proper, and we think the charge did substantially cover it. The court had charged the jury as follows: "If you find that the property should be carried upon the deck, and further, the agreement was that the plaintiff should furnish the lumber and the defendants should themselves place the lumber on the beans and cover them, then, if the captain furnished the lumber and they omitted to use it and cover the beans, when they had an opportunity, then they cannot recover; and that involves the proposition that the captain did furnish lumber, either at Albion or Brockport; for it was not contemplated that the defendants should at any other place adjust the lumber. If you find it was the agreement that the plaintiff was to furnish, and that the defendants were to advise the captain how to use it and cover and protect the property, and the lumber was furnished and they gave instructions to the captain, then they did all their duty, and the plaintiff was liable to them for the damages which might have occurred, the plaintiff himself assuming the risk that he would protect and preserve the property; and if he did not furnish the lumber at all then they were under no obligation to adjust it."

It may, however, be said that there was really no controversy at the trial that the defendants had opportunity to cover the beans, provided the lumber was furnished by the plaintiff. The contention of the plaintiff was that he furnished the lumber, and that of the defendants was that no lumber was furnished, although they repeatedly requested that it should be; and therefore they are not in a position to contend that they had no opportunity to use the lumber.

The principles controlling this case were in the main settled when it was here before; 83 N. Y. 192; and nothing further needs to be written now.

The judgment should be affirmed, with costs. All concur.

ELIAS STONE, *Appt.*,
v.
FRANKLIN INSURANCE CO. of Boston, *Respt.*

1. Under a **policy of fire insurance** containing a provision whereby the company reserves the right to return the unexpired premium *pro rata* at any time, with the effect of canceling and annulling the policy, a **notice of cancellation** by the company is effectual without returning part of the **premium** where the premium had **not in fact** been **paid** to the company, but, by the course of business between the company's agent and the insurance broker who obtained the policy, the agent had allowed the broker to take the insurance and to pay therefor when it suited his convenience.
2. *Held*, under the facts of the case, in connection with a clause in the policy providing that "any person, other than the assured, who may have procured this insurance to be taken by this company, through its regularly appointed agents, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever, or in any transaction relating to this insurance," that the **insurance broker** who obtained the present insurance and who had acted as agent for the assured in obtaining insurance in various companies for about two years, **was so far** the **agent of** the **assured that notice to him of** the **cancellation of** the **policy was notice to** the **assured.** (*Hermann v. Niagara Fire Ins. Co.* 1 Cent. Rep. 707, 100 N. Y. 411, distinguished.)

(Decided May 10, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Circuit on a verdict for defendant in an action on a policy of fire insurance. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **Benno Loewy,** for appellant:

The policy was in force and of binding effect, even though no premium had ever been paid upon it. The credit accepted by Langford on delivery of the policy was a sufficient payment to sustain it.

Bennett v. *Maryland F. Ins. Co.* 14 Blatchf. 422; *Boehen* v. *Williamsburgh City Ins. Co.* 35 N. Y. 131; *Angell* v. *Hartford F. Ins. Co.* 59 N. Y. 171.

Langford's notice that the Company desired to cancel the policy and that "The same will be held binding until the 28th inst., 12 o'clock noon. After that date the Company will not be liable for any loss under said policy," is a recognition of the validity of the policy.

Ætna Ins. Co. v. *Maguire,* 51 Ill. 342.

The policy in suit was never legally canceled, as the *pro rata* unearned premium had never been actually paid or tendered to the assured prior to the occurrence of the loss.

White v. *Conn. F. Ins. Co.* 120 Mass. 330; *Bennett* v. *Maryland F. Ins. Co.* 14 Blatchf. 422: *Hathorn* v *Germania Ins. Co.* 55 Barb. 28; *Van Valkenburgh* v. *Lenox F. Ins. Co.* 51 N. Y. 465; *Ætna Ins. Co.* v. *Maguire,* 51 Ill. 342, 351.

There was no cancellation of the policy, even if notice without repayment of the unearned premium had been sufficient, as there was no notice to the assured. The clause in the policy, making the person who procures the insurance "the agent of the assured, in any transaction relating to this insurance," does not make such person the agent of the assured to receive notice of its termination.

Hermann v. *Niagara F. Ins. Co.* 1 Cent. Rep. 707, 100 N. Y. 411, 415; *Von Wein* v. *Scottish Union & National Ins. Co.* 20 Jones & S. 490; *Hodge* v. *Security Ins. Co.* 33 Hun, 583; *White* v. *Conn. F. Ins. Co.* 120 Mass. 333; *Grace* v. *Am. Cent. Ins. Co.* 109 U. S. 278 (Bk. 27. L. ed. 932); reversing 16 Blatchf. 433; *Rothschild* v. *Am. Cent. Ins. Co.* 74 Mo. 44; *First Nat. F. Ins. Co.* v. *Isett,* 14 Rep. 378 ; *Latoix* v. *Germania Ins. Co. of New Orleans,* 27 La. Ann. 113; *Van Valkenburgh* v. *Lenox F. Ins. Co.* 51 N. Y. 465.

There is in this case no evidence whatever that Frank's authority extended to anything beyond placing the insurance.

Mr. **Osburn E. Bright,** for respondent:

The policy provides for the return to the assured of the unexpired premium *pro rata;* and although it is usually necessary to do so in order to effect a cancellation, yet where it becomes impossible to do so because no premium has ever been paid, and hence none is due the assured, the courts make an exception, and hold that the cancellation is valid in such cases, even where the cancellation is to take effect on a given hour on a future day.

Bergson v. *Builders Ins. Co.* 38 Cal. 541, 546; *Mueller* v. *South Side F. Ins. Co.* 87 Pa. 399; *Von Wein* v. *Scottish Union, etc. Ins. Co.* 20 Jones & S. 490.

In *Van Valkenburgh* v. *Lenox Fire Ins. Co.* 51 N. Y. 465, the attempted cancellation was made in ignorance that the fire had already occurred; p. 467; and it was also held that the agent was not authorized to consent to an abandonment of the insurance.

In *Griffey* v. *N. Y. Cent. Ins. Co.* 1 Cent. Rep. 528, 100 N. Y. 417, the company asked for a return of the policy, promising in that case to remit the return premiums. No step showing a purpose to abandon the insurance was taken by the assured.

Frank, being clearly the agent of the assured at the time of the fire, the notice of cancellation was properly served upon him.

Grace v. *Am. Cent. Ins. Co.* 16 Blatchf. 433; *Hartford F. Ins. Co.* v. *Reynolds*, 36 Mich. 502, 507; *Standard Oil Co.* v. *Triumph Ins. Co.* 64 N. Y. 85.

Earl, *J.*, delivered the opinion of the court:

On or about the 18th day of February, 1881, the defendant issued a policy insuring certain property of the Standard Tinware Company of the City of New York, to the amount of $1,500, for one year from the 16th day of February, 1881. The policy contained this clause: "To protect itself against such increase or change of the risk as may not, under the above conditions, render this policy void, the Company reserves to itself the right at any time and for any cause to return the assured the unexpired premium *pro rata*, which shall have the effect to cancel and annul this policy;" and also the following clause: "It is a part of this contract that any person, other than the assured, who may have procured this insurance to be taken by this Company, through its regularly appointed agents, shall be deemed to be the agent of the assured named in this policy, and not of this Company under any circumstances whatever, or in any transaction relating to this insurance."

The insurance was procured through an insurance broker named Frank, from Langford & Co., who were agents of the defendant. The premium was never paid, but by the course of business between Langford & Co., and Frank, they allowed Frank to take insurance and pay when it suited his convenience. On the 26th day of February Langford & Co. sent to Frank this notice:

"Dear Sir: The Franklin Insurance Company of Boston desire to cancel their policy No. 9190, covering property of Standard Tinware Co., Nos. 394 and 396 First Ave., N. Y. The same will be held binding until the 28th inst., 12 o'clock noon. After said date the Company will not be liable for any loss under said policy.

Yours respectfully."

This notice came to Frank's hands about 9 o'clock A. M. on the 28th and in the evening of the same day the property insured was damaged by fire to the extent of $4,600. Six other insurance companies had policies upon the same property. On the 16th day of June, 1881, the Standard Tinware Company assigned its claim against the defendant upon its policy, to the plaintiff; and in February, 1882, he commenced this action. He claims that the policy was in force at the time of the fire, while the defendant claims that it was effectually canceled before the fire.

The plaintiff contends that the cancellation was ineffectual, because at the time of the notice of cancellation a *pro rata* share of the premium was not returned. But the premium had never in fact been paid. If it could in any sense be treated as paid, it was so paid by the credit given to the broker, Frank. The defendant had never actually received anything, and therefore it had nothing to return. If the premium could be paid by the credit, so it could be restored by the cancellation of that credit, and after the defendant gave the notice canceling the policy its charge against Frank or the Tinware Company was thereby canceled. If it could thereafter enforce payment of the premiun against anyone, it would have been only a *pro rata* share thereof for the time intervening between the 16th and the 28th days of February, at noon, when the cancellation took effect. It was the agreement between the parties to the insurance that the Insurance Company should have the right to cancel the policy; and it was certainly not contemplated that it should make a present to the insured in case the premium had not been paid as a condition of its right to cancel. We do not think, therefore, that the contention is sound that the cancellation was ineffectual on account of the nonreturn of the *pro rata* portion of the premium.

It is further claimed on behalf of the plaintiff that Frank had no authority to receive this notice of cancellation, and that notice to him was not notice to the insured. We are of opinion that upon the undisputed evidence Frank was so far the agent of the Tinware Company that notice to him was notice to that company. He had been the agent of the Tinware Company for about two years, through whom it procured insurance upon its property from various companies, in all to the amount of $10,000. It does not appear that he received any particular instructions as to the companies from which he was to receive insurance, or as to the rates of premium, or the amount to be insured by any particular company. It is inferable that all these matters were left to his discretion.

After the fire Scheider, the president and general manager of the Tinware Company, did not know how much insurance the company had, nor what policies it held until he called upon Frank the morning after the fire and obtained the information from him. The defendant's policy, and probably all the other policies, remained in the possession of Frank until after the fire. Frank, when he received the notice of cancellation, retained the same and in no way objected that he was unauthorized to receive the notice, and when Scheider called upon him the next morning after the fire, he informed him of the receipt of the notice and he in no way questioned Frank's authority to receive it. On the afternoon of the same day Langford, one of defendant's agents, called upon Scheider, informed him that the policy was canceled, and thereupon Scheider surrendered it to him, without objection, as a canceled policy.

On the day after the fire formal notice of the loss, and in about two weeks after the fire, formal proofs of loss were served upon all the other companies, but not upon the defendant. In the proofs of loss thus served the insurances in the other six companies were specified and the loss was apportioned among them, in proportion to the amounts respectively insured by them; and one of the companies specified in the proofs paid to the Tinware Company its share of the loss as thus determined. In those proofs the defendant was not named among the insurance companies having policies upon the property. No claim of liability against the defendant on its policy was made until about three months after the fire, and no proofs of loss were served upon the defendant until about three and a half months after the fire.

From all these facts, including the stipulation in the policy above set out, it is clear that Frank was understood by the parties to be the general agent of the Tinware Company to procure and deal with this insurance. During more than three months after the fire his authority to that extent seems to have been conceded by the Tinware Company and was not questioned by anyone. If upon this evidence the jury had found that Frank was not authorized to receive the notice, their verdict would have been so far contrary to the evidence that it would have been the duty of the trial judge to set it aside.

It is true that Scheider testified that Frank was simply the broker whom he authorized to get so much insurance and that he did not consider him his agent, and that Frank testified that he had nothing to do "but to place the business" (meaning probably to perfect the insurance) as Scheider ordered him to do. But these were mere expressions of opinions by the witnesses, while testifying, which in no way impaired the force and significance of the other evidence or changed its legal effect.

It is a matter of some significance that nothing was said about the extent of Frank's agency in the charge of the judge; and he was not requested to submit the facts in reference to such agency to the jury.

If Frank had had no authority, except as a broker, to procure this insurance, and the defendant had been obliged to rely solely upon the clause in the policy above set out to establish his agency, then this case would have been in that respect like the case of *Hermann* v. *Niagara Fire Ins. Co.* 1 Cent. Rep. 707, 100 N. Y. 411.

But the evidence bearing upon Frank's agency distinguishes this case from that. Certainly, so long as Frank held the policy and it was carried upon his credit, and not delivered to or accepted by the insured, notice of cancellation could be given to him, and upon receipt of such notice, it would be his duty, as broker, to procure other insurance. Suppose in this case the notice had been given to him within one hour after the policy was delivered to him; would anyone doubt that the policy would have been thereby effectually canceled and that it would have been his duty at once to procure other insurance? The fact that it remained in his possession for ten days does not affect the principle or make any difference in his status, authority and obligation.

The further claim is made that there was not sufficient proof that Scheider was authorized to represent the Tinware Company. We think the proof is ample that he was so authorized and that he was the general manager of the company. It appears that the Tinware Company was the successor of Joseph Scheider & Co., and so it was printed upon the letter heads of the company. He was its president and acted for and represented it in all its transactions in reference to the insurance upon its property and the adjustment and settlement of the loss. The assignment of the claim to this plaintiff was executed by him. When testifying he spoke of the bookkeeper of the company as "my bookkeeper," and of Frank as "my agent," thus showing that, in his estimation at least, he was the company; and there is no hint in the evidence that any other person had authority to represent it.

From all this evidence the inference is irresistible that he was the general manager of the company, authorized to represent it; and the trial judge could properly have so determined as matter of law.

We are, therefore, of opinion that upon the evidence as it appears in this record, the trial judge could, if moved thereto by the defendant, have nonsuited the plaintiff. The plaintiff, therefore, has no cause of complaint of the verdict of the jury against him, or of any error in the charge of the judge.

If the policy had not been canceled before the fire, and thus had remained in force, its subsequent surrender to the defendant would not have extinguished its cause of action for its loss. It is the cancellation of the policy before the fire, and that alone, which requires the affirmance of this judgment.

The judgment should be affirmed, with costs.

All concur, except **Ruger,** *Ch. J.*, dissenting, and **Finch,** *J.*, absent.

Kittie M. PERKINS, *Respt.*,
v.
George HALL *et al.*, *Appts.*

1. Whenever an **equitable right to subrogation** cannot be made out without resorting to some **agreement** or security which is **void for usury,** no such equity exists.
2. Hence, **where one on paying off** certain **liens upon another's realty received** from the latter **a mortgage** on such realty which was subsequently declared **void for usury,** and thereafter assigned his cause of action arising out of his payment of said liens, and his assignee thereupon brought suit to revive and to be subrogated to and to enforce the liens which had been so satisfied, a **judgment, declaring** that plaintiff's assignor, having paid said liens and there being a junior mortgage, **was entitled to be subrogated** to said liens so paid by him, **was erroneous**—the so-called junior mortgage being the mortgage which had been declared usurious; the usurious contract being out of the case, he stood merely as a volunteer and would have no right to subrogation.

(Decided May 10, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Fourth Department, affirming a judgment of the Onondaga Special Term in favor of plaintiff in an action to revive and be subrogated to and enforce certain liens against real estate. *Reversed.*

The facts and questions raised appear from the opinion.

Messrs. **Hunt, Leavenworth & Everson,** for appellants:

There was no existing fact, pleaded, given in evidence or found, which gave plaintiff's assignor any standing whatever to subrogation, except that contained in the usurious mortgage. The mere fact of payment alone is not enough.

Baldwin v. *Moffett,* 94 N. Y. 82, 85.

Said usurious agreement cannot be the foundation of a valid claim.

Dung v. *Parker,* 52 N. Y. 500.

Mr. **J. R. Shea,** for respondent:

The mortgage given to plaintiff in consideration of his paying off certain existing and valid liens on the premises having been declared void, on the ground of usury pleaded by the mortgagor in an action to foreclose such mortgage, the original valid obligations were thereby revived.

Allison v. *Schmitz,* 31 Hun, 106, affirmed in 98 N. Y. 657; *Underhill* v. *Crennan,* 25 Hun, 569; *Real Estate Trust Co.* v. *Keech,* 69 N. Y. 248; *Gerwig* v. *Sitterly,* 56 N. Y. 214; *Cole* v. *Malcolm,* 66 N. Y. 366; *Barnes* v. *Mott,* 64 N. Y. 397; *Patterson* v. *Birdsall,* 64 N. Y. 294; *Cook* v. *Barnes,* 36 N. Y. 520; *Ellsworth* v. *Lockwood,* 42 N. Y. 89; *Winstead Bank* v. *Webb,* 39 N. Y. 325; *Russell* v. *Nelson,* 99 N. Y. 119, 123.

Rapallo, *J.,* delivered the opinion of the court:

The plaintiff, as assignee of Payn Bigelow, sought by this action to revive and be subrogated to and enforce certain liens upon real estate of the defendant Hall, which Bigelow had paid and procured to be discharged of record under an agreement with Hall. These liens consisted of two mortgages executed by Hall, and of certain legacies which were charges on the real estate in question.

It appears by the findings of the trial judge that on the 17th of October, 1874, an agreement was entered into between Hall and Bigelow whereby Bigelow agreed to advance the amount of the said liens and pay them off, and also to advance to said Hall the sum of $919.71 in cash and Hall. agreed that to secure the payment of said advances and of the further sum of $150 as a bonus Hall and his wife would execute a mortgage on said premises to Bigelow.

In pursuance of this agreement the mortgage was executed for $3,000 and interest, which amount included the amount then due on said liens and the cash advance of $919.71 and the bonus of $150. This mortgage of $3,000 provided in express terms that, as part of the consideration thereof, Bigelow was to assume and pay the before mentioned liens.

Bigelow paid a portion of the liens, and they were discharged of record; and he afterwards brought an action against Hall and others for the foreclosure of the $3,000 mortgage, in which action such mortgage was adjudged void for usury. After that adjudication he assigned to the plaintiff his cause of action arising out of the satisfaction of said liens, and she thereupon brought this action, and judgment was rendered in her favor in the supreme court, adjudging that her assignor (having paid said liens, and there being a junior mortgage) was entitled to be subrogated to said prior liens so paid by him, and entitled to enforce the same.

We are of opinion that this judgment was erroneous. The only claim of Bigelow to be junior mortgagee rested upon his $3,000 mortgage which was adjudged to be void for usury, and upon his agreement to pay off the prior liens, which agreement was part of the usurious contract. It was necessary to resort to this usurious contract and security to make out any equitable right in Bigelow to subrogation. If they were left out of the case, he would stand as a mere volunteer, and would have no right to subrogation; *Acer* v. *Hotchkiss,* 97 N. Y. 395; *Gans* v. *Thieme,* 93 N. Y. 225; and whenever an equitable right to subrogation cannot be made out without resorting to some agreement or security which is void for usury, no such equity exists.

We think the case of *Baldwin* v. *Moffett,* 94 N. Y. 82, is decisive on this point. None of the cases cited in the respondent's brief, or in the opinion at general term, conflict with this principle, or sustain the claim of the respondent.

In the cases of *Ellsworth* v. *Lockwood,* 42 N. Y. 89, *Barnes* v. *Mott,* 64 N. Y. 397, *Cole* v. *Malcolm,* 66 N. Y. 363, *Gans* v. *Thieme,* 93 N. Y. 225, no question of usury was involved, and they have no special bearing on the case. *Cook* v. *Barnes,* 36 N. Y. 520, *Winstead Bank* v. *Webb,* 39 N. Y. 325, *Gerwig* v. *Sitterly,* 56 N. Y. 214, *Real Estate Trust Co.* v. *Keech,* 69 N. Y. 248, *Russell* v. *Nelson,* 99 N. Y. 119, simply hold that when an existing valid debt is renewed, or the time of payment extended, or a valid security held therefor is canceled, by means of a subsequent agreement or security which is void for usury, the original debt or security is not invalidated; and if it has been discharged by means of the usurious security it will be revived and enforced.

In *Patterson* v. *Birdsall,* 64 N. Y. 294, the plaintiff was the holder of a valid junior incumbrance which entitled him, without reference to the usurious agreement, to redeem from prior incumbrances and be subrogated thereto.

In the case now before us the right of the assignor of the plaintiff to pay the prior incumbrances, and his claim to subrogation, rested wholly upon the usurious agreement. He had no position of junior mortgagee, except under the mortgage which was adjudged void for usury.

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur, except **Ruger,** *Ch. J.,* not sitting.

Julius POLLOCK, *Respt.,*
v.
Gouverneur MORRIS, *Appt.*

1. The provision of section 998, chapter 410, Laws of 1882, that **where no own-**

er is named in the report of commissioners **in a proceeding to open a street in New York City** or the owners named cannot be found, it shall be lawful for the city to **pay** the **award into** the **supreme court** to be disposed of by it, is for the city's benefit, and may be adopted and pleaded in defense, but the city is not compelled to resort to it.

2. This provision does not deprive the **Superior Court** of the City of New York of **jurisdiction of** an **action** against the city **to recover an award** for land taken for a street opening, and on such an action being brought in that court it is **proper for the city to bring the money into that court** for the true owner, by depositing it with the city chamberlain to the credit of such action.

3. A **question calling for** an **inference** or opinion of a witness founded upon facts either undisclosed or insufficient to warrant the conclusion sought, should be **excluded**.

(Decided May 13, 1887.)

APPEAL from a judgment of the General Term of the Superior Court of New York City, affirming a judgment of the Trial Term in favor of plaintiff in an action to recover an award for land taken in the opening of a street. *Affirmed.*

Reported below, 19 Jones & S. 112.

The facts and questions raised sufficiently appear from the opinion.

Mr. **W. Stebbins Smith,** for appellant.

Mr. **James R. Marvin,** for respondent.

Finch, *J.*, delivered the opinion of the court:

There are no exceptions to the findings of fact or conclusions of law contained in this record, and none to the refusals to find, requested on behalf of the defendant. There is nothing subject to our review beyond an exception taken to the jurisdiction of the court, and one to the exclusion of a question during the progress of the trial.

The action was brought in the Superior Court of the City of New York to recover an award for land taken in the opening of a street, and the city was the original defendant. A claim to the award was also made by Morris and an order of interpleader granted and entered substituting him as defendant and discharging the city upon its paying into the hands of the chamberlain to the credit of the action the amount of the award.

The jurisdiction of the court was assailed upon the basis of a single provision of the statute. Laws 1882, chap. 410, § 993.

The enactment is that where no ownership is named in the report of the commissioners, or the owners named cannot be found "it shall be lawful" for the city to pay the award "into the said supreme court" to be disposed of by it. This is a provision for the city's benefit which it may adopt and plead as a defense, but to which it is not compelled to resort. It did not adopt it in the present case and made no such defense, but admitting its liability to the true owner brought the money into the court in which it was sued and left it there to the credit of the action. That such action could be maintained for the award we have heretofore decided. *Fisher* v. *Mayor*, 57 N. Y. 344; *Spears* v. *Mayor*, 87 N. Y. 359.

The question excluded called for an inference or opinion of the witness founded upon facts either undisclosed or insufficient to warrant the conclusion sought. The inquiry whether all persons who obtained deeds from Morris did so because they were members of the Land Owners' Association involved an inference derived from the character of that association and Morris' relation to it, and the possibility of his conveyance outside of its control, matters which depended upon the force of the written contract, and as to which the judgment or inference of the witness was inadmissible. The effort was to derive from that inference another that Hyde when he took his deed from Morris must have been a member of the association, and then from that a third that he knew of the contract and so was affected by it. The witness did not even know that Hyde was a member of the association or that Morris had conveyed to him, and his inference from or reasoning upon the facts were properly rejected.

The judgment should be affirmed, with costs.

All concur.

Charles H. MEAD *et al.*, *Respts.*,
v.
Walter C. TUCKERMAN, *Appt.*

A written stipulation entered into by the attorneys for the respective parties declared that the **compensation of** the **referee** should be $20 "for every hearing." *Held*, that the meaning of the word **"hearing"** could **not** be extended so as to **include days appointed for** a **hearing but on which no hearing** in fact **was had,** and when, in advance of the time appointed, the parties had agreed upon a postponement and in pursuance thereof had omitted to appear before the referee.

(Decided May 13, 1887.)

APPEAL from an order of the Supreme Court at General Term in the Second Department, affirming an order of the Orange Special Term denying a motion for a new taxation of costs. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **Prescott Hall Butler,** for appellant:

An appeal lies to this court upon a question of costs, and especially from an order fixing the amount of a referee's fees under the statute, as one "affecting a substantial right, and not involving any question of discretion."

Code Civ. Proc. § 190, subdivision 2; *Sturgis* v. *Spofford*, 58 N. Y. 103; *First Nat. Bank of Cooperstown* v. *Tamajo*, 77 N. Y. 476; *Ogdensburgh etc. R. R. Co.* v. *Vermont & C. R. R. Co.* 63 N. Y. 176; *Columbian Ins. Co.* v. *Stevens*, 37 N. Y. 536; *Hobart* v. *Hobart*, 86 N. Y. 636.

The stipulation did not extend the right of the referee to charge for times when, under the general rules of practice, he could not charge the statutory fee. Under these general rules he was not entitled to any compensation whatever for days when no other proceeding was had before him, excepting the asking for and obtaining an adjournment.

Such a proceeding is not, under the decisions, a hearing, and the referee is not entitled to make any charge therefor.

Shultz v. *Whitney*, 17 How. Pr. 471; *Watson* v. *Gardiner*, 50 N.Y. 671; *Townsend* v. *Peyser*, 14 Abb. Pr. N. S. 324; *Brown* v. *Windmuller*, 14 Abb. Pr. N. S. 359.

The provision of the Code, § 3296, requiring that any agreement varying the compensation of referees fixed by law, should be in writing or entered in the minutes, is conclusive against the claim of the referee in this case for $780 over and above the $1,500 to which, at most, he can be entitled.

The stipulation speaks of "every hearing" only. The Code says "for each day spent in the business of the reference." These mean the same thing; or if there is any difference in meaning, the language of the stipulation has a more restricted application.

And if such a conversation were had as is relied upon to affect the original stipulation, it was a new and independent oral agreement between the parties in respect to the compensation of the referee, and as such it was nugatory and ineffective for any purpose under § 3296 of the Code: 1, because, admittedly, it was not entered into either at or before the commencement of the trial as appears by the affidavits which state this conversation; 2, because it was not in writing; and 3, because it was not entered in the minutes.

Shultz v. *Whitney*, 17 How. Pr. 474; *First Nat. Bank of Cooperstown* v. *Tamajo*, 77 N.Y. 476; *Townsend* v. *Peyser*, 14 Abb. Pr. N. S. 324; *Chase* v. *James*, 16 Hun, 14.

Mr. **Frederick Seymour**, for respondents:

The order is not reviewable by this court.

People, Clute, v. *Boardman*, 41 N. Y. 362; *McClure* v. *Supervisors*, 4 Abb. Pr. N. S. 202; *People, Waldman,* v. *Board of Police Comrs.* 82 N. Y. 506.

The parties placed their own interpretation upon the stipulation, and that interpretation was acted upon by the referee and by the plaintiff.

R. R. Co. v. *Trimble*, 10 Wall. 367 (77 U. S. bk. 19, L. ed. 948); *Reading* v. *Gray*, 37 N.Y. 79, 90; *Stokes* v. *Recknagel*, 38 N. Y. 368.

The stipulation provides that the referee's certificate shall be final as to the amount of the time spent by him.

It has been repeatedly held that where the parties have agreed to submit to a third person the decision of a question likely to arise under contract or stipulation, one of the parties cannot thereafter withdraw from him the decision of the question and submit it to the determination of a legal tribunal.

Smith v. *Brady*, 17 N.Y. 173, 176; *McMahon* v. *N. Y. etc. R. R. Co.* 20 N. Y. 463; *Barton* v. *Hermann*, 11 Abb. Pr. N.S. 378; *Weeks* v. *Little*, 15 Jones & S. 1, 30.

Per Curiam:

The question in this case turns upon the interpretation of that clause in the written stipulation of the attorneys for the respective parties, which declares that the compensation of the referee shall be the sum of $20 per day "for every hearing." The fees in controversy relate to the charge made by the referee for thirty-nine days on which appointments for a hearing had been made at the request of counsel, but where no hearing in fact was had, and no meeting or appearance before the referee. The failure to appear on the several days so appointed was due to the fact that by arrangement between the respective counsel made prior to the times fixed by the referee, the hearing was postponed, of which postponement the referee was notified. The postponements were made in most cases at the request and for the accommodation of the counsel for the defendant. The reference continued during the period of two years or more, and the referee charged fees for 114 days at the stipulated rate per day, amounting in the aggregate to $2,280.

We are of opinion that the charge for the days on which there was no hearing and no appearance, was unauthorized. The compensation of referees is fixed by statute at $6 "for each day spent in the business of the reference," unless a different rate of compensation is fixed by the consent of the parties, manifested by an entry in the minutes of the referee, or otherwise in writing, or a smaller compensation is fixed by the court or judge in the order of reference. Code § 3296.

In this case there was no entry in the minutes on the subject, and the right to fees beyond the statutory rate depends solely upon the written stipulation. It is impossible, we think, to extend the meaning of the words "every hearing" in the stipulation so as to include days appointed for a hearing, but on which no hearing in fact was had, and when, in advance of the time appointed, the parties by arrangement had agreed upon a postponement and in pursuance thereof had omitted to appear before the referee. It might have been proper to have provided for this contingency in the stipulation. But the stipulation is silent on the subject; and we cannot, in face of the statute, give any force to the alleged oral agreement or understanding between the counsel and the referee that the word "hearing" should be deemed to include appointments of hearings. The word "hearing" is unambiguous; and to give effect to the oral evidence would be adding a material term to the stipulation, contrary to settled rules of evidence.

The statute is founded on a just policy. When counsel undertake to fix the rate of compensation by agreement it is but just that their intention should be manifested in such a formal and authentic manner as to leave no doubt.

The orders of the Special and General Terms should be reversed, and an order entered for the retaxation in respect to the items mentioned

All concur.

Mark L. McDONALD, *Respt.*,
v.
Erwin DAVIS, *Appt.*

1. A **judgment** obtained against defendant intermediate the commencement by him of voluntary proceedings in bank-

ruptcy under the late bankrupt law and the granting of his discharge therein is **discharged by** the **discharge in bankruptcy** where such judgment was founded upon a debt which existed when the bankruptcy proceedings were commenced and was provable therein.

2. If the **discharge** had been in existence before the judgment was rendered, leave to set it up as a defense to the action might have been applied for; but as it had not been granted at that time, it is **competent to interpose** it as a shield **to any proceeding** taken **to enforce** the **judgment,** by asking for a **perpetual stay upon** the **execution,** if any is issued, or by setting it up as an answer to any action brought upon the judgment.
3. An **order** in the **bankruptcy court vacating** the **stay** which defendant had procured and permitting plaintiff to proceed with his suit and in case he obtained judgment therein permitting him to take any other proceeding which the law allowed, had no effect by way of limiting the subsequent discharge of defendant, and such **discharge can be pleaded** by him and its full legal force insisted upon **in** an **action upon** the **judgment and is a perfect defense** in such action.

(Decided May 3, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Circuit on a verdict directed for plaintiff on the second trial of an action on a judgment obtained in the State of California. *Reversed.*

The facts and questions raised appear from the opinion.

Messrs. **Joseph H. Choate** and **Henry A. Root,** for appellant:

It is claimed that the order of the bankruptcy court permitting plaintiff to prosecute his suit to judgment was equivalent to adjudging that the plaintiff's suit and the judgment and execution therein should not be affected by a discharge in bankruptcy, if any were subsequently obtained; and that the order was equivalent to a dismissal of the proceedings in bankruptcy *pro tanto.* Assuming the bankruptcy court to have thus intended by its order, such action would have been void and of no effect, because of the utter lack of power in the bankruptcy court to give such effect to the order under the Bankruptcy Act.

Under the general rule the plaintiff's claim would be barred by the discharge in bankruptcy.

Section 5119 of the United States Revised Statutes provides as follows:

"A discharge in bankruptcy duly granted, shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy."

Plaintiff's debt was provable in bankruptcy; U. S. Rev. Stat. § 5067; and it was so proved.

The fact that the original claim had been reduced to judgment does not merge it in the judgment. The judgment is not a new debt.

This is one of the class of cases in which a judgment, instead of being regarded strictly as a new debt, is "held to be merely the old debt in a new form, so as to prevent a technical merger from working injustice."

Clark v. *Rowling,* 3 N. Y. 216; *Monroe* v. *Upton,* 50 N. Y. 593; *Dresser* v. *Brooks,* 3 Barb. 429; *Re Brown,* 3 Nat. Bank. Reg. 584 [145]; *Re Stansfield,* 16 Nat. Bank. Reg. 268. See also, *Fox* v. *Woodruff,* 9 Barb. 498; *Re Van Buren,* 19 Nat. Bank. Reg. 149, 150; *Re Stevens,* 4 Nat. Bank. Reg. 367 [123]; *Re Vickery,* 3 Nat. Bank. Reg. 696 [171]; *Re Crawford,* 3 Nat. Bank. Reg. 698 [171]; *Re Rosey,* 8 Nat. Bank. Reg. 509; 6 Ben. 507; *Arnold* v. *Oliver,* 64 How. Pr. 452.

Mr. **E. R. Robinson,** for respondent:

Under the Bankrupt Act of 1867 it is not the general rule, as asserted by defendant, that a discharge in bankruptcy is *per se* a defense to a judgment obtained against a bankrupt, pending bankruptcy proceedings and before the discharge, upon a debt contracted prior to the adjudication in bankruptcy and provable against the estate.

On the contrary the general rule is precisely the reverse, viz.: that the discharge in bankruptcy is not a defense to such a judgment.

By this we do not mean, of course, that the court, by which the judgment was rendered, loses control over it, and may not, on equitable grounds and proper cause shown and laches excused, open its own judgment so as to permit the discharge to be set up as a defense, or even grant a perpetual stay against the enforcement of the judgment.

Monroe v. *Upton,* 50 N. Y. 593; *Palmer* v. *Hussey,* 87 N. Y. 303; *Revere Copper Co.* v. *Dimock,* 90 N. Y. 33; *S. C.* 117 U. S. 559 (Bk. 29, L. ed. 994).

The Bankrupt Law of 1867 necessarily contemplates that, notwithstanding the proceedings in bankruptcy, a valid and enforceable judgment may be obtained against the bankrupt, which will not be barred by a subsequent discharge in either of two events: 1, the failure of the bankrupt to apply for and obtain a stay; or 2, the dissolution of the stay, in consequence of unreasonable delay on the part of the bankrupt in applying for his discharge.

Bradford v. *Rice,* 102 Mass. 472; *Cutter* v. *Evans,* 115 Mass. 27; *Boynton* v. *Ball,* 105 Ill. 628; *Holden* v. *Sherwood,* 84 Ill. 92; *McCarthy* v. *Goodwin,* 8 Mo. App. 380; *Bowen* v. *Eichel,* 91 Ind. 22; *Palmer* v. *Merrill,* 57 Maine, 29; *Steadman* v. *Lee,* 61 Ga. 58; *Wells* v. *Edmison,* 32 Alb. L. J. 70, and cases cited; *Re Williams,* 2 Nat. Bank. Reg. 229; *Re Gallison,* 5 Nat. Bank. Reg. 353; *Re Mansfield,* 6 Nat. Bank. Reg. 388; *Dingee* v. *Becker,* 9 Nat. Bank. Reg. 508; *Revere Copper Co.* v. *Dimock,* 90 N. Y. 33; affd. 117 U. S. 559 (Bk. 29, L. ed. 994); *Smith* v. *Nelson,* 62 N. Y. 286; *Doe* v. *Childress,* 21 Wall. 642 (88 U. S. bk. 22, 549); *Eyster* v. *Gaff,* 91 U. S. 521 (Bk. 23, L. ed. 403); *Hill* v. *Harding,* 107 U. S. 631 (Bk. 27, L. ed. 493).

The English decisions, and those made by the New York Courts under the Act of 1841 (*Clark* v. *Rowling,* 3 N. Y. 216; *Dresser* v. *Brooks,* 3 Barb. 429, and *Fox* v. *Woodruff,* 9 Barb. 498) cited by the defendant, are inapplicable. No similar provision as to stay, etc., was contained in the Bankruptcy Act of 1841, or in the Bankruptcy Laws of England.

This difference in the rule with respect to the judgment being or not being barred by the discharge, arising out of difference of practice under the Act of 1841, with regard to granting a stay, is clearly pointed out in *Bradford* v. *Rice*, 102 Mass. 474, and *Re Gallison*, 5 Nat. Bank. Reg. 355.

The Bankruptcy Act of 1867 adopts and incorporates the Massachusetts practice of granting a stay for a reasonable time to enable the bankrupt to apply for and plead his discharge if obtained.

The reason for the New York decisions under the Act of 1841 that a judgment on a provable claim is barred by a subsequent discharge, therefore, no longer exists, and the propriety of adopting the principle of the Massachusetts decisions on this point is evident. *Cessante ratione, cessat lex. Eadem ratio, eadem est lex.*

The decisions made by this court under the Act of 1867 (*Monroe* v. *Upton*, 50 N. Y. 593, and *Palmer* v. *Hussey*, 87 N. Y. 308), relied upon by defendant, are not opposed to this view. They do not hold that as matter of law the subsequent discharge is a bar to a suit on the judgment obtained on the original debt; on the contrary, they proceed on the assumption that it is not a bar. They hold that a bankrupt against whom such a judgment has been obtained, may, by excusing his laches and showing adequate grounds for equitable interference, obtain relief from the court which rendered the judgment by having it vacated or having its enforcement restrained. The necessary implication is that in the absence of interference on equitable grounds by the court which rendered the judgment, the judgment may be sued, and the subsequent discharge will not be a legal defense to the suit.

Therefore, under the general rule, and without claiming or insisting upon the benefit of the express terms of the order of the bankruptcy court of the 25th of February, 1873, the plaintiff was entitled to have a verdict directed in his favor for the amount of the California judgment and interest.

But even if the general rule were as asserted by the defendant, nevertheless, the plaintiff, by reason of the order of the bankruptcy court of the 25th of February, 1873, was entitled to such direction.

The order of the bankruptcy court of the 25th of February, 1873, was much more than a mere vacation of the stay of proceedings. It not only authorized the plaintiff to proceed with his action in the same manner as he might have done if no restraining order had been issued, but also expressly provided that if he should obtain judgment therein he should be at liberty to sue out execution and to take any other proceedings under the judgment that the law and practice of the state court permits to enforce judgments. It was in effect an adjudication that the plaintiff's suit, and the judgment and execution therein should not be affected by a discharge in bankruptcy if any should be subsequently obtained, and was equivalent to a dismissal of the proceedings in bankruptcy *pro tanto*, and in so far as they affected the plaintiff's suit. Such adjudication was made after due notice and hearing, has never been appealed from, vacated or modified, and cannot be attacked collaterally.

The bankruptcy court had the power to make the order.

A bankrupt, by his laches in prosecuting his proceedings for discharge, loses his right to restrain creditors, and loses the benefit of his discharge as to a creditor who pursues and obtains his remedy, as the plaintiff in this case did, by motion to vacate the stay and proceed to judgment and execution. Such a creditor has a right to collect the judgment, if obtained, out of after acquired assets.

Bump, Bankruptcy, 240; *Re Woolums*, 1 Nat. Bank. Reg. 131; *Re Bodenheim*, 2 Nat. Bank. Reg. 133; *Re Martin*, 2 Nat. Bank. Reg. 169; *Re Willmott*, 2 Nat. Bank. Reg. 76; *Re Canaday*, 3 Nat. Bank. Reg. 3; *Belden's Case*, 6 Nat. Bank. Reg. 443; *Dingee* v. *Becker*, 9 Nat. Bank. Reg. 508; *Re Gallison*, 5 Nat. Bank. Reg. 353.

The direction of the verdict in plaintiff's favor was also proper, because he was precluded from availing of his defense in this action by the previous adjudication adverse to him in his proceeding in California to set aside the judgment.

Pepin v. *Lachemeyer*, 45 N. Y. 27; *Dwight* v. *St. John*, 25 N. Y. 203.

Peckham, *J.*, delivered the opinion of the court:

The judgment sued on herein was obtained in the State of California against defendant, intermediate the commencement by him of voluntary proceedings in bankruptcy in that State and the granting of the discharge therein. The judgment was founded upon a debt which existed at the time the bankruptcy proceedings were commenced, which debt was provable and was in fact proved in the bankruptcy proceedings.

Under the Bankrupt Act of 1841, this court held that a discharge in bankruptcy operated upon such a judgment. *Clark* v. *Rowling*, 3 N. Y. 216.

The ground upon which that decision rested was that although technically a judgment upon a contract merged the original debt, yet it did not do it so completely that the court could not look behind the judgment to see upon what it was founded, for the purpose of protecting the equitable rights of the parties in their original relations to each other. It was said that in such a case a judgment, instead of being regarded strictly as a new debt, was to be looked upon as the old debt in a new form so as to prevent a technical merger from working injustice.

The learned counsel for the plaintiff claims however that there are some provisions of the late bankrupt law which differ in such a material degree from those of the Law of 1841 as to call for a different disposition of the case.

It is urged that in the Act of 1841 there was no provision for a stay of proceedings in an action prior to the discharge in bankruptcy; and hence, a judgment obtained prior thereto should be discharged by the certificate, while in the later Act there is an express provision for such a stay and a defendant has a legal right to it. The argument then is that if, having the legal right to a stay, he does not procure it, or having once procured it, if it has been vacated by reason of his own neglect, the judgment then obtained ought to merge the debt and escape the force of the discharge in bankruptcy.

Although it does not appear that this precise argument has been heretofore used for the purpose of permitting such a judgment to remain, notwithstanding the discharge, still the question of the effect of such discharge, under the later Bankrupt Act, upon a judgment obtained under similar circumstances as the one in suit, has been decided; and we do not think it wise to open the door to further discussion here. *Monroe* v. *Upton*, 50 N. Y. 593–597.

That case decided the question in the same way as *Clark* v. *Rowling*, *supra*.

Nothing said or decided in *Revere Copper Co.* v. *Dimock*, 90 N. Y. 33, affects this question. The judgment in that case was subsequent to the discharge, and the court simply held that the determination by the judgment of the existence of a debt on that day was conclusive, and the prior discharge could not be set up to dispute the absolute verity which the judgment imported.

The cases of *Clark* v. *Rowling*, and *Monroe* v. *Upton*, *supra*, were cited with approval and distinguished from the one then under discussion. The case went to the Supreme Court of the United States, where the judgment was affirmed, the court holding that as the discharge had been obtained before the entry of the judgment, application to the court should have been made for leave to plead it as a defense, and that as that was not done the judgment was valid, like any other judgment in an action where a good defense existed but had not been pleaded, and that such defense could not thereafter be set up in an action on the judgment. *Dimock* v. *Revere Copper Co.* 117 U. S. 559–565 [Bk. 29, L. ed. 994, 996].

There is nothing in the case of *Hill* v. *Harding*, 107 U. S. 631 [Bk. 27, L. ed. 493], which impairs the authority of the two cases in this court already referred to, and we must still adhere to the law as therein decided, although the courts of some other States may have taken a different view of the question.

Of course the discharge operates only when pleaded, like the defense of a release or payment, and it must exist in order to be pleaded; hence, the answer to the plaintiff's claim that the Supreme Court of California was the only tribunal to which to apply for leave to set up the discharge. If the discharge had been in existence before judgment was entered, undoubtedly that tribunal would have been the one to apply to for leave to set it up as a defense to the action. As it had not been granted at that time, it was then competent to interpose it as a shield to any proceeding taken to enforce the judgment by asking for a perpetual stay upon the execution, if one were issued, or by setting it up as an answer to any action brought upon the judgment. This is all, as I understand the cases, that has been decided by any court of this State or by the Supreme Court of the United States.

The next question is as to the construction and effect of the order in the bankruptcy court in California, vacating the stay which defendant had procured, and permitting plaintiff to proceed with his case the same as if never restrained, and in case he obtained judgment therein, permitting him to take any other proceedings that the law and practice of the state court allowed.

We think this order had no effect by way of limitation upon the subsequent discharge of defendant, and that it could, therefore, be properly pleaded and its full legal force insisted upon in this action.

The order simply took away from the defendant the protection of the statute while he was obtaining his discharge, leaving the plaintiff at liberty, if he could, to obtain judgment and issue execution thereon and enforce payment of his debt before the discharge was obtained.

This is, or might be in many cases, a most desirable privilege to a plaintiff, while the defendant, by his negligence, is deprived of his freedom from harassing litigation during the bankruptcy proceedings which he otherwise would be entitled to, and which was one of the reasons for the provision granting a stay. *Hill* v. *Harding*, *supra*.

As we think this to be the true construction of the order it is unnecessary to examine the question of its legality, provided it were construed, as the court at general' term did, as in effect a dismissal of the bankrupt proceedings as to the plaintiff, grounded upon the assumed right to dismiss them altogether as to everybody, because the defendant had not applied to be discharged within one year after his adjudication as a bankrupt, there being, as alleged, no assets in the hands of the assignee.

The court should have granted the motion of defendant to direct a verdict for him, on the ground of the discharge in bankruptcy being a perfect defense to the action.

The judgment should, therefore, be reversed and a new trial ordered; costs to abide event.

All concur.

FLOUR CITY NATIONAL BANK of
Rochester, *Appt.*,
v.
TRADERS NATIONAL BANK of Rochester, *Respt.*

By the **system of exchanges among** the **banks in Rochester,** commercial paper held by either of them payable at any of the others was, on being presented at maturity at the bank where payable, marked by that bank "certified" and then returned to the bank presenting it, to be held as an item of credit to such bank in its exchange account for the day with the certifying bank, for the purpose of being set off against items in favor of that bank against the other. These exchange accounts were compared on the following day and the balance only was paid by the debtor bank to the other. On December 19, 1882, a draft payable that day at the plaintiff bank was presented to it by the City Bank of Rochester; the draft was marked "certified" by the plaintiff and returned to the City Bank, which bank on the same day transferred it to the defendant bank, under a special arrangement between them, in settling that day's balance between them. The City Bank stopped payment and was insolvent at the close of business on that day. On the next day this draft was, with other items, passed into the plaintiff bank by the defendant bank in settlement of the account between them, but on being discovered by the plaintiff was returned to the defendant, with a statement that the plaintiff had off-sets to a much larger amount in its account with the City Bank. The defendant insisted however on being credited with the draft and refused to pay the amount thereof to the plaintiff, which, therefore, brought this suit for such amount.

Held, that under the circumstances, the **defendant did not become a holder of the draft in good faith**; that it purchased what it knew to be a **mere voucher** for an item **in an account to be settled** between the plaintiff and the City Bank, and necessarily took it **subject to the result of the settlement** of that account, and that therefore judgment for defendant should be reversed.

(Decided May 10, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Fifth Department, affirming a judgment of the Monroe Circuit in favor of defendant on the second trial of an action to recover the balance of a bank exchange account. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **Thomas C. Montgomery,** for appellant:

The defendant is not entitled to credit for the certified Gordon acceptance in its account with the plaintiff, because it took that acceptance with knowledge that its transfer by the City Bank was a diversion of it to the plaintiff's damage, and was in violation of the plaintiff's right and of the City Bank's duty.

Davis v. *Spencer*, 24 N. Y. 386; *Morehouse* v. *Second Nat. Bank of Oswego*, 98 N. Y. 503; *Belden* v. *State*, 4 Cent. Rep. 180, 103 N. Y. 9; *Evans* v. *Kymen*, 1 Barn. & Ad. 528.

The suggestion that no notice of the plaintiff's rights can affect the defendant's claim under the certified acceptance, because such a certification is like the bank's circulating notes or currency, is without force.

No national banking association shall issue any notes to circulate as money other than such as are authorized by the provisions of this title.

U. S. R. S. § 5183.

The Gordon acceptance when presented for payment at maturity, and "certified," was thereby canceled, and served only as a memorandum that the City Bank was entitled to credit for the amount of it in the exchanges the next morning.

Irving Bank v. *Wetherald*, 36 N. Y. 337; *Meads* v. *Merchants Bank of Albany*, 25 N. Y. 143; *Warwick* v. *Rogers*, 5 Mann. & G. 340, 346; 16 N. Y. 125; *First Nat. Bank* v. *Leach*, 52 N. Y. 358; Chitty, Bills, p. 100; 2 Parsons, Bills, p. 215 and cases cited; *Comstock* v. *Hier*, 73 N. Y. 269; *Niagara Bank* v. *M'Cracken*, 18 Johns. 493.

Mr. **William F. Cogswell,** for respondent:

The certificate of the Flour City Bank was, in effect at least, its certificate of deposit, payable on demand to the holder. It did not become dishonored until after actual demand made and refusal to pay. This is the lowest form of stating the liability of the plaintiff bank. It has been stated much stronger.

Merchants Bank v. *State Bank**, 10 Wall. 604, 648 (77 U. S. bk. 19, L. ed. 1008, 1019); *Farmers & Mech. Bank* v. *Butchers & Drovers Bank*, 28 N. Y. 428; *Willets* v. *Phœnix Bank*, 2 Duer, 121; *Farmers & Mech. Bank* v. *Butchers & Drovers Bank*, 14 N. Y. 623; *Nolan* v. *Bank of N. Y. Nat. Banking Asso.* 67 Barb. 24; *Nat. Bank of Fort Edward* v. *Washington Co. Nat. Bank*, 5 Hun, 605; *Pardee* v. *Fish*, 60 N. Y. 271; *Merritt* v. *Todd*, 23 N. Y. 28; *Munger* v. *Albany City Nat. Bank*, 85 N. Y. 580; 16 N. Y. 144; Daniel, Neg. Inst. pp. 641, 642.

Rapallo, *J.*, delivered the opinion of the court:

By the system of exchanges established among the banks in the City of Rochester, commercial paper held by either of such banks, payable at any of the others, on being presented at maturity at the bank at which it was made payable, instead of being paid on presentation, was marked by the teller of the bank where payable, "certified," and was then returned to the bank which had presented it, for the purpose of being held as an item of credit to such bank, in its exchange account for the day with the certifying bank, and being off-set against any similar credit in favor of that bank against the other, which might arise during the same day for paper presented at and certified by it. On the following day these exchange accounts were compared and the balance only was paid by the debtor bank to the other.

Under this system the purpose of the certification was not to furnish to the bank receiving it a negotiable instrument, which might be put in circulation, but simply to furnish it with a voucher or memorandum, to be used as a credit on the settlement, the next day, of its exchange account with the certifying bank. If paper certified under these circumstances should be used, by the bank receiving it, as negotiable paper and passed off as such to anyone who would receive it, it is evident that the exchange system could not subsist.

All the banks concerned in the present litigation were doing business in the City of Rochester, and were parties to this system of exchanges, and had exchange accounts with each other. The plaintiff and the defendant had an exchange account with each other, and each had an exchange account with the City Bank of Rochester. On the 19th of December, 1882, a draft for $800 drawn by Wellington Bros. & Co., upon Gordon, payable at one day's sight to the order of the cashier of the City Bank of Rochester and accepted by Gordon on the 15th of December, payable at the Flour City Bank of Rochester (the plaintiff) was presented by the City Bank of Rochester to the plaintiff, it hav-

*See also note in Law. ed. [Ed.]

ing matured on the 19th. Instead of paying it, the plaintiff, in accordance with the exchange system, marked it "Certified" and returned it to the City Bank, to be used the next day in the settlement of its exchange with the plaintiff, charging it to Gordon as having been paid.

On the same day the plaintiff held commercial paper, payable at the City Bank of Rochester, and on presenting it at that bank received its certifications, in lieu of payment, to the amount of over $1,900, which were held by the plaintiff to be charged to the City Bank on the settlement of the exchange account, leaving a balance at the close of the day's transactions in favor of the plaintiff against the City Bank of over $1,100, after crediting the $800 draft.

At the close of the same day (December 19, 1882), there was a balance due to the plaintiff from the defendant on their exchange account for the day, and on the morning of the 20th of December the items of the previous day in favor of the plaintiff in its exchange account with the defendant, amounted to $26,423.15, and were undisputed, and the defendant, in settlement of this amount, sent in to the plaintiff $21,790.59 in cash and an account of items, which it claimed in its favor, amounting to $4,632.56, but in which was included the before mentioned $800 Gordon acceptance which had been certified by the plaintiff on the 19th for the City Bank of Rochester, and which belonged in the exchange account of the plaintiff with the City Bank of Rochester.

The City Bank of Rochester had finally stopped business at the close of the business day on the 19th of December and was then insolvent and did not afterwards resume.

The plaintiff on the morning of December 20, on discovering that the Gordon acceptance was among the items of credit claimed by the defendant in its exchange account, refused to allow it, and immediately returned it to the defendant, with a statement that the plaintiff had off-sets to a much larger amount in its account with the City Bank. The defendant insisted on being credited with the Gordon acceptance, and has never paid the balance of $800 claimed by the plaintiff; and hence this action.

The trial court found that defendant had received the certified Gordon acceptance from the City Bank of Rochester on the 19th of December, 1882, under the following circumstances: although by the usual custom between the banks the exchanges were to be made on the day following the certifications, the defendant (instead of exchanging with the City Bank in the usual way) had, for a month previous to the 19th of December, 1882, required of the City Bank a settlement each day, of the balance of that day, instead of settling on the morning after. On the 19th of December, on exchanging their respective demands due on that day, there was found due from the City Bank to the defendant a balance of $8,000, and the said Gordon acceptance, certified by the plaintiff, was thereupon transferred by the City Bank to the defendant as a payment of $800 of that balance, the remainder being otherwise paid, and the defendant surrendering its demands against the City Bank in consideration of such payment and transfer.

It was further found by the trial court that prior to November 19, 1882, the exchanges between the defendant and the City Bank had been settled in accordance with the general custom among banks before stated, that is on the day after the paper became due and was certified, but that the defendant had adopted the course of requiring from the City Bank a settlement on the same day, because it was unwilling to give credit to the City Bank; that this Gordon acceptance was taken by the defendant from the City Bank, under circumstances which charged the defendant with notice that it was intended to be used in settling the exchanges between the plaintiff and the City Bank; that the intention of the plaintiff in certifying the Gordon acceptance, instead of paying it, was that it might be offset by any cash demands which the plaintiff might have against the City Bank, and that such certification carried with it notice of such intention to the defendant, and that the defendant took the said Gordon acceptance, with notice that it was diverted from the purpose for which it had been certified by the plaintiff.

On the 19th of December, and before the Gordon acceptance was passed off by the City Bank to the defendant, the City Bank had certified paper held by the plaintiff, to the amount of $1,900.

On the first trial of this action the special term held that the certification in question was not negotiable, and rendered judgment in favor of the plaintiff. This judgment was reversed at general term, and a new trial ordered. On the second trial the court at special term, conforming to the decision at general term, rendered judgment for the defendant, and that judgment was affirmed; and the plaintiff now appeals to this court.

It is claimed on the part of the plaintiff that the certification, being of an acceptance payable on time, was notice that the paper had matured and been presented for payment at maturity, and that as to all the parties to the bill the certificate was a payment which discharged them, and the paper had lost its negotiable character. On the other hand it is claimed that although all the parties to the bill were discharged, and as to them the paper had ceased to be negotiable, yet as to the Bank certifying it, the certification was equivalent to a certificate of deposit payable to bearer on demand, and as such was negotiable as against the Bank.

We do not deem it necessary to pass upon this question, because to entitle the holder of the certification to recover upon it, without regard to the equities between the certifying Bank and the party to whom the certification had been issued, it was necessary not only that it should be negotiable, but that the party claiming on the certification should have received it in good faith and without notice of those equities.

It seems to us that the defendant in this case does not, under the facts found, occupy that position. The defendant received the certification with notice that it represented an item merely in the exchange account between the City Bank of Rochester and the plaintiff, and that whether anything would be due or payable upon it would depend upon the state of the exchange account between the two Banks at the close of the day,—that it was certified for the purpose of being used in the settlement of that account. This was notice that it was intended as a mere voucher, and was not made for purposes of negotiation; and it is expressly found that the defendant took it with notice that in transferring it to them the City Bank was diverting it from the purpose for which it had been certified by the plaintiff. It matters not that the defendant did not know the actual state of the exchange account between the City Bank and the plaintiff. As matter of fact it appears from the findings that at the time the defendant received the plaintiff's certification from the City Bank it had been more than paid by certifications which had been made by that bank and were held by the plaintiff. But it is not necessary that the defendant should have had notice of that fact. It knew that there was an exchange account between the plaintiff and the City Bank and that the certification was subject to the settlement of that account on the following day, and also that in the ordinary course of business it was probable that the City Bank held paper certified by the plaintiff against which this certification was applicable.

By insisting on the City Bank settling with it on the 19th, contrary to the general custom, because it doubted the credit of the City Bank, and taking from it this certification for that purpose, it was endeavoring to cast upon the plaintiff, in case it had off-sets, the risk which it was unwilling to incur, and to subject the plaintiff to the chance of the City Bank providing other means, if required, of meeting its liabilities to the plaintiff. Whatever might have been the rights of an innocent party taking the certified draft in ignorance of the purpose for which the certification had been made, and of the right of the plaintiff to apply it on a pending account, we cannot hold, in the face of the facts found, that the defendant in taking this paper from the failing bank, under the circumstances, became a holder in good faith. It purchased what it knew to be a mere voucher for an item in an account to be settled, and necessarily took it, subject to the result of the settlement of that account.

The judgments of the General and Special Terms should be reversed, and a new trial ordered; costs to abide the event.

All concur.

Loftis WOOD, *Appt.*,
v.
Peter B. AMORY, *Respt.*

1. The **failure to inform** another of the existence of a fact is **not a fraud, unless** there was some **legal duty to make** the **disclosure.**
2. There must be some relation of trust and confidence existing between the parties upon which to build the duty to disclose before the right to disclosure can be enforced, and **no such trust** can be **supposed in** the **case of adverse parties to a contested lawsuit** as to facts connected with the amount of the judgment.
3. In a **suit** by the defendant in a former action, against the plaintiff therein, seeking **to recover** a portion of the **amount paid** under execution **upon** the **judgment** in such former action, alleged to have been **erroneously included** in such judgment through inadvertence on the part of the referee, which mistake of fact was alleged to have been known to the plaintiff in such former action but not to the defendant therein, *held*, that the complaint failed to state facts sufficient to constitute a cause of action.
4. Where **a judgment defendant learned** during the pendency of an appeal that the **judgment** appealed from had been, through inadvertence of the referee, **entered for too large an amount,** but failed to object or to take any steps to correct the mistake, and after affirmance of such judgment paid the amount thereof under execution,—such **payment** must be considered as **voluntary.**

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Special Term sustaining a demurrer to the complaint in an action to reform or modify a judgment on the ground of mistake. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **Samuel J. Crooks,** for appellant:

The judgment is a contract, and as such may be reformed: 1, because the mistake is plain and can be clearly made to and does appear from the allegation in the complaint; 2, it was a mutual mistake; and 3, one of fact.

It is no answer to say that the mistake could have been corrected at law; it was not apparent from the record, nor was it corrected, which is a sufficient answer; nor is it any answer to say that the mistake arose from a want of care on the plaintiff's part, or that the defendant cannot be restored to his original position.

Kingston Bank v. *Eltinge,* 40 N. Y. 391; *Nevius* v. *Dunlap,* 33 N.Y. 676.

The remedy sought is clearly within the equity powers of the court, and presents a state of facts showing an apparent valid judgment *in toto;* whereas, in fact, to a large extent, the judgment is not valid, owing to facts *aliunde,* that is to say, facts that can only be made to appear by evidence outside the record.

Binck v. *Wood,* 43 Barb. 315; *White* v. *Merritt,* 7 N. Y. 352; *Paine* v. *Upton,* 87 N. Y. 327; *Chapman* v. *Brooklyn,* 40 N.Y. 372, 381; *Heywood* v. *Buffalo,* 14 N. Y. 534; *N. Y. Ice Co.* v. *Northwestern Ins. Co.* 23 N. Y. 357–361.

"Fraud vitiates all contracts and fraudulent proceedings, and equity as a general rule will relieve against all deeds, writings, and assurances, also against all judgments and decrees, which have been obtained by fraud and imposition.

Willard, Eq. Jur. 160.

In cases where fraud is not penal, equity has concurrent jurisdiction with courts of law, as a general rule."

Dederer v. *Voorhies*, 81 N.Y. 153.

Mr. **George E. Horne**, for respondent:

The action was brought to review a judgment recovered in a court of competent jurisdiction, which had the entire subject matter in dispute before it; which judgment had never been reversed, but on the contrary, had been affirmed by all the appellate courts, and paid in full by the judgment debtor. It was an action to overhaul such a judgment, and to recover back money paid on that judgment. The ground of recovery was stated to be an alleged mistake by the court in arriving at the amount of recovery; and an excessive award by the former judgment.

No such action can be maintained. The authorities are unanimous against it, from the earliest reported cases, both in England and in this country, to the present time.

Marriot v. *Hampton*, 7 Term Rep. 269; *Walker* v. *Ames*, 2 Cow. 428; *Leonard* v. *Wilkins*, 9 Johns. 233; *Platner* v. *Best*, 11 Johns. 530; *White* v. *Merritt*, 7 N.Y. 355; *Farrington* v. *Bullard*, 40 Barb. 517; *Binck* v. *Wood*, 43 Barb. 315; See also, 6 Barb. 308; 15 Barb. 646.

The rule is equally applicable to courts of equity, as of law.

LeGuen v. *Gouverneur*, 1 Johns. Cas. 437.

Peckham, *J.*, delivered the opinion of the court:

The questions herein arise upon a demurrer to the plaintiff's complaint.

The plaintiff in his complaint alleged that prior to October 1, 1860, one Austin Packard commenced an action against him, which was duly referred, and on that date the referee reported in favor of Packard, and judgment was entered in favor of the latter for nearly $30,000.

On appeal by the defendant therein, the judgment was modified by the general term and so affirmed, and the defendant then and about December 8, 1864, appealed to the court of appeals, and the judgment was affirmed in the commission of appeals in January, 1873; that Amory, this defendant, previous to the entry of the first judgment, became the owner of the claim which Packard had been prosecuting against this plaintiff up to that time, and succeeded to the interest of Packard, and prior to the judgment of the commission of appeals he had been made the party plaintiff in such action; that such judgment was entered on or about January 3, 1873; that the judgments have all been paid through executions duly issued to enforce the same; that in or about the month of May, 1872, this plaintiff first was advised of the existence of the mistake hereinafter spoken of and of the means of verifying the same, and that such mistake did not appear from any of the records in that action and could only be shown by evidence *aliunde;* that the action was brought to compel an accounting by this plaintiff with Packard, and on the trial, and in making up his report, the referee made two mistakes of fact which increased the judgment against this plaintiff by the amount of more than $10,600 at the date of the report in August, 1860, and these errors of fact became a part of and entered into the judgment above spoken of, and remained forever uncorrected, and the amount thereof was fully paid to the defendant herein, with interest from date of the report; that these errors of fact were wholly attributable to the inadvertence of the referee; that, at the time of filing the report, Packard knew of these mistakes of fact made by the referee and concealed his knowledge from the referee and from the plaintiff herein, with intent to deceive and defraud the plaintiff; that this error was so concealed by Packard until May, 1872, when Packard, having quarreled with his assignee Amory, made an affidavit in proceedings in that action and therein disclosed the mistakes spoken of; that at the time of the transfer of the claim by Packard to Amory, and at the time when the latter was substituted as a party plaintiff, he well knew these mistakes of fact had been made by the referee and for the purpose of defrauding this plaintiff he has at all times concealed the same from this plaintiff; and that Packard and Amory colluded and conspired together so to do for the purpose of defrauding the said plaintiff, to the extent of these errors to the end that they might profit thereby.

The plaintiff then demanded, as relief, that the judgment, as affirmed by the commission of appeals, should be modified so that the sum of 10,000 and some odd dollars, with interest from August 16, 1860, etc., might be adjudged to have been included in said judgment by a mistake of fact, and such judgment should be declared to be erroneous to that extent; also, that this plaintiff might recover from the defendant the sum above named, etc., besides costs; and for such other or further relief as might be just.

The defendant demurred to this complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer has been sustained at the special and general terms; and from the judgment of affirmance, the plaintiff has appealed to this court.

The allegations of fraud made against Packard and defendant simply assert a failure on the part of either to inform the plaintiff of the existence of the mistake. There is no allegation that either resorted to any misrepresentations or had recourse to any artifice to prevent the disclosure to the plaintiff, or that either did anything whatever towards concealment beyond the bald and naked failure to give this information to him. If this failure were not in and of itself a fraud, it is not made so by alleging that it was induced by a desire to deceive and defraud the plaintiff. *Van Weel* v. *Winston*, 115 U. S. 228 [Bk. 29, L. ed. 384].

It was not a fraud unless there was some legal duty resting upon the defendant to make the disclosure.

It may be that *in foro conscientiæ* the disclosure should have been made, but unless a party has the right to this information, not only in that forum but *juris et de jure*, the withholding of it cannot be classed as a legal fraud. 1 Story, Eq. § 207 *et seq.*

I can see no such right here. There must be some relation of trust and confidence existing between the parties upon which to build the duty to disclose, before the right to a disclosure can be enforced by the courts. As has been said, it is not always easy to define when this relation of trust and confidence exists; but there is no difficulty in denying its existence here. If there even were a case where no such trust could be supposed, it is that of adverse parties to a contested lawsuit.

No additional strength is given to the allegation of fraud by stating that Packard and defendant colluded and conspired together to conceal the fact for the purpose of defrauding the plaintiff. If there were no duty resting on either to disclose the fact, each had the right to agree to be silent. The agreement to be silent where each has the right so to be is not made illegal by alleging that it was done pursuant to conspiracy and collusion between the parties, without going further and showing that the concealment was but one step in carrying out a conspiracy which was unlawful, and it must be shown that it was unlawful and how, and what the steps were which were illegal or fraudulent. Mere general allegations of fraud or conspiracy are of no value as stating a cause of action. *Van Weel* v. *Winston, supra; Cohn* v. *Goldman*, 76 N. Y. 284; *Knapp* v. *Brooklyn*, 97 N.Y. 520.

The idea of a mutual mistake existing between the parties, it seems to us, is equally idle upon the allegations in this complaint. The mistake was wholly that of the referee, unaided and uninfluenced by either party. That there may not be relief given in some form when such a mistake exists, we are far from saying, but not upon the principles applicable to transactions between persons who, in the course of the business, make a mutual mistake of facts upon which their transaction is based; and it is clear that a mere mistake of a referee or court in its decision, could not be remedied in such an action as this.

Assuming, however, that a case of fraud or mistake, or both, were made out on this complaint, yet it is shown therein that the plaintiff had full knowledge of all the facts about the time the case was argued in the commission of appeals, and months before the decision of the case by the court, and yet from the time when he acquired such knowledge up to the time of the commencement of this action in 1876, so far as appears from the complaint, he took no step, made no protest nor claimed in any way the existence of a mistake or fraud; and in the most perfect silence he paid the executions (sometime in 1873) issued upon the judgments; and he gives no excuse for such silence or for the payment of the judgments with this knowledge, and without the least effort made to correct the mistake or to expose the fraud and escape from the payment of the money based upon its successful accomplishment.

Under these circumstances we cannot see but that this payment was substantially a voluntary payment, after knowledge of all the facts, and no cause of action could survive such a payment.

The judgment should be affirmed, with costs.

All concur.

John REXFORD, *Appt.*,
v.
STATE of New York, *Respt.*

1. The **State** can only be **sued** with its own consent and for liabilities which it chooses to assume.

2. The **Act of 1870**, chap. 321, permits **claims** to be filed **for damages sustained from** the **canals;** from their use and management; or arising from a neglect of an officer in charge; or from any accident or other matter connected therewith; but does **not** extend to **claims** arising from damages **resulting from** the **navigation** of the canals.
3. The **Act of 1876**, chap. 444, which constituted the board of audit and gave it authority to hear "all private claims and accounts," **did not** in any manner **change** or enlarge the **liability of the State.**
4. The exception from the **jurisdiction of** that **board** of claims resulting from the navigation of the canals, only takes out of such jurisdiction such claims as are strictly within the terms of the exception, that is those which result from the passage of boats along and upon their waters, and does not apply to accidents or **injuries befalling one not at the time engaged in navigation of the canals** and which did not result from that navigation.
5. Where the **master of a canal boat,** on the way to his boat, in **climbing** up the abutment of a **bridge** by irons fixed therein, furnished by the State and serving as the rungs of a ladder, was **injured** through a loose stone falling from the wall, *held*, that the **board of claims had jurisdiction** of the claim for the damages thus sustained by the negligence of the State or that of its officers, and that the injury did not result "from the navigation of the canals."
6. The bridge being a structure built and maintained by the State to carry a highway over the canal, the proof given was sufficient to warrant the inference that the street existed for public passage when the canal was built and that the **duty of maintaining** the **bridge** had been **assumed by** and rested upon the **State.**
7. Although the **berme bank** of the **canal** where the injury happened was in no sense a public highway, yet it there served for the passage of those whose business brought them to that locality and the **presence of the irons** was **an invitation to such persons to use them** and indicated a purpose on the part of the State to permit the crossing of the bridge by such means and in such manner.

(Decided April 19, 1887.)

APPEAL from an award of the Board of Claims, dismissing (for want of jurisdiction) a claim for damages for injuries received through a defective bridge over the Erie Canal in the City of Syracuse. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **A. L. Johnson,** for appellant:

The board of claims has jurisdiction to audit and allow the claim in question.

Section 1, chap. 321, Laws, 1870, reads as follows:

"Jurisdiction is hereby granted to and conferred upon the canal appraisers, to hear and determine all claims against the State, of any and all persons and corporations, for damages alleged to have been sustained by them from the canals of the State, or from their use and management, or resulting or arising from the negligence or conduct of any officer of the State having charge thereof, or resulting or arising from any accident or other matter or thing connected with the canals. * * * *Provided*, That the provisions of this Act shall not extend to claims arising from damages resulting from the navigation of the canals."

The section above quoted seems broad enough to embrace all claims for damages arising or resulting from the canals by reason of any neglect of the State or its officers having charge thereof, and should be so construed as to give effect to all its provisions.

Rosenplaenter v. *Roessle*, 54 N. Y. 262; *Ramaley* v. *Leland*, 43 N. Y. 539; *People* v. *McGloin*, 91 N Y. 250.

By section 2, chap. 444, Laws 1876, the jurisdiction of the canal appraisers was transferred to the state board of audit, created by that Act; and by sections 12 and 13, chap. 205, Laws 1883, amended by section 8, chap. 60, Laws 1884, the jurisdiction of the canal appraisers and of the state board of audit was transferred to the board of claims.

The evidence shows that the stone that fell upon the claimant had been loose at least a year before the accident, long enough to presume knowledge of its condition on the part of the State, and especially when the defect existed in the midst of a populous city.

Conroy v. *Gale*, 5 Lans. 345, 347; *French* v. *Donaldson*, 5 Lans. 293; 57 N. Y. 496; *Goodfellow* v. *Mayor*, 1 Cent. Rep. 21, 100 N. Y. 15.

The rule laid down by the modern English authorities is that "whenever it is the defendant's duty to use reasonable care to keep a bridge or other structure in repair and proper condition, as respects persons passing along a highway, and it is out of condition, and an accident happens, it is incumbent upon him to show that he used that reasonable care and diligence which he was bound to use, and that the absence of that care can be fairly presumed from the fact that there was a defect from which the accident had arisen."

Kearney v. *London etc. R. Co.* L. R. 5 Q. B. 411, affirmed in L. R. 6 Q. B. 759.

And the rule as laid down in our own State is that "Where the accident is of such a nature as would not happen in the ordinary course of things, with proper care and management, the fact that it does happen affords reasonable evidence that the accident arose from the want of care."

Lyons v. *Rosenthal*, 11 Hun, 48; *Mullen* v. *St. John*, 57 N. Y. 567; *Edgerton* v. *N. Y. etc. R. R. Co.* 39 N. Y. 227; *Hume* v. *Mayor*, 74 N. Y. 264; *Smith* v. *British etc. Steam Packet Co.* 86 N.Y. 408; *Worster* v. *Forty-Second Street etc. R. R. Co.* 50 N. Y. 203; *McCarthy* v. *Syracuse*, 46 N.Y. 194.

Mr. **D. O'Brien,** *Atty-Gen.*, for the State, respondent:

The State is not liable unless it has voluntarily assumed a liability.

Lewis v. *State*, 96 N. Y. 71.

The only liability ever assumed by the State for injuries growing out of the use of the canals was that assumed by virtue of the Act of 1870. The Law of 1876 did not refer to or repeal the Act of 1870.

Mark v. *State*, 97 N. Y. 572.

Therefore, if this injury grew out of the navigation of the canals, the State was expressly exempted from liability by the Act of 1870.

There was no negligence proved upon the part of the State, and none found by the board. The board expressly refused so to find. The board, also, expressly refused to find that there was anything in the appearance of the stone to indicate that it was dangerous. The board expressly refused to find that the stone had been loose so long that notice of its condition was to be presumed.

Upon these grounds the award may be upheld. The fact that the board gave a wrong reason for its decision, assuming that it did so, is immaterial.

Allard v. *Greasert*, 61 N. Y. 4; *Cole* v. *State*, 2 Cent. Rep. 884, 102 N.Y. 57.

If this injury did not grow out of and result from the navigation of the canal, then it is submitted, within the principle of *Lewis* v. *State*, *supra*, that it was not otherwise such an injury as the State assumed any liability for, under the Act of 1870. That statute intends only to make the State liable for injuries arising from accidents connected with and arising from the use of the canals themselves, as such, and from the negligence of the officers of the State in the use thereof, etc. The building and maintaining of bridges for the use of the traveling public, or the failure so to do, does not come within the provisions of this statute at all.

Finch, *J.*, delivered the opinion of the court:

The plaintiff's demand against the State was dismissed by the board of claims as beyond its jurisdiction, and the correctness of that decision depends upon the meaning and construction of section 1 of the Act of 1870. The State can only be sued by its own consent and for liabilities which it chooses to assume; *People* v. *Dennison*, 84 N.Y. 281; and this has been expressly held where the cause of action alleged rested upon some misfeasance or nonfeasance. *Lewis* v. *State*, 96 N. Y. 71.

We are referred to no statute which permits a claim to be filed for such an injury as the claimant has suffered, except the Act of 1870, chap. 321. The later Act of 1876, chap. 444, which constituted the board of audit and gave it authority to hear all private claims and accounts, did not in any manner change or enlarge the liability of the State; and whoever presents a claim against it must show some statute which involves the consent of the State to be answerable before its own tribunals for such claims or those of a class to which it belongs.

The general language of the Act of 1870 is broad enough to cover the present case. It permits claims to be filed for damages sustained from the canals; from their use and management; or arising from the neglect of an officer in charge; or from any accident or other matter connected therewith. It ends, however, with a proviso that the provisions of the Act shall not extend "to claims arising from damages resulting from the navigation of the canals," and the case before us has been adjudged to be one of that character.

The claimant reached Syracuse upon a canal boat which he was navigating, at which place he stopped to discharge some portion of his freight. Having done so he went to the collector's office to obtain a clearance, his boat meantime going on in charge of others than himself. When the clearance was obtained he started along upon the berme bank of the canal to rejoin his boat. His route brought him to the abutment of the Warren Street bridge, which stood close to the water and could only be passed by one following the bank of the canal by climbing up one side and descending the other. To enable this to be done the State had provided irons fastened to the stones of the abutment and serving as rungs of a ladder. The claimant began his ascent, passing upward from one iron to another and reaching the upper iron took hold of it with his hands, but the stone to which it was attached had been insecurely fastened and become loose, and fell out of the wall under his grasp, throwing him to the ground and injuring him quite severely. For the damages thus sustained he filed a claim against the State for its negligence or that of its officers in charge.

The bridge was a structure built and maintained by the State to carry a highway over the canal. The proof is sufficient to warrant an inference that the street existed for public passage when the canal was built, and that the duty of maintaining the bridge had been assumed by and rested upon the State. While the berme bank of the canal was in no sense a public highway, yet at the point in question it served for the passage of those whose business properly brought them to that locality. The presence of the irons was itself an invitation to persons rightfully passing to use them, and indicated a purpose on the part of the State to permit the crossing of the bridge by such means and in such manner. The claimant was not a trespasser. He was rightfully upon the berme bank of the canal and, in virtue of his business and occupation, at liberty to pass along it and cross the abutment in his path. The defective stone had been loose for at least a year, and long enough for an inference that the defect had come to the knowledge of the State or its officers in charge of the canals. The Act of 1870, therefore, covered the injury sustained, unless the board of claims was right in deciding that it resulted from the navigation of the canals.

The liability assumed by the State was general; the exception special. The State could exclude what it pleased from the scope of its broad consent and could choose its own language for its own protection. Its exception therefore should take out from the broad general consent only what is strictly within its terms. The damages excluded must result from the navigation of the canals, that is from the passage of boats along and upon their waters. Damages might result from the careless management of locks, or their imperfect maintenance or construction, to the teams drawing the boats or those in charge of them, from collisions due to overcrowding or insufficient room; from sudden breaks chargeable upon unskillful or careless construction. Numerous cases of this general character were naturally to be apprehended and were intended to be excluded; and the language used in the proviso was appropriate and effective for that purpose. But it can have no just application to accidents or injuries befalling one not at the time engaged in navigation of the canals and which did not result from that navigation. The claimant for the time had abandoned his boat. Somebody else was navigating it. The former intended to resume its navigation and was walking along the bank with that view; but until he reached and rejoined his boat he would not be actually engaged in its navigation. It is quite true that in a certain broad and general sense he might be said to have been engaged in the business or occupation of navigating the canals when the injury occurred; but he was none the less away from his boat, traveling upon the land for no purpose essential to the movement of his boat upon the water, and his injury did not result from and was not occasioned by the navigation of that boat. The language used contemplates a case in which the act of navigation is one of the concurring causes of the injury so that the latter can be deemed a result.

For these reasons we are of opinion that the board of claims construed the proviso too broadly, and that its terms do not exclude the claimant's injury.

The award should be reversed, and the case remitted for a new hearing.

All concur, except **Peckham,** *J.*, dissenting.

William H. NEARPASS *et al.*, *Appts.*,
v.
Franklin NEWMAN, Jr., *et al.*, *Respts.*

1. In an action for an accounting and to obtain possession of certain real property, *held*, that a **deed** and agreement whereby the land was conveyed **to a trustee** to sell and convey the same and invest the proceeds, and pay the income thereof to the grantor's wife during life for her support and that of her children, **created a valid power in trust** to convert the land into money and invest the proceeds in securities in which the wife was to have a life estate only.
2. The **reversionary interest in the land,** not having been conveyed by such instrument, **remained in** the **creator of** the **trust** and upon the death of the wife reverted to him under the provisions of the statute, and **passed** to his grantee.
3. The limitations and conditions of the **trust followed** the **property into which** the **estate was converted** and it became subject to the same rules of reversion which pertained to that originally conveyed.
4. *Held*, *further*, that the **subsequent agreement and quitclaim deed** of the

land **executed by** the said **grantor to** the **trustee**, and delivered in escrow, the object of which was to make further provision for said wife and children, by which the property was to be reconveyed in case said wife should fail to fulfil and perform the covenants therein, were **intended as security for** the **performance of** grantor's **agreement, and** that the **grantor retained a reversionary interest** in the property after the trust purposes for which he had conveyed it were satisfied, and that the land was not exempted from the limitations and conditions of the trust by such subsequent deed and agreement.

5. The **practical construction given to** a conveyance and **agreement by** the subsequent dealings and conduct of **the parties** and contracts executed between them, is quite controlling as to their real intention in making it.

6. A subsequent **conveyance** of the property **by** such **trustee to** another **as a substituted trustee** under such trust deed, **reconstituted** the property a **trust fund** subject to the limitations and conditions of the trust.

(Decided June 7, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, reversing a judgment of the Kings Special Term in favor of plaintiffs in an action for an accounting and to recover possession of certain real property. *Reversed.*

The facts appear from the opinion.

Messrs. **Esek Cowen** and **E. Sprout,** for appellants:

"Where an express trust is created, every estate and interest not embraced in the trust and not otherwise disposed of, shall remain in and revert to the person creating the trust or his heirs as a legal trust."

2 R. S. 6th ed. p. 1110, § 75.

As the trust created was for the life of Harriet Newman, and terminated June 14, 1882, the following statute applies: "Where the purposes for which an express trust shall have been created shall cease, the estate of the trustee shall also cease; and the estate conveyed to the trustee or trustees and not granted or conveyed by him or them, shall revert to the grantor or grantors, his or their heirs, and to the same effect as though such trust estate had not been created."

2 R. S. 6th ed. p. 1110, § 80.

The general term, like the court of appeals, does not reverse a judgment rendered by a referee or judge without a jury, for a mere omission to find a fact, as to which no request is made by the defeated party.

Prior to the adoption of the present Code of Civil Procedure, the remedy both before and since the former Code was by motion to the court for an order directing the referee to pass upon such omitted fact, and not by appeal from the judgment.

Curtis v. *Staring*, 4 Wend. 199; *Cafferty* v. *Keeler*, 12 Wend. 291; *Stafford* v. *Bacon*, 6 Hill, 264; *Church* v. *Erben*, 4 Sandf. 691; *Renouil* v. *Harris*, 2 Sandf. 641; *Van Steenbergh* v. *Hoffman*, 6 How. Pr. 492; *Hulce* v. *Sherman*, 18 How. Pr. 411; *Heroy* v. *Kerr*, 8 Bosw. 194; *Anderson* v. *West*, 6 Jones & S. 441.

That this was the true practice was conclusively settled by this court in *Van Slyke* v. *Hyatt*, 46 N. Y. 259.

Since the adoption of the present Code the parties must request the judge or referee before the decision to find such facts as they deem material.

If the trial court, as in this case, omits to find a fact, proved by undisputed evidence, the presumption is that such fact is considered to be immaterial. Whether or not it is material is not a question of fact, but of law; and the proper and only way to raise the point is by request to find, and an exception to the refusal.

Mr. **John D. Pray,** and *Messrs.* **Hubbard & Rushmore,** for respondents:

When a contract is executed, no court will aid a party to it to set it aside upon an allegation that any of the considerations were illegal.

When both parties are equally offenders against positive law or the general principles of public policy "*Potior est conditio defendentis.*"

Nellis v. *Clark*, 4 Hill, 424; *S. C.* 20 Wend. 24; *Mosely* v. *Mosely*, 15 N. Y. 334; *Schermerhorn* v. *Talman*, 14 N. Y. 141.

But a delivery of a deed to a grantee named in it, although intended by the parties to be delivered as an escrow upon certain conditions, nevertheless vests the title absolutely in the grantee.

Worrall v. *Munn*, 5 N. Y. 229; *Gilbert* v. *N. A. Fire Ins. Co**. 23 Wend. 45; *Lawton* v. *Sager*, 11 Barb. 349; *Braman* v. *Bingham*, 26 N. Y. 483–492.

This deed effectually vested the reversion in John D. Neefus, the grantee.

1 R. S. § 1, 748; § 142, 739; *Jackson* v. *Fish*, 10 Johns. 456; *Lynch* v. *Livingston*, 6 N. Y. 422; *Ham* v. *Van Orden*, 84 N. Y. 257; *Rockwell* v. *Brown*, 54 N. Y. 213.

An appeal to the court of appeals from a final judgment reversing a judgment of the special term and ordering a new trial, when it appears from the judgment that the judgment below was reversed on the facts and the law, brings up for review in this court every question respecting a substantial right which was determined by the general term in rendering the judgment, etc., from which the appeal is taken; and it is the duty of the court of appeals to review the determination of the general term upon the facts as well as the law.

Code Civ. Proc. §§ 1337, 1338; *Petersen* v. *Rawson*, 34 N. Y. 370; *Coleman* v. *Second Ave. R. R. Co.* 38 N. Y. 201; *Godfrey* v. *Moser*, 66 N. Y. 250; *Van Wyck* v. *Watters*, 81 N. Y. 352.

Ruger, *Ch. J.*, delivered the opinion of the court:

The proof in the case is wholly documentary, and the only question arising thereon is whether, upon a proper construction of the several instruments read in evidence, Franklin Newman retained a reversionary interest in the property thereby transferred, after the trust purposes for which he had conveyed it were satisfied. Perhaps a more accurate statement of the question presented would be whether certain real estate once conveyed by him to a trustee for specific purposes was exempted from the limitations and conditions of the trust by a subsequent deed and agreement between the same parties.

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*See note, and notes and cases there cited, Lawyers' edition. [Ed.]

The case shows that prior to the year 1864 Newman and his wife lived unhappily together, and were desirous of making an arrangement by which they could live separately. They were the parents of four children, who it was thought desirable should reside with and be supported by the mother. Newman had theretofore given to his wife $9,000, and, being willing to provide more largely for her support, on the 7th day of December, 1864, entered into a tripartite agreement with his wife and one John D. Neefus, as trustee, whereby he conveyed to said Neefus and his successors and assigns, thirteen and one half lots of land in the City of Brooklyn, to be held and used by such trustee for the following purposes and conditions, viz.: to sell and convey the same and invest the proceeds in bonds of the United States or of the State of New York, and pay the income thereof to Harriet Newman during her natural life for her support and that of her four children.

This deed and agreement was duly recorded in the register's office of King's County, December 9, 1864. Within a year thereafter the parties, having determined that the peace and happiness of Newman and his wife and of their children would be promoted by an absolute divorce, on April 8, 1865, entered into another agreement between each other and with Neefus, for the purpose of promoting such divorce. In this agreement it was recited that Newman desired to make still further provision for his wife and children than was made in the previous trust deed, and for that purpose (upon condition that said Harriet should faithfully perform the covenants therein contained) agreed "to quitclaim to said Neefus all his right, title and interest to and in the certain thirteen and a half lots previously conveyed to said Neefus." He also agreed upon the same condition to give to Neefus for the use of said Harriet a bill of sale of certain furniture, to pay certain bills for board of the children, to pay Neefus $300 a year for the support and education of each of two of Newman's children until they should respectively become of age, to execute and deliver his own bond for $2,000, with collateral security, for the payment of such allowances.

It is provided that "Said quitclaim deed, also said bond with collateral, and the bill of sale, all to be put in escrow (said Neefus the party) to be delivered when said Harriet faithfully performs all her covenants hereinafter contained, but to be returned to said Newman if not so performed." Certain covenants are then made by Harriet that she will facilitate the proceedings for a divorce, by all means in her power; that out of the provisions heretofore and herein made she will support herself and her children, and that neither by herself nor the children will she run up bills or incur debts in Newman's name.

It was further provided that in case Harriet should fail to perform her several covenants, the agreement should be declared null and void, and Neefus should deliver back to Newman the quitclaim deed, bond and collateral, and bill of sale; but in case Harriet performed her covenants to faciliate such divorce, then said papers delivered to Neefus in escrow "shall become operative and in full force and effect."

It is then further provided that "The furniture taken, together with the several valuable properties heretofore conveyed to said Harriet, or caused to be conveyed, or in trust for her and children's benefit, shall be and hereby is taken in full satisfaction and bar of and to all or any claims whatsoever on said Newman, whether for her said Harriet's own or children's account."

A quitclaim deed, dated April 17, 1865, from Newman to Neefus and to his heirs and assigns of the thirteen and one half lots of land, was also put in evidence. This deed was duly recorded in the clerk's office of Kings County, on April 18, 1865.

The next instrument, in chronological order, put in evidence was a warranty deed, dated April 18, 1868, from Mary Jarvis and David R. Jarvis, her husband, of a house and lot on Jefferson Street, Brooklyn, to "John D. Neefus, as trustee by and under a deed of trust from Franklin and Harriet Newman," for the consideration of $6,500.

Next follows an agreement made on January 18, 1872, between Franklin Newman of the first part, Harriet Newman of the second part, John D. Neefus of the third part, and Franklin Newman, Jr., of the fourth part. This agreement embraces the following recitals: "*Whereas*, by a certain deed of trust made between the parties hereto of the first, second and third parts, bearing date the 7th day of December, 1864, *** the said party of the third part received certain real and personal property in trust for certain purposes therein mentioned; *and whereas*, such property so received in trust by said party has been sold and the proceeds thereof have all been invested in a house and lot in Jefferson Street, near Ormond Place in the said City of Brooklyn, and in four United States 6 per cent bonds of $1,000 each; *and whereas*, at the request of the said parties of the first and second parts, and with the consent of the said parties of the third and fourth parts, the said party of the fourth part is to be substituted as trustee in the place and stead of the said party of the third part subject to all the covenants and conditions in said trust deed contained; *and whereas*, the said party of the third part has conveyed to said party of the fourth part, by deed bearing even date herewith, the house and lot in Jefferson Street, and has also simultaneously with the execution hereof, delivered to said party of the fourth part the said four United States bonds for $1,000 each, being all the property, money or proceeds in the hands or possession of said party of the third part under and pursuant to said deed of trust;"—in consideration of the premises it was then provided that the parties of the first and second part should release and discharge the party of the third part from all claims and demands whatsoever. The party of the third part did thereby also in consideration of the premises "transfer, assign and set over to said party of the fourth part, the said Jefferson Street house and United

States bonds and all and every right, claim or demand which he may or shall have for or by reason of said deed or trust; and the said party of the fourth part, in consideration of the conveyance to him of the said house and lot and of the delivery of said bonds, did "consent and agree to take said house and lot and bonds, and hold the same as trustee, pursuant to the covenants and conditions in said trust deed contained, in the place and stead of the said party of the third part."

On the same day "John D. Neefus individually and as trustee, by and under a deed of trust from Franklin and Harriet Newman," and Mary Ann, his wife, conveyed by quitclaim deed all of the estate, right, title and interest, both in law and equity, of, in or to the house and lot on Jefferson Street to "Franklin Newman, Jr., as trustee in place and stead of said John D. Neefus, under said deed of trust" and to his successors and assigns forever.

From this time forward it would seem that Franklin Newman, Jr., acted as trustee under the original trust deed, until the death of Harriet Newman, which occurred in July, 1882.

Harriet Newman left a will by which she demised all of her property to her daughter Mary and her son Franklin, and appointed her son Franklin sole executor of her will. On December 9, 1882, Franklin Newman, claiming to be the reversionary owner of the property held by Franklin Newman, Jr., conveyed it to the plaintiffs; and this action was brought by them to recover possession of the same.

The effect of the deed and trust agreement of December, 1864, was to create a valid power in trust to convert the land into money and invest the proceeds in securities in which Harriet Newman was to have a life estate only. *Belmont* v. *O'Brien*, 12 N. Y. 395.

The reversionary interest in the land, not having been conveyed by such instrument, remained in the creator of the trust, and upon the death of Harriet Newman reverted to him under the provisions of the statute. 3 R. S. 7th ed. p. 2182, § 62.

It is also quite clear that the limitations and conditions of the attempted trust followed the property into which the estate was converted, and that it became subject to the same rules of reversion which pertained to that originally conveyed. *Belmont* v. *O'Brien*, *supra*.

These propositions were assumed to be correct by both the general and special terms in their consideration of the case, and may be regarded as conclusively settled.

It was, however, held by the general term that Franklin Newman by the execution and delivery of the quitclaim deed of April 17, 1865, transferred to Neefus his reversionary interest in the trust fund, and that it then became vested absolutely in Neefus, and still remains in him or the trustee, Franklin Newman, Jr., who was substituted in his place. The defendants' answer alleges impliedly, if not directly, that this reversionary estate was held by the trustee for the benefit of Harriet Newman, and upon her death descended or was distributable to her three children and the issue of the fourth who had died. This contention is hardly sustainable in view of the fact that Harriet Newman left her property, by will, exclusively to two of said children; and any reversion to which she was entitled is apparently controlled by its provisions.

This result is claimed to be produced by the provisions of the agreement of April 8, 1865, which, it is argued, created a trust in the reversionary estate for the benefit of Harriet Newman.

We are of the opinion that no trust was created by that agreement, and that under it Neefus acquired a mortgage interest only, which became satisfied in 1871 by the performance of the obligation and the arrival of Franklin and Mary at maturity and the termination of the period for paying annuities for their support.

The case was considered at the general term, upon the theory that its determination depended solely upon the effect to be ascribed to the quitclaim deed, unaffected by the cotemporaneous agreement, and as thus viewed might afford some reason for doubt as to its true solution.

A careful consideration of the provisions of that agreement, however, leads to the conviction that there was no intention on the part of Newman, or his wife, to vest any personal interest in the property in Neefus. It was conveyed to him indeed, but it was conveyed for a purpose which it is the duty of the court to discover and enforce, if consistent with the rules of law. This purpose is clearly disclosed by an examination of the provisions of the agreement. Among other things it appears therefrom that the sole consideration for the deed was furnished by Harriet Newman, and its object was declared to be "to make still further provision for said wife and four children." It was also provided that Neefus should reconvey the property to Newman in case the said Harriet "should fail to comply or perform in good faith her part of the covenants herein contained," and finally it was declared, that "said quitclaim deed, also said bond with collateral and the bill of sale, all to be in escrow (said Neefus the party) to be delivered when said Harriet faithfully performs all her covenants hereinafter contained."

The delivery here spoken of was a delivery to Neefus, to take the place of the conditional delivery there made, because it obviously was not intended that Harriet Newman was to take Franklin Newman's bond, or the judgment assigned as collateral thereto, or the bill of sale of the furniture transferred "for her use," which are therein spoken of in connection with the quitclaim deed.

The idea that the property was to be conveyed to Newman if Harriet failed to perform her contract is inconsistent with the theory of any personal interest in Neefus, while it was essential to the performance of his trust, as well as the enforcement of the security, that he should have the title of the property with the power of converting it. On the other hand, if the reversion had been intended to be given to Neefus in trust for Harriet Newman, the legal estate would have vested immediately in her by force of the forty-ninth section of the statute, and the life estate and reversion uniting in the same person the former would have merged in the latter, thus destroying the trust. That this was not intended is shown by the repeated declarations of the parties as to the continued existence of the trust of 1864. It matters not whether the provisions of the agreement were all valid or not, for when the object of the inquiry is to ascertain the interest of the parties in making a contract, their meaning is as much revealed by the expression of invalid as of valid provisions, and the court will avail itself of every lawful means and ascertain and give effect to the intention of the parties, if not contrary to the law.

It seems quite clear therefore that the object of the deed was simply to furnish additional security to Harriet Newman that Franklin Newman should promptly make the additional payments of income which he became liable to pay by the agreement.

It certainly was not intended that Neefus should take the reversionary interest for himself, and there is no color of a provision in the agreement by which Harriet Newman was entitled to take it. Neefus received the property in question simply as a security for the performance of Newman's agreement, to be returned to Newman when the object of the transfer had been satisfied. The practical construction given to this conveyance and agreement, by the subsequent dealings and conduct of the parties and the various contracts executed between them, is quite controlling as to their real intention in making it.

The thirteen and one half lots were converted into money, amounting presumably to about $9,000. Of this sum $6,500 was invested in the house and lot on Jefferson Street, the title to which was taken to Neefus *as trustee under the trust deed of 1864*, and the balance in 4 per cent United States bonds. By the agreement of January 18, 1872, it was recited that the properties were held by Neefus as trust property under the trust deed of 1864, and he thereby agreed to convey them to Franklin Newman, Jr., as substituted trustee, subject to the conditions and limitations of the said trust; and the said Franklin Newman, Jr., received them solely as trustee under such instrument. The quitclaim deed from Neefus to Franklin Newman, Jr., conveys all of the interest in the property held by Neefus, either individually or as trustee, to the grantee therein named *as trustee under such trust deed.*

Whatever effect, therefore, may be ascribed to the deed of April 8, 1865, all of the interest thereby conveyed was reconveyed to Franklin Newman, Jr., and by the agreement of January 18, 1872, executed by all of the parties having an interest in the subject and which was recorded in the register's office of King's County January 19, 1872, the trust was redeclared and the entire proceeds of the whole property were reconstituted a trust fund, subject to the limitations and conditions of the deed and contract of December 9, 1864.

It follows that upon the death of Harriet Newman the corpus of the trust estate reverted to Franklin Newman and passed to the plaintiffs, under the conveyance from him to them.

Other questions made in the case become immaterial in the view which we have taken of the questions raised.

The order of the General Term should be reversed and the judgment of the Special Term affirmed, with costs to the plaintiffs in the court below and in this court.

All concur.

Frank L. WARRIN, *Appt.*,
v.
Francis B. BALDWIN, County Treasurer of Queens Co., *Respt.*

Chapter 226, Laws of 1878, did **not authorize** the **Treasurer of Queens County to collect** from the trust funds in his custody the **fees** allowed **upon sales of lands** to the several towns in the county **for** unpaid **taxes, without** the **audit** of the town board; and such action on his part being illegal, an action for the prevention thereof was maintainable by a taxpayer, under chapter 531, Laws of 1881.

(Decided May 10, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Queens Circuit dismissing the complaint in an action to restrain the alleged illegal official act of a county treasurer. *Reversed.*

Reported below, 35 Hun, 334.

The facts and questions raised appear from the opinion.

Mr. **Francis M. Scott,** for appellant:

The plaintiff is entitled to maintain this action.

Chapter 571 of the Laws of 1881 authorizes action by taxpayers against officers of counties, towns and municipal corporations, to prevent illegal official acts on the part of such officers.

Osterhoudt v. *Rigney*, 98 N. Y. 222.

The County Treasurer's fees and expenses of advertising on lots struck off to the town are town charges in the sense in which those words are used in the Revised Statutes.

1 R. S. *p. 358; *People* v. *Haws*, 34 Barb. 69; *Brady* v. *Supervisors*, 2 Sandf. 460; *Bright* v. *Supervisors of Chenango Co.* 18 Johns. 242.

If the County Treasurer's claim for fees and expenses is a town charge, it must be audited by some competent body before it can be lawfully collected.

Laws 1840, chap. 305, § 1; *Bell* v. *Town of Esopus*, 49 Barb. 506 and cases cited; *People, Thurston*, v. *Town Auditors of Elmira*, 20 Hun, 150, affirmed in 82 N. Y. 80; *People, Bentley*, v. *Whalen*, 15 N. Y. Week. Dig. 410.

The board of the town auditors is the only body having authority and jurisdiction to audit the County Treasurer's claim against the town for fees and expenses.

1 R. S. p. 367, part 1, chap. XII, title 2, § 4, paraphrased from chap. 49, Laws 1813, § 2; R. S. part 1, chap. XI, title 4, art. 5, § 46, compiled from 2 Rev. Laws, 280, § 31; 1 Rev. Laws, 290, chap. 78, Laws 1813, § 28; 2 Rev. Laws, 138, chap. 49, Laws 1813, § 2; chap. 305, Laws 1840, Potter, Dwar. Stat. p. 156; *Wood* v. *Wellington*, 30 N. Y. 218; *Dash* v. *Van Kleeck*, 7 Johns. 497; *Columbian Mfg. Co.* v. *Vanderpoel*, 4 Cow. 556; *Livingston* v. *Harris*, 11 Wend. 329; *Dexter & Limerick Plank Road Co.* v. *Allen*, 16 Barb. 15–18; *Daviess* v. *Fairbairn*, 3 How. 636 (44 U. S. bk. 11, L. ed. 760).

Even the board of supervisors had jurisdiction to audit town accounts; the mere submission to that board at its annual meeting of all accounts of the County Treasurer would not constitute a sufficient audit of the Treasurer's claim against the town.

Laws 1845, chap. 180, § 24, as amended by Laws 1847, chap. 490, § 2.

Mr. **H. E. Sickels,** for respondent:

The plaintiff is not authorized to maintain this action.

Section 1925 of the Code provides for the cases in which a taxpayer may bring an action such as this, viz.: where the action is to obtain a judgment preventing waste or injury to the estate, funds or other property of the county, city or town.

There is no waste or injury alleged in the complaint for which the plaintiff is entitled to any judgment.

By the terms of the Act the defendant is obliged to publish the list returned by the town receiver with the description "as contained in the assessment roll of the town."

Laws 1878, chap. 226, § 1.

In the case of *Thompson* v. *Burhans*, 61 N. Y. 62, it was held that the comptroller must sell by lots and description as sent to him and as assessed.

The validity of the assessment cannot be determined in this action; it can only be done in a direct and appropriate proceeding for that purpose.

Swift v. *Poughkeepsie*, 37 N. Y. 511; *Western R. R. Co.* v. *Nolan*, 48 N. Y. 513; *Susquehanna Bank* v. *Supervisors*, 25 N. Y. 312.

The Act is imperative, in regard to lots struck down to the town.

"On the day fixed for said sale, should no bids be made for any of the lots or parcels that may be offered for sale, the County Treasurer shall strike off such lots or parcels to the town in which such lands are located and assessed, for the term of one thousand years."

Laws 1878, chap. 326, § 4.

The same section also provides that the County Treasurer's fees and expenses of publication for "all lots or parcels struck off to any town shall be a charge against such town."

Section 5 of the same Act declares that "in case of sale the Treasurer may charge and receive for each lot and parcel separately assessed and sold, the sum of $1.50, besides the sum paid for publication."

By the terms of the Act, the town is bound to pay to the Treasurer the sum allowed by law, for the lots and parcels of land sold by him to the town.

By the decision of the court of appeals in *People, Canajoharie Nat. Bank,* v. *Supervisors,* 67 N. Y. 109, it would seem that the Acts of 1872, 1879 and 1880, as to suits by taxpayers, are unrepealed.

The Act of 1881, chap. 531, does not alter the provisions of the Code as "to waste" or "injury" but allows the action to be maintained in order "to prevent any alleged illegal official act."

There is nothing alleged here that is illegal; in fact everything done by the Treasurer is in strict accord with the statute.

The County Treasurer is entitled to charge and receive the fees allowed him, whenever and as soon as he performs the duty for the performance of which he is allowed compensation.

People, Weekes, v. *Baldwin,* 19 Hun, 308.

Independently of this consideration, the spirit and intent of the Act shows that the Treasurer is entitled to his compensation at once.

Laws 1878, chap. 229, § 2; Act 1878, § 4; 1 R. S. 3d ed. § 141, p. 892; § 2, subd. 3, p. 861.

In view of the fact that the law, under which the Treasurer is proceeding, says that for all lots sold he is entitled "to charge and receive" certain fees and expenses, which are fixed by the statute, there is nothing left for the board. They have no power to alter or change the same.

People, Downing, v. *Stout,* 23 Barb. 338; *Morris* v. *People,* 3 Denio, 381.

There is a clear and specific method prescribed for the adjustment of the Treasurer's accounts; the case is not within the provision of the Code or the Act of 1881, as to suits by taxpayers.

Lutes v. *Briggs,* 64 N. Y. 404.

Finch, *J.,* delivered the opinion of the court:

The Act of 1878, chap. 531, expressly authorizes a taxpayer to maintain an action for the prevention and restraint of "any illegal official act" on the part of the officers of any county, town, or municipal corporation; and if the intended and threatened act of the defendant as County Treasurer is illegal, the plaintiff is entitled to sue and to prevent the meditated violation of law, irrespective of the consequences of such violation. The statute assumes that any illegal official act is or may be injurious to the corporation when done by its servant, and allows him to be restrained simply because of the illegality.

The complaint here is that the County Treasurer has been in the habit of paying himself out of the trust funds in his possession the fees allowed by law upon sales of land for unpaid taxes, without previous audit of his claim, and alone determining the amount of the debt due from himself as trustee to himself as officer. He stands here upon his right, not denying his past habit or future purpose, but insisting that his conduct is not illegal, and so his action should not be restrained.

The sale of lands for unpaid taxes in the County of Queens is the subject of a special statute. Laws 1877, chap. 268; Laws 1878, chap. 226.

Under its provisions the receivers and collectors of taxes are required to report to the county treasurer all such taxes; the latter is directed to examine the list, and, having rejected therefrom such as cannot be lawfully enforced by reason of imperfect description or otherwise, to advertise them for sale. Pending the notice, owners or parties in interest may pay the taxes with charges and expenses; and the lands thus freed from liability must be withdrawn from the proceedings. The balance are to be sold by the treasurer at public auction for the shortest term of years for which any person will take the premises and pay the taxes with percentage, interest and expenses. In case no bids are made the Treasurer is commanded to strike off the land to the town in which it lies for a term of one thousand years, and in all cases of sales is to execute and deliver the proper leases.

The Act allows the county treasurer as fees for his service $1 for every lot or parcel assessed which has been released by payment before sale; in case of sale $1.50 for each separate lot and parcel assessed and sold; where a lease is given, $1 to be paid by the person receiving it; and for making and certifying a search $3.

There is no difficulty and no dispute about these fees when actually paid by purchasers other than the town. Such fees belong to the treasurer and may be received by him and appropriated to his own use. They never become town or county funds or a part of the trust money in the officer's hands. But the situation is quite different where he strikes off the land to a town. In that event no money is paid or received, and the taxes and fees become purely matters of account. The statute provides that in such case the fees and expenses of publication shall be a charge against said town. They become a debt due to the treasurer, and are (when earned and expended) a claim in his favor against the town. Until it pays the charge the fees and expenses do not come to him as such or become his money. If he takes their amount from the trust funds in his custody without audit or direction, he simply collects his own debt against the town out of moneys already devoted to other specific purposes, and fixes for himself the amount of the debt which he assumes to collect. The statute provides that all claims against the town must be audited by the town board (Laws 1840, chap. 305), and for that purpose must be presented in items and verified by the oath of the creditor. Laws 1847, chap. 490, § 2.

The officer repudiates the need of this audit. But the Act is broad and general, and admits of no exception unless as the product of some special legislation. Such exception cannot fairly be reasoned out of the Act of 1878. Its permission that the treasurer may charge and receive the fees allowed implies that somebody is to pay and is satisfied by an application to the cases in which the fees are paid as such. It is said there is no need of an audit because the amount is fixed. But the number of sales may be incorrectly asserted or the expenses unduly increased, and the auditing board has a right to be satisfied that the fees claimed have all been earned.

It is suggested that the treasurer must collect his fees at once in order to correctly perform his duties, since on a sale he must make a certificate stating the amount of tax with interest and expenses added, so that one coming to redeem may know what to pay; and since the town may assign its certificate for the amount of bid, expenses and treasurer's fees with 12 per cent interest from the date of sale. In each case the fees of the treasurer are fixed, although he is not paid, and his duty is easily and may be correctly performed. Whether the town assigns or does not is its own concern, and does not affect its liability to the treasurer for the fees that he has earned. It is added that his accounts are annually subjected to the examination of the board of supervisors; but when they are, his voucher for a claim against the town should be the audit of its board.

The Act of 1884 (chap. 484), now specifically requires such audit and makes certain for the future what was disputed in the past. It is easy to see the evils which might result from a contrary rule, and we deem it our duty to hold that the Act of 1878 did not authorize the Treasurer to collect from the trust funds the fees in question without the audit of the town board.

The judgment should be reversed and a new trial granted, costs to abide event.

All concur.

PEOPLE, *ex rel.* Isaac W. PECK, *Appts.*,
v.
COMMISSIONERS of Department of Fire and Buildings OF City of BROOKLYN, *Respts.*

1. Where a writ of **certiorari** was issued, directed **to the commissioners of** a **department of a city,** reciting that A, a duly appointed and acting **detailed fireman** of such department was, on a day named, **removed** from such position by such commissioners and commanding them to make **return** to the writ, and the affidavit states that he was removed without cause; and the commissioners return thereto only their resolution that A, "inspector of kerosene oil, be dismissed," such return is an admission that while A occupied the position of a detailed fireman in the department, he was summarily dismissed by such resolution.
2. Under **section 2138 of** the **Code,** where the return to a writ of **certiorari** meets all the allegations of fact contained in the writ and the papers on which it was granted and traverses them, then the **hearing** must be **confined to** the **facts stated in** the **return.**
3. But where the return admits the **facts stated in** the **writ** or the papers on which it was granted, or is silent as to them, then such facts become important, and must be considered and have effect upon the hearing.
4. Before any conviction can be had under section 14 of the **Brooklyn** Charter Act, the **member of** the **department** proceeded against is entitled to notice of the charge made against him, and to a hearing and trial; he **cannot be** arbitrarily **dismissed without a charge, hearing** or trial.

(Decided June 7, 1887.)

APPEAL from an order of the Supreme Court at General Term in the Second Department, affirming an order of the Kings Special Term in favor of respondents in a *certiorari* to review the action of the Commissioners of the Department of Fire and Buildings in the City of Brooklyn, in dismissing plaintiff from the office of kerosene inspector. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **Edward F. O'Dwyer,** for appellants: The appointment of the relator became a vested right, of which he could only be deprived (devested) upon charges, trial and conviction; and the right to such charge, trial and conviction is provided for by section 14 of title 13, chapter 863, Laws 1873, and is a substantial one, capable of execution, and cannot be disregarded.

People, Munday, v. *Fire Comrs.* 72 N. Y. 445.

Section 14 implied judicial powers; and the word "conviction" implied a trial with sworn testimony and legal proof.

People, Folk, v. *Board of Police,* 69 N. Y. 408; *People, Smith,* v. *Fire Comrs.* 4 Cent. Rep. 774, 103 N. Y. 370.

Relator, being a detailed fireman, was a member of the Department.

Pennie v. *Brooklyn,* 97 N. Y. 654; *People, Smith,* v. *Fire Comrs. supra.*

It was his duty to render such services as the Commissioners should direct him to perform.

It certainly cannot be contended that. having been appointed a member ot the department and detailed as an inspector of kerosene oil, in obeying the directions of his superior officers, relator ceased thereby to be a member of the department. If he had refused to act as an inspector of kerosene oil as directed, he could have been dismissed for disobedience of orders.

People v. *Comrs.* 27 Hun, 615.

Mr. **Almet F. Jenks,** for respondents:

There was no provision of law at the time of the removal of the relator which prohibited the dismissal of any member of the department of fire and buildings, whatever his position.

Section 14 of title XIII, chap. 863, Laws of 1873, on which admittedly the appellants wholly rely, is a punitive statute. To preserve discipline a trial is provided for, and certain punishments prescribed which may be meted out.

Does it follow that because a punitive statute provides dismissal as one of the punishments which may follow conviction for certain offenses, such provision amounts to giving a life tenure to those firemen who have not been convicted and punished by dismissal?

Because dismissal is named as a punishment, for certain offenses, does that in terms deprive the appointing board of the general power to remove? The power to appoint implies the power to remove.

People, Sims, v. *Fire Comrs. of N. Y.* 73 N.Y. 439.

Section 14 has not been changed or altered. The relator's inferential argument that this section prohibited removal, except on trial, is squarely met by the positive provision that they may be removed by said Commissioners. This I think is conclusive as to the contention that section 14 merely provided removal as one of the punishments that might be inflicted after conviction, and nothing more.

Laws 1873, §§ 9, 14, chap. 580; Laws 1874, § 20, chap. 337; Laws 1880, § 7.

Earl, *J.*, delivered the opinion of the court:

The petitioner presented to the supreme court a verified petition in which he represented that he was, and had been for a long time a member of the Department of Fire and Buildings of the City of Brooklyn; that on the 15th day of September, 1879, he was a duly appointed and acting detailed fireman of that Department, having been appointed by the Commissioners of that Department; that on that day the Commissioners, irregularly, illegally, and without authority or jurisdiction, and without cause, removed him from his position; and he prayed for a writ of *certiorari*, directed tô the Commissioners, commanding them to certify and return to the court all proceedings had before them in reference to his removal.

Thereupon a writ of *certiorari* was granted, directed to such Commissioners reciting that Isaac W. Peck, a duly appointed and acting detailed fireman of the Department of Fire and Buildings of the City of Brooklyn was, on the 15th day of September, 1879, removed by the Commissioners of that Department from such position, and commanding them to make return to the writ. In obedience to that writ the Commissioners returned, simply, that at a meeting of the Board of Commissioners, held September 15, 1879, they adopted the following resolution: "*Resolved*, that Isaac W. Peck, inspector of kerosene oil, be dismissed."

The return did not deny that Peck, at the time of his dismissal, was a member of the Department of Fire and Buildings of the City of Brooklyn, or that he had been duly appointed and was then acting as a detailed fireman of that department as alleged in his affidavit. Neither did it deny the allegation in the writ that he was a duly appointed and acting detailed fireman of the department. It did not allege that Peck was appointed inspector of kerosene oil, or that that was the official position which he occupied in the department. Consistently with the facts alleged in the affidavit and the writ, he was a fireman, detailed at the time of his dismissal as an inspector of kerosene oil. Indeed, nothing is returned, except the fact of Peck's dismissal.

The return therefore is a plain, unambiguous admission that while Peck occupied the position of detailed fireman in the Department of Fire and Buildings of the City of Brooklyn he was summarily dismissed by the resolution returned.

The practice prior to the adoption of the present Code required that the hearing upon the return to a writ of *certiorari*, should be solely upon the return. *People, Sims,* v. *Fire Comrs.* 73 N. Y. 437.

But by section 2138 of the present Code it is now required that the hearing upon the return to a writ of *certiorari* must be had "upon the writ and return and the papers upon which the writ was granted." Under this section where the return meets all the allegations of fact contained in the writ and the papers upon which it was granted and traverses them, then the hearing must be confined to the facts stated in the return. But where the return admits the facts stated in the writ or the papers upon which it was granted, or is silent as to them, then such facts become important, and must be considered and have effect upon the hearing. *People, McCarthy,* v. *French,* 25 Hun, 111.

Therefore, looking at these papers, the affidavit, writ and return, it appears that, without any trial or hearing, the Commissioners summarily dismissed the relator from his position as a detailed fireman and member of the Department of Fire and Buildings of the City of Brooklyn. The case, therefore, as it appears in the record, is precisely like that of *People, Smith,* v. *Fire Comrs.* 4 Cent. Rep. 774, 103 N. Y. 370, and upon that authority this appeal must prevail.

Since writing the above, the learned counsel for the respondents has submitted an additional brief, in which he makes for the first time the point that "There was no provision of law, at the time of the removal of the relator, which prohibited the dismissal of any member of the Department of Fire and Buildings, whatever his position;" and he claims that the point was not decided in the case of *People, Smith,* v. *Commissioners,* because it was not there made, and that it was there assumed after convictions. We think it clear that the point is not well taken.

The Brooklyn Charter Act, chapter 863 of the Laws of 1873, title 13, section 14, provides as follows: "It shall be the duty of said Commissioners to make suitable regulations under which the officers and men of the department shall be required to wear an appropriate uniform and badges, by which, in case of fire and at other times, the authority and relation of such officers and men may be known; and the Commissioners shall have power, in their discretion, on conviction of a member of the department for any legal offense, or neglect of duty, or violation of rules, or neglect or disobedience of orders, or incapacity, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct, or other breach of discipline, to punish the offending party by reprimand, forfeiting or witholding pay for a specified time, or dismissal from the department; but no more than ten days' pay shall be forfeited and withheld for any offense."

This section standing alone specifies the cases in which and the causes for which dismissals may be made; and the plain implication is that they cannot be made in any other cases, or for any other causes. The Latin phrase *Expressio unius exclusio alterius* furnishes the rule of construction which must be applied. By well settled rules, applicable to such cases, before there can be any conviction under this section the member proceeded against is entitled to notice of the charge made against him and to a hearing and trial. It would, therefore, be quite absurd to hold that a worthy and competent member of the department who was guilty of no offense or delinquency of any kind, could be arbitrarily dismissed without a charge, hearing or trial, but that a member guilty of some of the offenses or delinquencies mentioned could be dismissed only after a trial and conviction.

But it is claimed that section 9 of the same title throws some light upon the meaning of section 14, and that section as originally enacted in 1873, was as follows: "The said Commissioners shall have power to select a secretary, chief and assistant engineers, and as many officers, clerks, firemen, engineers, drivers, inspectors and bell ringers as may be declared necessary by the common council; and the same shall at all times be under the control of said Commissioners, and perform such duties as may be imposed upon them by the said Commissioners, and may be removed by said Commissioners."

But the conflict between that section and section 14 having probably been perceived, the Legislature, the next year, by section 20 of chapter 589, amended section 9 to bring it into harmony with section 14, so as to make it read as follows: "The said Commissioners shall have power to select a secretary, chief and assistant engineers, and as many officers, clerks, firemen, engineers, drivers, inspectors and bell ringers, as may be necessary; *Provided,* that the salaries of such employees, in the aggregate, shall not exceed the amount annually raised by the proper officers for such purpose. The said employees shall at all times be under the control of said Commissioners, and perform such duties as may be imposed upon them by the said Commissioners."

The omission from the section, of the absolute power of removal, is quite significant and leaves no doubt as to the proper construction of section 14.

The last paragraph of section 7 of the Act, chapter 377 of the Laws of 1880, passed after the dismissal of the relator, made no new provision, but applied the prior law to the new state of things.

The orders of the General and Special Terms, and the proceedings of the Commissioners of the Department of Fire and Buildings of the City of Brooklyn, should be reversed, with costs to the relator in the Supreme Court and in this Court.

All concur.

Paul GRAVILLE, *Respt.*,
v.
MANHATTAN R. CO. *Appt.*

It is the plain **duty of a passenger** standing on the platform of a steam railway car **to go inside the car** when requested so to do by a person having charge of the train; and this is so, **although** there may be **no unoccupied seats** in the car at the time.

(Decided May 10, 1887.)

APPEAL from a judgment of the General Term of the Court of Common Pleas of New York City, affirming a judgment of a trial term on a verdict for plaintiff for $535.43 damages, in an action to recover damages for assault and battery, etc., suffered by plaintiff, a passenger on defendant's elevated railroad, by the hands of defendant's servant. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **Edward S. Rapallo,** for appellant:

The charge of the court was an erroneous explanation to the jury of the rules of law regulating the duty of the defendant to passengers and particularly as to persons standing on the platforms; and especially was it erroneous to decline to give the instructions asked for.

See 1 Redf. Railways, p. 91–92; *Hibbard* v. *N. Y. & Erie R. R. Co.* 15 N. Y. 463; *Putnam* v *Broadway & Seventh Ave. R. R. Co.* 55 N. Y. 108; *Clark* v. *Eighth Ave. R. R. Co.* 36 N. Y. 135.

Mr. **L. A. Gould,** for respondent:

The plain conflict of evidence made necessary a submission to the jury of the questions at issue.

Miller v. *Ins. Co. of North America,* 1 Abb. N. C. 470; *Betsinger* v. *Chapman,* 24 Hun, 15.

In no just view can the damages awarded be deemed excessive.

Kiff v. *Youmans,* 20 Hun, 123; *Minick* v. *City of Troy,* 19 Hun, 253, affd. 83 N. Y. 514.

At all events the court of appeals may not interfere upon the grounds of excessive damages; *Peck* v. *N. Y. Cent. etc. R. R. Co.* 70 N. Y. 592; nor because of any alleged preponderance of evidence against the verdict.

Standard Oil Co. v. *Amazon Ins. Co.* 79 N. Y. 510.

Per Curiam:

The counsel for the defendant requested the court to charge the jury that although there were no seats inside the car and people were standing therein, yet if there was room for the plaintiff, he was bound to go there. The court refused to charge as requested, and to this refusal the counsel for the defendant excepted. We are of opinion that the defendant was entitled to this instruction and that the exception was well taken.

It appears from the plaintiff's testimony that he boarded a train going north, at Houston Street, at about 6 o'clock Sunday evening. The car at the time was crowded and the plaintiff with other passengers stood on the platform. When the train reached Thirty-Fourth Street the brakeman requested the plaintiff and the other passengers on the platform to go inside the car, but as there was no room in the car at that time the plaintiff did not do so. Passengers got out of the car at Forty-Second Street, and on the train leaving that station the conductor requested the plaintiff to go inside, but he declined to do so. The conductor or brakeman then pushed the plaintiff inside the car. When the train reached Forty-Seventh Street the plaintiff, as he testifies, passed from inside the car on to the platform for the purpose of leaving the train at that station, and when he reached the platform the conductor took hold of him and pulled him off the car, and a struggle ensued between the plaintiff and the conductor, the details of which it is unnecessary to state.

The plaintiff on the trial testified to the act of the brakeman in pushing him into the car, and to the subsequent assault at the station, and relied upon both acts as constituting grounds of recovery.

Both of the transactions were litigated without objection and were submitted by the court to the jury and they rendered a general verdict. The request to charge related to the first assault; and if it should have been granted, the error cannot be disregarded. The counsel for the defendant on the argument sought to justify the act of the brakeman in pushing the plaintiff into the car, on the ground that his standing on the platform was a dangerous act and interfered with the proper management of the train, and that the brakeman was authorized to use necessary force to compel the plaintiff to go inside the car if there was standing room, although all the seats were occupied.

This question is not, we think, open to the defendant on this record. The court charged the jury that the brakeman had no right to force the plaintiff inside the car upon his refusal to go inside, and that the only remedy was to eject the plaintiff from the car on reaching the next station. The counsel for the defendant did not except to this ruling, but by his silence acquiesced in its correctness; and it must be regarded as the law of the case. But assuming that the law in this respect was correctly stated, as to which there is, it seems to us, room for serious doubt, nevertheless we think the court should have charged the proposition requested.

Whether on the plaintiff's refusing to comply with the request of the brakeman to go inside the car, the latter was authorized to use force to compel him to do so, is a distinct question. It is a matter of common knowledge that it is considered unsafe for passengers to ride on the platform of a running train. By so doing they expose themselves and the other passengers to unnecessary danger. The law exacts of carriers of passengers the highest degree of care for their safety. The control of trains is necessarily placed in the hands of employees. It is impossible to foresee all the exigencies which may demand prompt action on their part, to avert danger or accident. The safety of passengers on railroads requires that they should comply with reasonable regulations and acquiesce in reasonable directions of the persons to whom the management of the train is committed.

It is obvious that the crowding of passengers on the platform of a steam railroad car may seriously embarrass the trainmen in the performance of their duties; and it is, we think, the plain duty of a passenger standing on a platform, to go inside the car when requested so to do by a person having charge of the train.

The request to charge was material, as bearing upon the question of damages, assuming that the use of force by the brakeman was not justified. Although the brakeman may have been mistaken as to his authority to enforce a compliance with the request made to the plaintiff, yet it was the duty of the plaintiff to comply; and his refusal tends to mitigate and explain the conduct of the brakeman and to show that the assault was not wanton or malicious.

The fact that there were no unoccupied seats in the car did not, we think, change the duty of the plaintiff to go inside. If he had any well founded complaint against the Company for not providing adequate accommodations for passengers, this did not, we think, release him from the duty of leaving the platform and going inside the car, although there was standing room only. The car was crowded when the plaintiff entered it at Houston Street. He placed himself immediately in a position where he was compelled to submit to some inconvenience, and he was not freed from the obligation to obey the reasonable directions of the trainmen, made with a view to the general convenience and safety, because there was no vacant seat.

For the error in the refusal to charge, the judgment should be reversed and a new trial granted.

All concur.

Elizabeth GRIFFITHS, *Respt.*,
v.
Edward A. MORRISON *et al.*, *Appts.*

The owner of two **adjoining** city **lots,** Nos. 141 and 143, **conveyed lot** No. 143 to defendant's grantor, **by metes and bounds,** as being twenty-two feet wide, "with the buildings and improvements thereon," "together with all and singular the tenements, hereditaments and appurtenances thereto belonging." The **house** then and now **on** the **lot conveyed extended beyond** the **line** called for by the deed five feet on lot No. 141 on the east, up to the west wall of a building thereon, which was used as the east wall of the house the greater part of which was on the land conveyed, but was not used as a party wall, the timbers not being keyed into it, but resting on piers. The said original grantor being still the owner of lot No. 141 brought ejectment for the said five feet of lot No. 141, covered by the house which extended over the line from lot 143. *Held*, that judgment for plaintiff should be affirmed; that said **deed conveyed only that part of** the **house** occupied by defendant **which is on** the **land described** therein; **and that no easement exists for** the **extension** of the house upon the land not conveyed. (*Rogers* v. *Sinsheimer*, 50 N. Y. 646, distinguished.)

(Decided June 7, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Circuit on a verdict directed for plaintiff in an action of ejectment. *Affirmed.*

Reported below, 36 Hun, 337.

The defendant Edward A. Morrison is the principal defendant, the other defendants being his tenants.

The facts and questions raised appear from the opinion.

Mr. **James J. Thomson,** for appellants:

The maxim "To whomsoever anyone grants a thing he grants with it also that without which the thing itself could not exist," applies to this case.

Broom, Legal Max. marg. p. 479.

In the condition of the property granted the easement in question was appurtenant to the respondent's grant.

Rogers v. *Sinsheimer*, 50 N. Y. 646; *Lampman* v. *Milks*, 21 N. Y. 506; *Huttemeier* v. *Albro*, 18 N. Y. 51; *Doyle* v. *Lord*, 64 N. Y. 437: Goddard, Easements, 71; *Root* v. *Wadhams*, 35 Hun, 57.

This right to maintain and enjoy the exterior walls of the house carries with it the right to occupy the space between the boundary of the lot and the exterior wall of the building.

Rogers v. *Sinsheimer*, 50 N. Y. 648.

This easement in the land and in the cottage wall to serve as an interior wall continues so long as the wall shall endure.

Id.; Reiners v. *Young*, 38 Hun, 335.

The easement in question is not only created by grant, but it is an apparent and continuous easement, and would pass as incident to the grant without the word "appurtenances."

Parsons v. *Johnson*, 68 N. Y. 66; *Rogers* v. *Sinsheimer*, 50 N. Y. 648.

The action for the possession cannot be maintained; the appellants enjoy an easement in the land in dispute wholly inconsistent with actual occupation by respondent.

Wilklow v. *Lane*, 37 Barb. 247; *Rogers* v. *Sinsheimer*, 50 N. Y. 649.

Mr. **S. Jones,** for respondent:

Defendants have no rights of easement. There is no actual necessity of the walls in question for the support of the remaining part of the structure on defendant's lot. Actual necessity is the controlling element.

Ogden v. *Jennings*, 62 N. Y. 526, 531.

By the clear terms of the deed this space and so much of the building as was on it were not granted or intended to be so.

These walls are not directly necessary to the proper enjoyment of the thing granted; and, therefore, they will not pass as incident or appurtenant thereto. *Id.*

Peckham, *J.*, delivered the opinion of the court:

The deed from plaintiff to defendant's grantor conveyed the lot No. 143 by metes and bounds, as being twenty-two feet wide on Forty-Ninth Street, and the same width in the rear, and 100 feet and 4½ inches deep. This description confessedly does not embrace the five feet in question, which are within the area of lot 141 on the east. The defendant, however, claims to have the right, in the nature of an easement, to retain the possession of this strip, although not embraced in the above description, because the house on the rear of his lot was built and extended these five feet on the lot adjoining it on the east, by the person who was at the time the owner of both lots.

For this house, thus extended towards the east, there never was a separate and exterior eastern wall, but its front and rear walls were simply extended five feet over the line until they met the western wall of a house built on that adjoining lot, but not up to the western line of the lot within the said limit of five feet and some inches. The front and rear walls above mentioned were not keyed into this western exterior wall, and the timbers of the house did not rest in such wall but were supported by piers. This wall was thus made the east wall of the house, the largest part of which was built on the lot now owned by defendant, and the plastering was placed upon or directly against it. The house had a hallway through its centre with rooms on each side, and the eastern rooms, of course, had this wall for their eastern boundary. Under these circumstances the plaintiff sold to defendant's grantor a piece of land described as above, "with the buildings and improvements thereon," "together with all and singular, the tenements, hereditaments and appurtenances thereto belonging."

Unless the defendant has the right to retain the possession of the five feet and the right to use the exterior wall above described as a wall to his building so long as the wall shall endure, the plaintiff has established her right to the premises; and the judgment awarding her possession thereof must be affirmed.

The defendant claims to have established his right under the language of the deed last above quoted.

The description in the deed of the amount of the land conveyed is minute and definite, even to a half inch, and the deed conveys "the buildings and improvements thereon." Does this language include the right to retain possession of this five feet in controversy while that western extension wall endures and to use such wall as the eastern extension wall of the defendant's house? It is the building and improvements on the land, which is most accurately and minutely described, that are conveyed.

There is no suggestion of mistake of measurement in the amount of land intended to be conveyed; and yet a piece of land five feet in addition to that which was actually conveyed and out of a total of only twenty-two feet, is thus called for to furnish this easement to defendant's premises. We think that the language conveys only that part of the building which is on the land described, and that no right such as is claimed by the defendant exists upon or in relation to the land not conveyed and which belongs to plaintiff. Such we think is the clear intention to be deduced from the language used and from the situation of the parties.

The defendant can easily build up a wall on the easterly side of his premises which will then keep the building thereon in good condition, although the effect of course will be to somewhat diminish the size of the whole building as to width. The defendant will still have all that was conveyed to his grantor, viz.: the building and improvements which were on the land actually conveyed.

But the defendant claims that his right can be founded upon the other clause of the deed which conveys the land thus specifically described, "together with all and singular, the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining." It is claimed that this right to use the western extension wall as long as it endures, and also the space for the front and rear walls, is an easement which is appurtenant to the grant of the twenty-two feet of land "with the buildings and improvements thereon," which building defendants say cannot exist as a building, unless the front and rear walls are permitted to stand, and they cannot stand unless permitted to occupy the land on which they stand.

It must be remembered that the parties have respectively granted and received all of the land that was intended. There has been no mistake made about the quantity thereof. The grantee received and the grantor conveyed only twenty-two feet in width, each of course knowing that five feet of the width of the building ran over and upon land not conveyed. If there had been any thought of conveying that portion of the house which stood on land not conveyed, or of erecting any easement upon the land not conveyed, in the nature of a right of support for the walls of the building, I think language would have been used which would have made it plain that such was the intention. By the word "appurtenances" incorporeal easements or rights or privileges will alone pass, and of these only such as are necessary to the proper enjoyment of the estate granted. *Ogden* v. *Jennings*, 62 N. Y. 526.

I think the estate granted was a lot of land twenty-two feet wide, and such building as was on that lot; but the estate did not extend to any portion of that building which was outside of and beyond such lot. It was not necessary, in order to enjoy the estate granted, that there should exist an easement in the shape of an appurtenance to such estate, which was not directly necessary to its proper enjoyment, and was no more than a mere convenience, and in effect simply an enlargement of the grant. By building the extension wall on his own land the defendant can have the full enjoyment of every thing that has been conveyed to him. He cites as the main authority for his contention the case of *Rogers* v. *Sinsheimer*, 50 N. Y. 646.

But the cases are clearly distinguishable. In the *Rogers Case* the original owner had built two houses on two lots with a party wall eight inches thick between them, which served as a support for the beams of each house. On the same day he sold the houses by two deeds to two different parties, conveying the easterly lot to A., the plaintiff's grantor, and the westerly lot to B., the defendant's grantor, the deed to the latter by a description which located the division line so as to throw the party wall and two inches of land on the westerly side thereof within the plaintiff's lot. The plaintiff recovered a judgment which was reversed at general term and such reversal affirmed here. It was placed upon the ground that as it was a party wall, which at the time of the conveyance served as a support for the beams of the house erected on the lot then belonging to defendant, the premises were obviously charged with the servitude of having the beams of the house rest in the wall, and the wall remain as an exterior wall for defendant's house so long as the building should endure. Thus we have the fact of a party wall and an actual existing support therein for the beams of each house, and the right to the use of it as an exterior wall. Again; there was a space of but two inches beyond the party wall which plaintiff claimed, and that space was so short as to prevent the idea being formed that there was an intention by such conveyance to terminate the character of the wall and the right of defendant to rest his beams upon it. Such right of support existing carried with it, of course, the right to occupy this space of two inches between the easterly boundary of defendant's lot and the wall, with the timbers which were to be supported in the wall.

In the case at bar there was no party wall, and no support and no right of support for the beams of defendant's house. The exterior wall of an existing house had simply been utilized as being partition enough between the houses, and no part of it was used for a support of any of the timbers of the house in question, and this wall was five feet from the line of the premises which were actually conveyed to the defendant.

The character of the easement claimed by defendant, in effect, does not differ from the claim of the fee to the five feet, for the right to occupy the space with the front and rear walls and to have the western wall of the other building serve as the eastern exterior wall of defendant's, requires in its exercise the actual and exclusive possession of that amount of land, although it was never conveyed to defendant. There is no intention to make a conveyance of any such right expressed in the deed, and there is nothing in the *Rogers Case* which compels or authorizes us to imply such an intention. We have looked at the other cases cited by defendant's counsel, but they plainly have no application.

What has been said in regard to the claim of defendant as to the five feet, applies with stronger force to the alleged easement for the maintenance of the privy, hydrant, etc. This alleged claim is plainly untenable, as not being in any sense an appurtenant to the land conveyed, not necessary to its enjoyment, and scarcely even more convenient.

The judgment should be affirmed, with costs.

All concur.

Franklin WOODRUFF *et al.*, *Respts.*,

v.

Frederick C. HAVEMEYER *et al.*, *Appts.*

1. Where parties to a **contract for** the **shipment of sugars** made a **special agreement as to** the **mode of delivery** and fixed by the agreement the amount which the owner or consignee should pay for landing and wharfinger's charges, *held*, that the **agreement was valid and binding** on such owner and consignee.
2. The **owners of** the **wharves** upon which the sugars were landed in pursuance of such contract, who received the sugars under a delivery by the carriers, are **entitled to enforce** the **contract** made for their benefit **and recover** from the owner or consignee the **wharfinger's charges** at the specified rate.
3. In general a **bill of lading** is binding upon and protects all persons who, by means of it or under it, become the owners or custodians of the goods.
4. The **statute,** chap. 320, Laws of 1872, can **not** be construed to **prohibit** the **owner of a private wharf from entering into a contract** for the landing and deposit of goods upon his wharf, **upon such terms as may be agreed upon** between himself and the owner of the goods, nor can it be construed as requiring him to store goods for any period of time without compensation.

(Decided June 7, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Kings Circuit on a verdict for plaintiffs in an action to recover landing and wharfinger's charges under a bill of lading. *Affirmed.*

Statement by **Andrews,** *J.*:

The plaintiffs were owners of certain wharves, piers and warehouses at the foot of Joralemon Street in the City of Brooklyn, within the Port of New York, erected on land under water within the boundaries mentioned in chapter 156 of the Laws of 1848, and chapter 318 of the Laws of 1860. The defendants were owners and consignees of certain cargoes of sugar, imported from Havana by Ward's line of steamers between November, 1880, and November, 1882, which, upon the arrival of the vessels transporting the same were landed by the carrier upon the plaintiffs' wharves, and were, within twenty-four hours thereafter, delivered by them to the defendants.

The sugars were transported from Havana to New York under bills of lading by which the carrier agreed to carry them from Havana to the Port of New York, "to be there delivered within reach of the steamship's tackles, unto Messrs. Havemeyer & Elder, or his or their assigns," upon payment by the consignees of the freight and primage specified.

This primary clause in the bill of lading was followed by a provision out of which and the action of the carriers thereunder, arises the present controversy. That provision is as follows: "It is expressly stipulated that the articles named in this bill of lading shall be at the risk of the owner, shipper or consignee thereof, as soon as delivered from the tackles of the steamer in the aforesaid Port of New York (steamer has option of discharging cargo at New York or Brooklyn, consignees of cargo to pay charges thereon as expressed in the margin) and they shall be received by the consignee thereof, package by package, as so delivered," etc. In the margin of the respective bills of lading is this printed notation: "Landing and wharfinger's charges, including storage on wharf not exceeding six days, 17 cts. per hhd., 15 cts. per t'ce., 8 cts. per box and 4 cts. per bag, commencing immediately upon delivery from steamer."

The vessels on which the sugars were shipped carried general cargoes, and on reaching New York stopped in the first instance at the regular pier of the company in New York, at the foot of Wall Street, and there discharged light cargo other than sugar, and thence proceeded, under the option reserved in the bill of lading, to the wharves of the plaintiffs in Brooklyn and there delivered the sugars. The defendants were ready with lighters to receive the sugars from the vessels, and demanded that they should be delivered directly into the lighters. They were, however, delivered upon the wharf, and not directly into the lighters, for the convenience of the steamers in sorting the defendants' sugars from other goods and sugars on the vessels, the cargoes in most cases including other sugars than the defendants'.

This action is brought to recover the landing and wharfinger's charges, at the rate expressed in the bills of lading.

Mr. **John E. Parsons,** for appellants:

The bills of lading compelled the vessels to transport the sugar to the Port of New York. They required them to deliver the sugar there, within reach of the vessel's tackle, to the consignees. This is provided in express terms. It is the language of the instruments. There is no doubt or uncertainty about the provision. It admits of no question.

New York Cent. etc. R. R. Co. v. *Standard Oil Co.* 20 Hun, 39; *Rowland* v. *Miln*, 2 Hilt. 150; *Goodwin* v. *Baltimore etc. R. R. Co.* 58 Barb. 195; *Redmond* v. *Liverpool etc. Steamboat Co.* 46 N. Y. 578.

For rendering this service the bills of lading provided in direct terms that the consignee should pay freight at a fixed rate, "with 5 per cent primage and average accustomed, payable in United States currency." The rate is stated in the margin. It is called "freight," and 5 per cent primage is added.

Freight is one thing; landing and wharfinger's charges are something entirely different.

As the defendants were entitled to their sugar, *ex necessitate*, it was not a service rendered to them or for which they were required to pay that the vessels should deliver it to them or should be provided with a berth at the plaintiffs' wharf to permit it to be landed there.

By the terms of the bills of lading the payment of the freight entitled the defendants to have the sugar delivered to them within reach of the vessel's tackle.

No wharfage, storage or protection was asked or given to the sugar. It passed at once into the defendants' lighters.

It was for the convenience of the steamers in sorting from other lots that the sugar went upon the wharf at all. The defendants were ready with lighters to receive it from the vessels, and demanded that it should be delivered directly into lighters, which lay alongside.

If it were possible for the plaintiffs to recover upon the ground that the defendants were liable arbitrarily, and without reference to whether the plaintiffs should or should not render any service, they could not recover in this action.

The bills of lading did not confer upon the vessels the option of discharging cargo both at New York and at Brooklyn. The option is to discharge at one place *or* the other. As the vessels did discharge in New York and the defendants were ready to receive and insisted upon receiving their sugar there, the vessels lost any right which may be claimed to have been conferred upon them by the bills of lading to land in Brooklyn, and thus to subject the defendants to the disputed charge.

The Act of 1872, chap. 320, § 2, as amended by the Act of 1875, chap. 405, § 2, permitted the defendants to use the wharves in question not to exceed twenty-four hours without compensation. None of the sugar remained on the plaintiffs' wharves as much as twenty-four hours.

The Act of 1872 fixes the rates of wharfage to vessels within the Cities of New York, Brooklyn or Long Island City.

In enacting that it shall be lawful for pier owners to make the permitted charge, the Legislature by implication has provided that no greater charge shall be imposed upon commerce.

The plaintiffs are the owners of a pier within the City of Brooklyn. They come within the direct description contained in the Act.

The plaintiffs contend that this Act does not apply to what are called private piers, *i. e.*, piers owned by individuals instead of those which are the property of the corporation of the City of New York.

Wharfage, in a sense of compensation for the use by a vessel of a pier and for the right to discharge cargo, has always been recognized as the subject of legislation.

See Acts of May 6, 1870, April 23, 1872, May 21, 1875, April 16, 1879.

Shipping interests concern the public. The regulation of matters which affect such interests is with the people represented by the Legislature. Commerce, the carriage of passengers or transportation of merchandise, are subjects in reference to which the whole world is entitled to protection against the unlicensed action of individuals.

Vanderbilt v. *Adams**, 7 Cow. 349; *Comrs.* v. *Clark*, 33 N. Y. 251; *Munn* v. *Ill.* 94 U. S. 113 (Bk. 24, L. ed. 77); *Taylor* v. *Atlantic Mut. Ins. Co.* 37 N. Y. 275.

If it be assumed that the defendants became liable, it is not a liability to the plaintiffs, or a liability which can be enforced by them. The plaintiffs are not parties to the bill of lading. There is no obligation in the bills of lading which runs to or in favor of the plaintiffs either in name or by description. The bills of lading are single and entire contracts; the parties are the owners or consignees of the cargo of the one part and the owners of the vessels of the other. It is not within the power of the vessel owners either to give a right of action to the plaintiffs or to split up a right of action which belonged to themselves.

Pardee v. *Treat*, 82 N. Y. 385; *Root* v. *Wright*, 84 N. Y. 72; *Seward* v. *Huntington*, 94 N. Y. 104; *Merrill* v. *Green*, 55 N. Y. 270; *Simson* v. *Brown*, 68 N. Y. 356.

Mr. **S. P. Nash,** for respondents:

The defendants are liable for the charges specified in the bills of lading, notwithstanding the statute regulating wharfage. "Wharfage" as regulated by statute is a charge against the vessel for lying at the wharf, and not a charge for caring for the goods.

In 1872, by chapter 320 of that year, the Legislature, for the first time, passed an Act relating to charges on goods remaining on the wharf.

If the construction of the Act is as contended by appellants and was applicable to private wharves, it would doubtless be held to transcend the constitutional power of the Legislature.

Munn v. *Ill.* 94 U. S. 127 (Bk. 24, L. ed. 85).

The plaintiffs' wharves are not public wharves leased by them, but they are private property and are built on land under water within the boundaries mentioned in chapter 156 of the Laws of 1848, and chapter 313 of the Laws of 1850, in neither of which Acts are any rights of dockage or wharfage reserved.

The "owners or lessees" of public wharves may have no right, as such, to make any charge to the owner of goods which a vessel has a right to land upon their wharves; nor have they any responsibility for such goods. The wharves and piers in the City of New York, for example, are but public streets; and the only right of the lessee or owner is the privilege of collecting wharfage of the vessels making fast to them.

Comrs. v. *Clark*, 33 N. Y. 251; *Taylor* v. *Atlantic Mut. Ins. Co.* 37 N. Y. 275.

But as goods lawfully landed upon a public wharf may incumber and obstruct it for an unreasonable time, the section of the statute allowing a charge upon the goods after twenty-four hours, was passed to enable the owner of the wharf to compel the removal of the goods.

Story, Bailm. § 453.

The statute in question has no application to the owner of a wharf who has the right to use it for storage purposes, and who holds himself out as a warehouseman and wharfinger and renders services for and about the goods.

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*See note, Lawyers' edition. [Ed.]

This is the case in respect to the plaintiffs, and their wharves and the Brooklyn wharves generally, as distinguished from the wharves in New York.

As regards the former the public has no absolute right to use them, either with or without paying wharfage.

Wetmore v. *Atlantic White Lead Co.* 37 Barb. 70; *Wetmore* v. *Brooklyn Gas Light Co.* 42 N.Y. 384.

The construction of the bill of lading is clear, and both plaintiffs and defendants are bound by it.

Whitworth v. *Erie R. Co.* 87 N. Y. 413; *Morse* v. *Pesant*, 2 Keyes, 16; *S. C.* Abb. App. Dec. 321; *The Delaware*, 81 U. S. 579 (Bk. 20, L. ed. 779).

Sufficient privity of contract between plaintiffs and defendants arises upon the bill of lading, and what was done under it, to enable the plaintiffs to sustain the action.

Lawrence v. *Fox*, 20 N. Y. 268.

There is nothing in the contention that the condition contained in the bill of lading of which the vessel availed itself is contrary to public policy or the principles of justice.

In the case of a general cargo the different consignments must be properly separated and during the time required for this purpose the carrier's risk continues.

The Eddy, 72 U. S. 481 (Bk. 18, L. ed. 486).

In such a case it is the carrier who remains the custodian of the goods on the wharf.

But the carrier may limit this liability and provide that each parcel shall be at the risk of the consignee as soon as delivered from the ship's tackle; and bills of lading containing such a limitation are binding upon the consignee.

The Santee, 2 Ben. 519; *S. C.* affirmed in 7 Blatch. 186.

Andrews, *J.*, delivered the opinion of the court:

The defense to this action on the merits, if it has any foundation, rests upon the assertion by the defendants of the right to disregard and repudiate their written contract contained in the bills of lading, to pay landing and wharfinger's fees at the rate specified in the margin of the bills, although the carriers exercised their option to discharge the sugars in Brooklyn. It is manifest that this defense cannot be maintained upon the ordinary and general rules applicable to contracts. The option reserved by the carrier, to discharge the sugars in Brooklyn, contemplated a delivery upon a wharf in case the option was exercised, as is shown by the notation in the margin of the bills.

It is inferable from the agreed facts that the option was reserved by the carriers for their convenience in unloading and assorting cargo. At all events the shippers by the bills of lading assented to this mode of delivery; and they had no right to insist that for their convenience the sugars should be delivered from the side of the ship. The parties to the contract not only made a special agreement as to the mode of delivery, but they fixed by the same agreement the amount which the shipper or consignee should pay for landing and wharfinger's charges in case the carriers elected to discharge the sugars in Brooklyn. It is plain that this agreement also was within the general competency of contracting parties and was binding upon the defendants, unless they are freed from liability to perform their contract upon some special ground.

It is claimed that, assuming that the contract was valid and enforceable between the carriers and the defendants, there was no privity between the plaintiffs and defendant which will support an action by the plaintiffs to recover the stipulated compensation. It is unnecessary to invoke the doctrine of *Lawrence* v. *Fox*, 20 N. Y. 268, in order to support the judgment below; and it is not important to consider whether the doctrine of that case is applicable.

The plaintiffs came into possession of the sugars through a delivery by carriers duly authorized by the shippers and consignees to make delivery on such wharf in Brooklyn as the carriers might select, subject to the payment by the consignees of wharfinger's fees at a specified rate. The receipt of the cargo on the wharf was in legal effect a service rendered by the plaintiffs for the defendants, upon the employment of the carriers duly authorized to contract in behalf of the defendants for the service at the rates agreed upon in the bill of lading.

The defendants were parties to the bills of lading. The plaintiffs received the goods under the terms expressed therein and thereby became entitled to enforce the contract made for the benefit of such wharfinger as should render the contemplated service. In general a bill of lading is binding upon and protects all persons who by means of or under it become the owners or custodians of the goods. See *Whitworth* v. *Erie R. R. Co.* 87 N. Y. 413; *Morse* v. *Pesant*, 2 Keyes, 16, and *The Delaware*, 81 U. S. 579 (Bk. 20, L. ed. 779).

But the defendants mainly rely for their defense upon the Act, chapter 320, of the Laws of 1872, entitled "An Act to Amend an Act in Relation to the Rates of Wharfage and to Regulate Piers, Wharves, Bulkheads and Slips in the Cities of New York and Brooklyn, Passed May 6, 1870."

The first section of the Act prescribes the rates of wharfage and dockage, within the Cities of New York and Brooklyn. "Wharfage" is a charge against a vessel for lying at a wharf, and is not a charge for caring for the goods. The plaintiffs are not seeking to recover wharfage, and the first section of the Act has, therefore, no direct bearing upon the present controversy. But it is claimed that by the second section the defendants had the right to have the sugars remain on the plaintiffs' wharf for a period not exceeding twenty-four hours without charge. The second section is as follows:

"It shall be lawful for the owners or lessees of any pier, wharf or bulkhead within the Cities of New York and Brooklyn, to charge and collect the sum of five cents per ton on all goods, merchandise and materials remaining on the pier, wharf or bulkhead owned or leased by him for every day, after the expiration of twenty-four hours from the time such goods, merchandise and materials shall have been left or deposited on such pier, wharf or bulkhead, and the same shall be a lien thereon."

It will be observed that the section does not in terms prohibit wharfingers from entering into special contracts for the use of their wharves, for the storage or deposit of goods thereon during the first twenty-four hours. It simply declares it to be lawful for owners or lessees of wharves or piers to charge the rate specified, upon goods remaining thereon more than twenty-four hours.

The public wharves in New York and Brooklyn are in general extensions of public streets, and the second section of the Act may have been enacted for the protection of wharfingers on the public wharves against the annoyance and obstruction which might be occasioned by the accumulation of goods, merchandise and materials thereon, and to furnish a motive to the owner of property for its prompt removal.

This view is quite consistent with the course of legislation and the decisions. But, however this may be, we think the statute cannot be construed to prohibit the owner of a private wharf from entering into a contract for the landing and deposit of goods upon his wharf, upon such terms as may be agreed upon between himself and the owner of the goods; nor can it be construed as requiring him to store goods for any period of time without compensation. Assuming that such a regulation would be within the competency of the Legislature, as to which we express no opinion, nevertheless the intention of the Legislature to exercise such an exceptional power cannot be inferred from the language of the Act of 1872. The Act can have scope and effect without imputing to the Legislature the design attributed to it by the defendants. See *Wetmore* v. *Brooklyn Gas Light Co.* 42 N. Y. 384.

We think the plaintiffs were entitled to maintain the action, and that the judgment should be affirmed.

All concur.

Henry M. CASE, *Respt.*,
v.
Isaac R. PHARIS, *Appt.*

1. Where plaintiff sued for board furnished to defendant, and defendant answered by a denial putting the claim at issue and setting up a **counterclaim** for board furnished by him to plaintiff, to which the latter replied with a denial, and plaintiff furnished a **bill of particulars containing a charge against defendant** for board **and a credit** allowed him for similar service of a less amount; *held*, that the **credit** is **not a conclusive evidence of legal liability** to that amount.
2. The **admission,** although a concession of the fact that board had been furnished, does **not waive** the **right** claimed by the denial on each side **of contesting a resultant liability** flowing from the fact admitted.
3. The **trial** having been **conducted upon** the **assumption** that the question of legal liability for board was an open one on each side, if defendant held the contrary he should have objected to the evidence offered to defeat his claim and relied upon the alleged admission; it is **too late to raise** the **point for** the **first time in this court.**
4. A **bill of particulars,** like a pleading, **may be amended.** It is not the office of a bill of particulars to furnish a defendant with facts whereon to found an affirmative defense in his behalf.
5. A **plaintiff** is **not bound to furnish** a **statement of payments** or offsets which he has **voluntarily credited.** Where he has done so in such manner as by mistake to have periled his **right,** an amendment may be allowed.

(Decided June 7, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Fourth Department, affirming a judgment entered in Onondaga County on report of a referee in an action to recover on a promissory note, for a balance on a running account and for board furnished. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **Louis Marshall,** for appellant:

A bill of particulars is treated by the authorities as an amplification of the pleading to which it relates, and is to be construed as forming a part of it and has the effect to restrict the proofs and to limit the recovery to the matters therein set forth.

Matthews v. *Hubbard*, 47 N. Y. 429; *Higenbotam* v. *Green*, 25 Hun, 216; *Bowman* v. *Earl*, 3 Duer, 694; *Melvin* v. *Wood*, 3 Keyes, 535, 536; *Brown* v. *Williams*, 4 Wend. 368; *Starkweather* v. *Kittle*, 17 Wend. 201; *Dwight* v. *Germania Life Ins. Co.* 84 N. Y. 506.

A failure to serve a bill is to be treated in the same manner as a default in pleading.

Gross v. *Clark*, 87 N. Y. 276.

It is a rule of evidence elementary in its nature that the party who explicitly admits by his pleading, that which establishes the right of his opponent, will not be permitted to deny its existence, or to prove any state of facts inconsistent with that admission.

Paige v. *Willet*, 38 N. Y. 28; *Tell* v. *Beyer*, 38 N. Y. 161; *Fleischmann* v. *Stern*, 90 N. Y. 114; *Donovan* v. *Bd. of Ed. of N. Y.* 55 How. Pr. 176; *Thomas* v. *Austin*, 4 Barb. 265; *Robbins* v. *Codman*, 4 E. D. Smith, 315; *Crosbie* v. *Leary*, 6 Bosw. 315; *White* v. *Smith*, 46 N. Y. 418; see also, *People* v. *Van Rensselaer*, 9 N. Y. 291, 319.

In this case the referee utterly disregarded the admission contained in the plaintiff's bill of particulars: that the defendant had furnished the plaintiff with board and performed labor for him, and that he was liable therefor.

White v. *Smith*, 46 N. Y. 418.

Where a referee thus disregards an admission contained in the pleading of a party, his decision (based upon such omission to consider conceded facts in the case) is error which must lead to a reversal.

Bridge v. *Payson*, 5 Sandf. 210.

The effect of an express and particularized admission cannot be destroyed by a subsequent formal general denial. The ambiguity, if any is created by such a method of pleading, is occasioned by the conduct of the pleader who adopts such eccentricity; and the consequences must fall upon him, and not upon the party who had a right to rely upon his explicit concession. It is the duty of a party to an action to present a clear and unequivocal statement of his cause of action or defense; and when a material statement is susceptible of two meanings, the one most unfavorable to the pleader must be taken.

Clark v. *Dillon*, 97 N. Y. 370; *Bates* v. *Rosekrans*, 23 How. Pr. 98; *Moores* v. *Lehman*, 20 Jones & S. 283.

If the pleadings and bills of particulars in this action had been verified, the plaintiff could not have been convicted of perjury for interposing a constructive denial of liability for board and lodging in the reply, when in his amplified complaint in the action he expressly admitted such liability.

Clark v. *Dillon*, 97 N. Y. 376.

Mr. **Thomas Hogan,** for respondent:

Because plaintiff stated a credit in his bill of particulars it does not follow that defendant should be allowed it, the referee having found adversely thereto and the pleadings expressly denying such credit.

Vanderbilt v. *Schreyer*, 21 Hun, 537; *Stuart* v. *Kissam*, 2 Barb. 494; *Craig* v. *Tappin*, 2 Sandf. Ch. 78-85; *Goodyear* v. *De La Vergne*, 10 Hun, 537; *Putney* v. *Tyng*, 24 N. Y. Week. Dig. 344.

The defendant did not rely upon it at the trial, and cannot claim it now.

Smith v. *Freeman*, 71 Ind. 85; *Bass* v. *Smith*, 61 Ind. 72; *Randolph* v. *Mayor of N. Y.* 53 How. Pr. 68.

Finch, *J.*, delivered the opinion of the court:

The pleadings in this case were very general in their form. The complaint alleged among other things that the defendant was indebted to the plaintiff for board furnished; to which the former answered by a denial putting the claim at issue. The defendant further answered by setting up a counterclaim for board furnished by him to the plaintiff, to which the latter replied with a denial.

On this state of the pleadings, if nothing else had occurred, either party would have been at liberty as against the other to have resisted his adversary's claim for board upon the ground that the relations between the parties, as father-in-law and son-in-law, and the attendant circumstances were such as to negative any implied contract to pay for board and require for success proof of an express agreement to pay; and if that defense failed, then to establish the amount and value of the board furnished. The two positions were not necessarily inconsistent. It might turn out in favor of either party that, while there was no implied contract, there was yet an express agreement to pay on one side and not on the other, and so respectively each party could insist upon his own claim while denying his adversary's, and neither conceded an implied contract by asserting his own right of action. But at some time each party furnished to the other a bill of particulars, and upon that served by the plaintiff the question arises, argued on this appeal. It contained a charge against the defendant for board, and a credit allowed him for similar service of a less amount; and that credit, it is claimed, admits that for board to some amount the defendant was entitled to be paid; and so the referee erred in refusing wholly an allowance for that item, and on both sides, upon the ground that in the absence of an express agreement the circumstances repelled an implied one.

We are now reminded that a bill of particulars is to be deemed an amplification of the pleadings, and that similar admissions have been held to be sufficient basis for a judgment. It may be that the credit here given was an admission of the fact that board to the amount stated was furnished by the defendant to the plaintiff, but we do not think, having reference to the form of the pleadings, and the issues raised by them, that the credit is a conclusive admission of legal liability to that amount. It is impossible to harmonize such a liability with the denials of the answer and reply; and therefore I think the bill of particulars must be construed to contain only a conditional or contingent admission framed to operate in a possible emergency.

As no item could be proved on the trial, ordinarily, unless embraced in the bill, it became necessary to name in that every charge which upon any theory at the trial might become admissible; and so the plaintiff (while resisting the defendant's claim upon a ground equally fatal to his own) might guard against the possible failure of that resistance by pleading and itemizing his own charge for board as in excess of the defendant's, and the credit given is in connection with the charge made and upon the theory that both charge and credit may by possibility prove to be a legal liability. The admission fairly requires to be treated as a concession of the fact that board had been furnished, but does not waive the right claimed by the denial on each side of contesting a resultant liability flowing from the fact admitted. It is as if the plaintiff had said: "Board was furnished so much by me and so much by my adversary; but I deny that either, for a reason which affects both, is a legal charge; yet if mine is allowed, it amounts to so much and I will prove it at that, while my adversary's is the less sum, which in that event I admit."

If this was hypothetical pleading, or the theories were in one view inconsistent, it is further to be observed that no objection was made upon the trial in any manner raising the question. The trial went, from its beginning to its end, upon an assumption that the question of legal liability for board was an open one on each side; and if defendant held the contrary, he should have objected to the evidence offered to defeat his claim and relied upon the alleged admission. The attention of the referee would then have been called to it, and he could have ruled upon it, and possibly the plaintiff might then have sought leave to amend, and obtained permission to strike out the credit as made under a mistake as to its effect and construction. A bill of particulars, like a pleading, may be amended. *Melvin* v. *Wood*, 3 Keyes, 533.

When the amendment sought is to strike out what is unessential to the bill and a needless addition, leaving the plaintiff's side of the account unchanged, it would seem quite possible to permit it. It is not the office of a bill of particulars to furnish a defendant with facts whereon to found an affirmative defense in his behalf.

Drake v. *Thayer*, 5 Robt. 594.

A plaintiff is not bound to furnish a statement of payments or offsets which he has voluntarily credited. *Ryckman* v. *Haight*, 15 Johns. 222; *Williams* v. *Shaw*, 4 Abb. Pr. 209.

Where he has done so in such manner as by mistake to have periled his right or made ambiguous his meaning, an amendment allowed would not be an unwarranted discretion. But in this case the defendant went to judgment without once relying upon the alleged admission, or drawing attention to it, or claiming anything under it. He sees the evidence which defeats it offered and given in silence; and not until the decision is made, when opportunity for amendment is gone, does he raise the point. We think that is too late and furnishes no just ground for a reversal of the conclusion reached.

The judgment should be affirmed, with costs.

All concur, except **Ruger**, *Ch. J.*, not voting.

William A. LEWIS, *Appt.*,
v.
Charles BARTON, *Appt.*, and Helen F. Barton *et al.*, *Respts.*

1. The usual **rule for** the **construction of pleadings** applies as well to an **answer of usury** as to one setting up any other defense.
2. The **defense of usury** is not inconsistent with the admission of the averments in the complaint. Where the case turns wholly upon the defense of usury, it is unimportant that there is no sufficient **denial** in the answer **of the averments in the complaint.**
3. Where the plaintiff, when he took a note, and a **mortgage** as collateral security, had **notice** that the **note was accommodation paper,** the **certificate** and affidavit **of** the **mortgagor** made cotemporaneously with the note that it was business paper and was given for a full consideration, and was subject to no defense, **constitute no estoppel against** his setting up the defense of usury to defeat the mortgage.
4. On **appeal to this court,** it cannot regard a **reversal** below as having been made **on the facts** unless this appears from the order of reversal.

(Decided June 7, 1887.)

CROSS appeals from a judgment of Supreme Court at General Term in the Fifth Department, reversing in part a judgment of the Monroe Equity Term in favor of defendants in an action to foreclose a mortgage. *Reversed.*

This action was brought to foreclose a mortgage given as collateral security for a certain note drawn by Charles W. Briggs, under the name of Briggs Brothers, to the order of plaintiff, and indorsed by John T. Briggs and Charles Barton for the accomodation of Briggs Brothers.

The defenses were usury and an extension of time of credit to the principal debtor, without the consent of the sureties.

The case was tried at the Monroe Equity Term before the court without a jury, who found the facts as follows:

1. That on the 14th day of December, 1876, it was agreed between the plaintiff and one Charles W. Briggs, who was engaged in business under the firm name of Briggs Brothers, that the said Briggs Brothers should execute their promissory note to the order of John T. Briggs, for the sum of $5,000, and interest from December 14, 1876, payable in nine months from date, and should procure the same to be indorsed by said John T. Briggs and Charles Barton, for the accommodation of said Briggs Brothers. And it was further agreed that the defendants, Charles Barton and Charles F. Sargent, as a collateral security for the payment of said note, should execute and deliver to the plaintiff their bond, in manner and form as set out in the complaint, to be secured by a mortgage executed by the defendants Charles Barton and Charles F. Sargent, Helen F. Barton and Esther J. Sargent, as is alleged in the complaint. And it was further agreed that upon the delivery of said papers to said plaintiff he would loan and advance to the said Briggs & Brother $3,000 in money, and should deliver to them three promissory notes of third parties of the nominal value of $1,500.

2. That said promissory notes so delivered to Briggs & Brother were not worth the said sum of $1,500, but were worth much less, which was well known to plaintiff and to Briggs & Brother.

3. That on the 15th day of December, 1876, in pursuance of said agreement, said plaintiff loaned to Briggs & Brother the said sum of $3,000, and turned out said three notes to them, and received therefor the said note for $5,000, and said bond and mortgage.

4. That said transaction was had between the plaintiff and said Briggs & Brother with the intent on the part of the plaintiff to take, and on the part of Briggs & Brother to pay, a usurious rate of interest for the loan and advance of the said sum of $3,000, and that the said Briggs & Brother did pay and the said plaintiff did receive for the loan and advance of said $3,000, the sum of $500, and the difference between the actual and nominal value of the said notes, in addition to the rate of 7 per cent yearly.

5. That at the time of the indorsement of said note and of the execution of said bond and mortgage, said Barton signed a certificate that said note was valid business paper, and was made for a full consideration, and was not made for the purpose of raising money, and that there was no defense thereto for want of consideration, usury or otherwise.

6. That said statement was not true, and was known by plaintiff not to be true, and he did not rely upon it when he took the note.

As conclusions of law the court found:

1. That the notes indorsed by the defendant Barton, and the said bond and mortgage, are usurious and void.

2. That the defendants, Charles Barton, Helen F. Barton, Charles F. Sargent and Esther J. Sargent, are entitled to judgment that the complaint of the plaintiff be dismissed, and

that they recover their costs against the plaintiff.

Judgment was entered accordingly.

Upon appeal by plaintiff to the general term the judgment was affirmed as to the defendants Sargent and wife and Mrs. Barton, but was reversed as to Charles Barton, and a new trial awarded; whereupon, plaintiff and defendant Charles Barton appealed to this court.

Mr. **J. E. Roe,** for plaintiff:

Usury is an affirmative defense and must be clearly proved.

Valentine v. *Conner*, 40 N. Y. 252; *Morris* v. *Talcott*, 96 N. Y. 107.

The transaction was not, and it was not proven to be, a loan of money, but a sale of commercial paper, accompanied with a collateral bond and mortgage as a pledge or security for its payment.

Tyler, Usury, 118–130, § 91; *Ingalls* v. *Lee*, 9 Barb. 647; *Rapelye* v. *Anderson*, 4 Hill, 472, 481; *Sutherland* v. *Woodruff*, 26 Hun, 411; *Cobb* v. *Titus*, 10 N. Y. 198, and cases cited.

This is not an action upon the note, but upon Barton's indorsement upon it; or, rather, upon defendants' guaranty or undertaking to see it paid. A contract of indorsement is one independent of the note.

See *Morford* v. *Davis*, 28 N. Y. 481, 485 and *Archer* v. *Shea*, 14 Hun, 493.

The defendants were shown to have themselves received the avails of this transfer through McFaul, their agent; and the mortgage in evidence expressly admits its receipt by them.

Dauber v. *Blackney*, 38 Barb. 432.

Barton was estopped by his affidavit from saying that his contract of indorsement on the note was invalid.

Mason v. *Anthony*, 3 Keyes, 609; *Erwin* v. *Downs*, 15 N. Y. 575; *Morford* v. *Davis*, 28 N. Y. 481, 485.

The other parties are bound by the oral representations of the parties who procured the loans.

Platt v. *Newcomb*, 27 Hun, 186; *Ahern* v. *Goodspeed*, 72 N. Y. 108; *Littauer* v. *Goldman*, 72 N. Y. 507; *Ross* v. *Terry*, 63 N. Y. 613.

Was not this mortgage security, or guaranty, executed directly to the plaintiff, by the other defendants, equivalent to an indorsement of the note by them, and this even aside from the mentioned representations?

Brown v. *Curtiss*, 2 N. Y. 226; *Allen* v. *Rightmere*, 20 Johns. 365.

Having guarantied the note, were they not estopped from saying it was invalid?

Dauber v. *Blackney*, 38 Barb. 432.

By reason of the oral as well as written representations, all of the defendants were estopped.

Platt v. *Newcomb*, 27 Hun, 186; *Ahern* v. *Goodspeed*, 72 N. Y. 108; *Littauer* v. *Goldman*, 72 N. Y. 507; *Union Dime Sav. Inst.* v. *Wilmot*, 94 N. Y. 225.

Where the principle is estopped, the surety is estopped also. Briggs as well as Barton represented the paper as business paper, and as belonging to Barton at the time of its transfer.

Brandt, Suretyship, 518–521; 1 Greenl. Ev. 186; *Mc Williams* v. *Mason*, 31 N. Y. 298, 302; *McNaught* v. *McClaughry*, 42 N. Y. 22; *Western N. Y. Life Ins. Co.* v. *Clinton*, 66 N. Y. 326, 331; *Howe Machine Co.* v. *Farrington*, 82 N. Y. 126.

These authorities hold that even if the principal had distinctly misrepresented the character of the note to the surety, this would not avail them as a defense as long as plaintiff did nothing to mislead them. Their remedy would be against the one who had deceived them. It was not necessary that the plaintiff seek and make inquiries of the surety.

Mc Williams v. *Mason*, 31 N. Y. 302.

No allegation of the complaint is controverted. The answers deny "each and every allegation of the complaint,"—except what? The answers do not in any way point out or say what, but simply go on with a statement more or less in conflict with the complaint. They do not even state that they deny such allegations as are not thereafter admitted or modified; and even such form is held to put nothing in issue.

Thierry v. *Crawford*, 33 Hun, 366; *McEncroe* v. *Decker*, 58 How. Pr. 250.

That it does not constitute a general denial is also equally evident, for the obvious reason that it does not deny all, but denies all except a statement more or less in conflict with the complaint; and hence, it in no way points out what is or what is not controverted, and hence, does not controvert anything, and the plaintiff was entitled to judgment under section 522 of the Code, against all the defendants, upon his motion, and the ruling denying it was error.

Clark v. *Dillon*, 97 N. Y. 370, 373, 15 Abb. N. C. 261, note; *Fleischmann* v. *Stern*, 90 N. Y. 110, 113; *Paige* v. *Willet*, 38 N. Y. 28; *Miller* v. *McCloskey*, 9 Abb. N. C. 303.

Mr. **George Yeoman,** for defendants:

The trial court was right in not finding Charles Barton estopped from defending upon the ground of usury, and its decision will not be reviewed here.

Sherwood v. *Hauser*, 94 N. Y. 626; *Baird* v. *Mayor*, 96 N. Y. 576–577.

It is submitted that the general term was in error if it reversed upon the facts.

But since it does not appear, except from the opinion, that the court reversed upon the facts, the question here is: Was there any evidence sufficient in law to sustain the judgment?

Kane v. *Cortesy*, 1 Cent Rep. 245, 100 N. Y. 132; *Sheldon* v. *Sheldon*, 51 N. Y. 354; *Weyer* v. *Beach*, 79 N. Y. 409.

Andrews, *J.*, delivered the opinion of the court:

We think the answer sets out with sufficient distinctness and accuracy the transaction constituting the alleged usury as proved on the part of the defendants, and that there was no essential variance. It alleges in substance that Briggs Bros., the maker of the note to which the mortgage in question was collateral, applied to the plaintiff for a loan of $5,000, for nine months, and that it was thereupon agreed between them that the plaintiff would loan to Briggs Bros. $3,000, for the time stated, and transfer to them three notes he then held against third parties, amounting in the aggregate to $1,500, upon receiving the note of Briggs Bros. for $5,000, payable in nine months, with interest, and that the transaction was consummated as proposed between the plaintiff and Briggs Bros., and the note of $5,000, given, indorsed by the defendant Barton and by John T. Briggs for the accommodation of the makers, and that the mortgage sought to be foreclosed was a further security to the plaintiff for the loan.

The answer also alleges that the transaction was usurious and in violation of the statute. There is some lack of precision and certainty in the averments in the answer, but the plaintiff could not have been misled in respect to the defense intended, or as to the circumstances relied upon to support it. The usual rule for the construction of pleadings applies as well to an answer of usury as to one setting up any other defense. *Nat. Bank of Auburn* v. *Lewis*, 75 N. Y. 516.

The claim that there was no sufficient denial in the answer of the averments in the complaint, if well founded, furnishes no ground of error. The defense of usury was not inconsistent with the admission of the averments in the complaint; and as the case turned wholly upon that defense, it is unimportant that the defendants may have admitted what but for the existence of the usury would have constituted a cause of action. On the merits the evidence was conflicting. The plaintiff was sworn as a witness in his own behalf. He admitted that he advanced only $3,000 in money and $1,500 in notes, for the note of $5,000 and the mortgage.

It was not disputed on the trial that the note of $5,000 had its inception on its transfer to the plaintiff, nor that the defendant Barton was an accommodation indorser for the makers. But the plaintiff testified in substance that he bought the $5,000 note as business paper at the time that it was such, and that he took it in reliance upon the credit of the parties to the paper and the mortgage of Barton, and also upon the certificate of the makers and indorsers of the note and the affidavit of Barton, the mortgagor, executed cotemporaneously with the note, that it was business paper, and was given for a full consideration, and was subject to no defense of "want of consideration, usury, or otherwise."

On the other hand, evidence was given on the part of the defendants tending to show that the plaintiff, when he took the note and mortgage, had notice that the note was accommodation paper.

Upon this ground the learned judge at special term held that the certificate and affidavit of Barton constituted no estoppel against his setting up the defense of usury against the mortgage. This was manifestly right, upon the basis of the facts which the evidence of the defendants tended to establish.

But the general term, as appears from their opinion, reversed the judgment of the special term in favor of the defendant Barton, on the ground that the preponderance of evidence was in favor of the contention of the plaintiff that he took the note, supposing it to be business paper, and without notice that Barton was an accommodation indorser, and that therefore Barton was estopped by his certificate and affidavit from defeating the mortgage on the ground of usury.

But in the posture of the case on the appeal to this court, we cannot regard the reversal below as having been made on the facts, because this does not appear from the order of reversal; and we are bound to presume that the reversal was on questions of law only. On looking at the exceptions, we find none upon which the order of reversal can stand.

The question of pleading has already been considered. Exceptions were taken to findings of the trial judge that the transaction in its origin was a loan from the plaintiff to Briggs Bros. upon security of the note and mortgage, and that the plaintiff, when he took the note and received the certificate and affidavit of Barton, knew his relation to the note, and did not rely upon the truth of the representations contained therein, and various exceptions were taken to the admission and rejection of evidence.

There was evidence, we think, to support the findings excepted to; and we can find no exception to the admission or rejection of evidence, which presents any material error. Dealing with the case, therefore, as we must, as one involving questions of law only, our conclusion is that *the order of the General Term should be reversed, and the judgment of the Special Term affirmed.*

All concur.

David LEVY *et al.*, *Appts.*,
v.
Robert SALOMON, *Respt.*

1. The clause in **chapter 672 of Laws of 1886, amending section 111 of** the **Code of Civil Procedure,** that "**No person** shall be **imprisoned within** the **jail liberties** of any jail for a **longer** period **than six months** upon any execution or other mandate against the person," **refers only to final process** issued after the amount due from the person so imprisoned has been adjudged, **and does not apply to a** person imprisoned within the jail liberties under an **order of arrest** issued before a recovery has been obtained.
2. An **order** of general term affirming an order of special term discharging a defendant from the jail limits and from arrest under a preliminary order of arrest, upon the ground that he was entitled to discharge under said clause of said Act, is **appealable** to the court of appeals.

(Decided May 10, 1887.)

APPEAL from an order of the Supreme Court at General Term in the First Department, affirming an order of the Special Term discharging defendant from the limits and canceling his bond. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **Wales F. Severance,** for appellants:

The order is appealable to this court. It affects a substantial right, *i. e.*, the right of a creditor to hold his debtor in arrest for the satisfaction of his debt, and possibly the right to prosecute the limit bond and realize his claim in such proceeding.

The Act of 1886 does not apply to cases where the defendant is held on an order of arrest.

N. Y. Cent. etc. R. R. Co. v. *Shepherd*, 10

N. Y. Civ. Proc. Rep. 153; *Warshauer* v. *Webb*, 10 Civ. Proc. Rep. 169; *People, Rodding*, v. *Grant*, 10 Civ. Proc. Rep. 174; *Dalon* v. *Kapp*, Daily Reg. Oct. 27, 1886; 11 Civ. Proc. Rep. 58; *People, Cohen*, v. *Grant*, Daily Reg. Oct. 21, 1886; 11 Civ. Proc. Rep. 55.

The effect of the construction contended for in the court below is this: that in actions involving less than $500, the plaintiff, in order to avail himself of the remedy of execution against the person, must recover judgment and issue execution within three months in the one case, and six months in the other.

Defendant has twenty days to answer, fourteen days' notice of trial, execution against property sixty days, before execution can issue against the person, in all ninety-four days, which exceeds the three months limit by four days, leaving the plaintiff no time whatever to bring the action to trial, although in New York County no action can be reached on the calendar for trial in less than six months after issue joined, and in sixteen counties of the State there are but two circuits a year. The Legislature never could have intended this; and the court will not construe a statute so as to produce an unjust, absurd and grotesque result.

Potter, Dwar. Stat. p. 189, 197, 207; 10 Civ. Proc. Rep. 170.

The word "mandate" used in the Act was not intended to cover mesne, but only final process.

Warshauer v. *Webb*, 10 Civ. Proc. Rep. 170.

The words, other mandate, refer to some other mandate of the same character as that designated by the preceding word.

In construing a statute, when a specific word is used, followed by an indefinite one, the latter is controlled by the former; and "*noscitur a sociis*," as is judicially expressed.

90 N. Y. 218; 99 N. Y. 209. See also, *Chapman* v. *Forsyth*, 2 How. 202, 208 (43 U. S. bk. 11, L. ed. 236, 238); 77 N. Y. 430; *McGaffin* v. *City of Cohoes*, 74 N. Y. 387; *Corning* v. *McCullough*, 1 N. Y. 47, 69; *Aikin* v. *Wasson*, 24 N. Y. 482; *Chegaray* v. *Jenkins*, 3 Sandf. 409, 413; 28 Hun, 495, 496; 27 Hun, 344, 345; 65 How. Pr. 442, 445; 98 N. Y. 585, 595.

Mr. **Alex. Blumenstiel,** for respondent.

Danforth, *J.*, delivered the opinion of the court:

The record shows that the plaintiffs sued to recover personal property, and on the 9th of February procured the defendant's arrest upon the ground that he had concealed, etc., a part of the chattels, to recover which the action was brought. On the same day the defendant gave a bond for the jail limits, and has since been confined within them. It may be inferred that the cause is at issue; but it has not been tried, nor has any judgment gone against the defendant. Upon an affidavit showing his arrest and continued imprisonment as above stated, the defendant procured an order requiring the plaintiffs to show cause why he should not be discharged from the limits and "from arrest herein", and the bond given by him be canceled and annulled. The motion was granted. Upon appeal to the general term the decision was affirmed, and the plaintiffs appeal to this court.

The defendant justifies the order of the court below, upon the sole ground that under the order of arrest his imprisonment had continued six months, and he was therefore entitled to a discharge under the provisions of section 5, chap. 672, of the Laws of 1886, amending section 111 of the Code of Civil Procedure.

On the other hand, the plaintiffs contend that the statute applies to an imprisonment on final process only. We are of that opinion. The general title of the Act of 1886, *supra*, is "An Act to Amend the Code of Civil Procedure;" and the particular portion on the interpretation of which the defendant relies is the amendment of section 111 of the Code. The original section (111) relates to the support of prisoners in Kings County. The amendment introduces new matter, as to the meaning of which nothing can be gathered from the context.

It declares in the first clause that no person shall be imprisoned within the prison walls of any jail for a longer period than three months, under an execution, or any other mandate against the person to enforce the recovery of a sum of money less than $500 in amount, or under a commitment upon a fine for contempt of court in nonpayment of alimony or counsel fees in a divorce case, where the amount so to be paid is less than the sum of $500; and where the amount in either of said cases is $500 or over, such imprisonment shall not continue for a longer period than six months; and requires the discharge of such person at the expiration of those respective periods.

Then follow these words: "No person shall be imprisoned within the jail liberties of any jail for a longer period than six months, upon any execution or other mandate against the person."

These sentences are, I think, to be read together, and so read admit of but one meaning, viz.: that no person whose condition answers the terms referred to in the first clause, shall be imprisoned either within the walls of a jail or within the jail limits for a time exceeding six months; and if the recovery for the enforcement of which the execution or other mandate is issued, or the amount required to be paid by the commitment is less than $500, then his imprisonment within the prison walls shall not exceed three months. This is the only distinction applicable under the first clause, where the debtor is in close confinement, while under the second, when as to the walls of the jail and within certain limits, he is at large, the amount of the recovery or sum to be paid is unimportant.

The respondent concedes that under the first sentence only a final process or mandate, after an adjudication fixing the amount due, is referred to, but argues that the change of language in the second clause or sentence indicates a change in the intention of the Legislature, and a design to make it more extensive in its application than the former; that although the first included only final process or mandate, the second is of wider signification, and includes all mandates against the person, and so includes simple orders of arrest issued at the time of the commencement of the action and before any recovery.

This would require us to hold that the Legislature intended to alter the description of the process, by virtue of which the imprisonment was had, rather than the description of the place of imprisonment. I find no reason for doing this. The statute, in the first place, characterizes the process as "an execution or any other mandate against the person to enforce the recovery of a sum of money;" and in the next sentence, speaking of the imprisonment in a different place, repeats the words, "upon any execution or other mandate against the person," but does not again use the descriptive or qualifying words. This may have been to avoid the repeated use of the same words. They are to be implied, for the statute relates to a single matter, the relief of the imprisoned debtor; and this would be greatly impeded if a different meaning can be given to the second phrase.

According to the respondent, the first clause includes only final process or executions to enforce recoveries. It therefore does not include mesne process. The second, he says, includes mesne process or orders of arrest. It would follow that a debtor arrested on such process, but unable to procure bail for the limits, could not be discharged because confined within the walls, while one arrested in the same manner and already outside the walls, although within the limits, could be wholly liberated. That would seem to be an absurd conclusion and not to be adopted unless necessary to give meaning to the Act. This is avoided by construing the second clause with reference to the first, and the true meaning is that which we have above ascribed to it.

The general object of the Act in question (§ 5 of chap. 672, Laws of 1886, amending § 111 of the Code of Civil Procedure) is to limit the time of imprisonment under process issued against any person after the sum due from him had been adjudged, whether the imprisonment was within the walls of a jail, or within its liberties.

If confined within the walls the amount of the recovery or the sum to be paid by the imprisoned person determines whether the imprisonment shall end at the expiration of three months or at the expiration of six months. But if he had been admitted to the jail liberties there is no such qualification, and the six months' period applies to all cases within the Act. The defendant is not an imprisoned debtor within the Act. No execution or other mandate has been issued against him to enforce the recovery of a sum of money. No recovery has been had against him, nor has he been ordered to pay any money. We think, therefore, his discharge was improperly allowed.

The order was appealable. It deprived plaintiffs of a remedy given by statute, which they might retain until the prisoner was discharged according to law.

The orders of the General Term and Special Term should, therefore, be reversed and the motion to discharge the defendant and cancel the bond given by him for the liberties of the jail denied, *with costs in all courts.*

All concur.

Matthew F. NORTON, *Respt.*,
v.
Bernard DREYFUSS, *Appt.*

1. The **acceptance by a vendee of articles manufactured** for him **under an executory contract** after an opportunity to examine them, **precludes** him from raising any **question as to defects** or imperfections which were visible and capable of discovery on inspection, **unless** there is a **warranty** of their quality which was intended to survive their acceptance and give the vendee further time for trial and examination.
2. When there is such a warranty the **vendee may** still **retain** the **goods, and** when action is brought for their price may **recoup** such **damages** as he can show he has suffered from their defective or inferior character or from a breach of contract in respect to the time of its performance; **or** he can **return** the **goods and plead** the **rescission of** the **contract** as a defense to an action for their price.
3. But **these defenses cannot both be sustained in** the **same action,** and where it is uncertain on the pleadings and evidence which defense defendant intends to adopt, it is a **question for** the **jury** to determine whether the defendant's refusal to give up the goods was an election to accept them or was to give him further time for examination, or whether it was the expression of a determination to keep them and rely upon the damages which he might be able to prove from the alleged breach of warranty and the nonperformance of the contract.
4. The question as to **whether** such a **demand and refusal,** under all the circumstances of the case, **was** the **equivalent of** an **acceptance** of the goods under the contract, was a **question for** the **jury** to determine and could not be decided as a question of law.
5. Where one party has the property of another in his possession and refuses to surrender it upon demand, a jury may infer **a conversion;** but such evidence raises a question of fact alone and cannot be determined as a question of law.

(Decided June 7, 1887.)

APPEAL from a judgment of the General Term of the Superior Court of the City of New York, affirming a judgment of the Trial Term on a verdict directed for plaintiff in an action to recover the contract price for goods manufactured and delivered. *Reversed.*

Reported below, 19 Jones & S. 491.

The facts and questions raised appear from the opinion.

Mr. **John Frankenheimer,** for appellant:

By directing a verdict for the plaintiff, the court must be regarded as ruling that the plaintiff was entitled to a verdict, even upon the case as presented by the defendant's testimony, and in view of any inferences which a jury might legitimately draw from the defendant's testimony, or from the whole evidence in the case.

Royce v. *Watrous*, 7 Daly, 87; *Stone* v. *Flower*, 47 N. Y. 566; *Miner* v. *Mayor*, 5 Jones & S. 171.

There is no absolute rule of law that the buyer's failure to return or offer to return goods upon discovering their insufficiency, is to be deemed *per se* an acceptance of the goods; but it is a question for the jury whether, under all the circumstances of the case, the buyer's conduct is to be interpreted as a ratification of the bargain.

Story, Sales, 4th ed. § 405; 2 Smith, L. Cas. p. 36, 7th Am. ed.

In an executory contract for the manufacture of goods with express warranty, the vendee is not bound to return the goods on discovery of a breach of the warranty, but may retain and use the articles and rely on the warranty.

Brigg v. *Hilton*, 1 Cent. Rep. 807, 99 N. Y. 517; *Bach* v. *Levy*, 2 Cent. Rep. 490, 101 N. Y. 511; *Kent* v. *Friedman*, 1 Cent. Rep. 718, 101 N. Y. 616.

As no special form of words is necessary to create a warranty, it was at least a question of fact for the jury whether what passed between the parties amounted to a warranty.

Duffee v. *Mason*, 8 Cow. 26; *Whitney* v. *Sutton**, 10 Wend. 418; 2 Benj. Sales, § 932, pp. 811, 813, n. 7.

Mr. **Edward S. Hatch,** for respondent:

The defendant's only relief in this case was by a counterclaim for damages because of a breach of warranty, expressed or implied, he having refused to return the dies after having them in his possession four days, the defects, if any, being apparent on their face.

Day v. *Pool*, 52 N. Y. 416; *McCormick* v. *Pa. Cent. R. R. Co.* 99 N. Y. 65.

The defendant was only entitled to nominal damages because of any breach of warranty on the part of the plaintiff, not having given any evidence of any substantial failure to perform the contract.

Hughes v. *Ferguson*, 23 N. Y. Week. Dig. 185; *J. J. Case Threshing Machine Co.* v. *Haven*, 31 Alb. L. J. 418; *Brigg* v. *Hilton*, 1 Cent. Rep. 807, 99 N. Y. 517.

There was no issue of fact alleged in the complaint for the trial judge to leave to the jury.

There was no dispute as to the price of the merchandise, and there was no proof of any other value than the contract price; there was no dispute but that all of the dies were manufactured by the plaintiff and that they were actually delivered to the defendant, and that they were in the actual possession of the defendant at the time the action was brought; and that the defendant had never offered to return the merchandise to the plaintiff, but on the contrary had refused to recognize that the plaintiff had any right to the possession of the merchandise.

There were no other allegations in the complaint which were denied directly or indirectly by the answer, and all of the foregoing facts referred to in the complaint were either admitted in the answer or proven conclusively at the trial; and the only questions left in the case were any issues that might have been raised by allegations contained in the answer.

Brigg v. *Hilton*, 1 Cent. Rep. 807, 99 N. Y. 517; *Kent* v. *Friedman*, 1 Cent. Rep. 718, 101 N. Y. 616.

Per Curiam:

The plaintiff brings this action to recover the contract price for manufacturing and delivering certain dies and frames for the defendant. The answer was that the goods were not such as the contract required, and also set up a counterclaim.

The evidence given upon the trial differed very much as to the terms and conditions of the contract, the time for its performance, the quality of the articles manufactured, their fitness for the purposes intended, and as to whether the goods delivered corresponded with the articles ordered by the defendant.

It was conceded that the plaintiff manufactured and delivered goods in quantity and number corresponding with those required by his contract, and that some faults in their character and quality were alleged, by the defendant to exist when tendered in performance of the contract. It was also proved that the plaintiff received the articles back on several occasions and attempted to remedy the alleged defects, and finally redelivered the whole quantity to the defendant. It was then still alleged by the defendant that they did not correspond with the articles which the plaintiff contracted to make for him. Three or four days after this time the plaintiff called upon the defendant for payment of the amount claimed by him to be due upon the contract which was refused by the defendant. The plaintiff thereupon demanded the return of the goods and the defendant replied in substance that he would not then give them up, as he wished to consult counsel as to his right to keep them for reimbursement of the damages which he alleged he had sustained by reason of the plaintiff's failure to perform his contract.

The evidence as to what was said by the defendant at the time of the demand was somewhat contradictory, but we believe the above statement expresses the meaning substantially of the defendant's version of the transaction.

The defendant gave no evidence as to the damages claimed to have been sustained by him on account of the alleged breach of contract.

Upon this case, aside from some immaterial circumstances which do not affect the question of law presented, the trial court ordered judgment for the plaintiff for the amount of his claim, holding that the refusal of the defendant to return the goods, when requested, amounted to an acceptance of them upon the contract. The defendant excepted to this direction. He also requested to be allowed to go to the jury on "the question of fact involved in the case, upon the whole evidence, whether the defendant did accept the frame dies or the medallions as in compliance with the order as given by him," and also upon the further question "whether the defendant did absolutely refuse to return the frame dies or the medallions, or whether it was a qualified refusal."

Both of the requests were denied by the court, and the defendant excepted.

We are inclined to think the trial court erred in these decisions, and that the case should have been left to the jury to determine as a question of fact upon the requests made by the defendant. It is now quite well settled that the acceptance by the vendee of articles manufactured for him under an executory contract, after an opportunity to examine them, precludes him from raising any question as to defects or imperfections which were visible and capable of discovery on inspection, unless there is a warranty of their quality which was intended to survive their acceptance and give the vendee further time for trial and examination.

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*See digested citations at close of case, Lawyers' edition. [Ed.]

When there is such a warranty the vendee may still retain the goods and, when action is brought for their price, may recoup such damages as he can show he has suffered by reason of the defective or inferior character of the goods delivered. He may also in such an action recover damages for a breach of contract on the part of the vendor in respect to the time of its performance, if he can prove that he has suffered loss therefrom.

But these propositions do not seem to us to dispose of the case. When one party has the property of another in his possession and refuses to surrender it upon demand, a jury is authorized to infer from these facts a conversion of the property; but such evidence raises a question of fact alone and cannot be determined as a question of law.

We think this case is analogous to the question arising in an action of trover. Here two courses were open to the defendant to adopt in case he was dissatisfied with the performance of the contract by the plaintiff, and was satisfied that he had a warranty of the goods which would survive their acceptance. He could return the goods and plead the rescission of the contract as a defense to the action for their price, or he could keep the property, relying upon his warranty to recover such damages as he could show he had suffered by its breach as a counterclaim to the plaintiff's action for their price.

These defenses are, however, inconsistent with each other and cannot both be sustained in the same action. In case of a return of the goods and proof of their defective character, or a valid offer to rescind the contract, he makes out a defense to the claim to recover their price. If he retains the goods, however, and attempts to recoup his damages for a breach of warranty he may, provided he claims an affirmative judgment in his answer, not only defeat any recovery but recover judgment for the entire amount of damages shown by his proofs which exceed the plaintiff's claim.

It is quite uncertain on the pleadings and evidence in the case what line of defense the defendant really attempted to adopt, for the evidence was about as applicable to one theory as the other. While he admitted that he had declined to give up the goods, he strenuously insisted that he had always refused to accept them, and while denying that he ever became liable for their price he claims that he was entitled to damages for the plaintiff's nonperformance of his contract.

Under these circumstances we think it was a question for the jury to determine whether the defendant's refusal to give up the goods was an election to accept them or simply a tentative proceeding to give him further time for examination and trial, or whether it was the expression of a determination to keep them and rely upon the damages which he might be able to prove, arising upon the alleged breach of warranty as to their quality, and the nonperformance of the contract in other respects by the plaintiff.

By the direction of a verdict the defendant was deprived of the right of going to the jury on the question of the worthlessness of the goods to the defendant as a performance of the contract. The evidence upon this question was quite contradictory, and the jury might well have found either way upon the question. If they had found that the goods were utterly valueless to the defendant, he would then have made out a defense and was then entitled to a verdict at their hands. If they had found, however, that the refusal of the defendant to redeliver them was intended as an acceptance, or that the goods delivered were substantially the same as those ordered, and his refusal to return was dictated by an intention to evade the payment of the contract price, after finding that they were not adapted to the purpose he designed for them, the jury would have been justified in giving a verdict for the price.

But the question as to whether such a demand and refusal, under all the circumstances of the case, was the equivalent of an acceptance of the goods under the contract, was a question for the jury to determine, and could not be decided as a question of law.

We are, therefore, of the opinion that the judgments of the courts below should be reversed and a new trial ordered, with costs to abide the event.

All concur, except **Ruger,** *Ch. J.*, and **Earl,** *J.*, not voting.

John H. STARIN, Jr., *Appt.*,
v.
MAYOR, Aldermen and Commonalty of the City of NEW YORK, *Respt.*

The **compensation of an attorney** is not, **in the absence of an agreement,** necessarily coextensive with the taxable costs. While the costs may be a fair measure of compensation for services in an ordinary case, or in a very small number of such cases, such measure is grossly excessive when applied to a great number of cases (here, actions for penalties for violations of the excise laws), involving no complicated questions of law and only the most simple questions of fact, and, under such circumstances, the attorney is only entitled to what his services are reasonably worth.

(Decided June 7, 1887.)

APPEAL from an order of the Supreme Court at General Term in the First Department, reversing a judgment entered upon report of a referee in favor of plaintiff in an action to recover for professional services as an attorney at law. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **Aaron J. Vanderpoel,** for appellant: In the absence of an agreement, the reasonable and usual charge for services is, at least, the taxable costs. It is but fair to suppose that both parties knew the customary charges, and that the appointment was made and accepted upon that basis.

People v. *Supervisors of Delaware Co.* 45 N.Y. 196; *Van Rensselaer* v. *Jewell*, 2 N. Y. 135; *Adams* v. *Fort Plain Bank*, 36 N. Y. 255; *Mygatt* v. *Wilcox*, 45 N. Y. 306.

The determinations or findings of a referee as to the value of professional services where there is conflicting testimony should be affirmed.

Van Every v. *Adams*, 10 Jones & S. 126.

While parties are now at liberty to make agreements as to compensation, the rule was settled that on the employment of an attorney, nothing being said about compensation, the implied promise was to pay him the statutory costs.

Scott v. *Elmendorf*, 12 Johns. 315.

If the employer relies upon an agreement for a lower rate, the burden is made to show such agreement.

Brady v. *Mayor of N. Y.* 1 Sandf. 569.

In the absence of such agreement the taxable costs are *prima facie* the measure of the attorney's compensation.

Richardson v. *Brooklyn City etc. R. R. Co.* 15 Abb. Pr. 342.

Mr. **D. J. Dean,** for respondent:

The evidence is such as to necessarily imply that McKeag, plaintiff's assignor, agreed to perform all the services rendered by him without other compensation than that which he would receive from the collection of costs from the persons, against whom actions were brought for penalties.

Before a party can be made liable for services it must not only appear that the services have been rendered, but also that they were rendered in expectation of receiving wages.

Maltby v. *Harwood*, 12 Barb. 473, 476; *Griffin* v. *Potter*, 14 Wend. 209; *Williams* v. *Hutchinson*, 3 N. Y. 312; *Williams* v. *Finch*, 2 Barb. 208; *Moore* v. *Moore*, 21 How. Pr. 211, 222, 223; *Ross* v. *Ross*, 6 Hun, 185; *Drew* v. *Mayor*, 8 Hun, 445; *Livingston* v. *Ackeston*, 5 Cow. 531.

The judgment upon the referee's report was grossly excessive and contrary to the weight of evidence.

The claim of the plaintiff is barred by the Statute of Limitations.

Peckham, *J.*, delivered the opinion of the court:

The plaintiff sues as assignee of one who was appointed by the excise commissioners of New York their attorney to prosecute actions for violations of the excise laws in their county.

He was appointed such attorney in 1858, but only actively commenced his work in 1859, and from then until 1863 his whole time, he says, was taken up in this business, but more actively at the commencement of the season when the board would meet. From 1863 his services were so slight that he did not keep a book, and it was not worth making even a memorandum of the amount of costs collected by him. His active work was thus shown to have been included within about the period of four years. The amount of the work done may be thus summarized:

He commenced 14,915 actions for violations of the law by selling liquor without a license. The names of the defendants were reported to him from the commissioners of excise, with the dates of the alleged violations, and he then filled in such names and dates in blank summonses and complaints, which required only such names and dates to make a perfect writ and pleading. Five minutes spent in this business was ample to fill out each case and indorse it, etc. In 8,656 such actions the defendants appeared, a majority by one attorney, and put in answers which were simply general denials. In 1,054 of these actions judgments were taken by default on application to the court and executions issued thereon. In 1,243 of the actions notices of trial were given and they were placed on the calendar and remained thereon twelve terms, although after the trial of four or five the judges refused to try any more, and none was tried, and the evidence shows pretty conclusively that they were not necessarily on the calendar, nor did they require any attention, owing to an understanding that they were not to be moved until a test case had been decided by the court of appeals, and they never were moved.

The county paid the disbursements for printing, for county clerk's and for sheriff's fees. The whole sum disbursed by the attorney for clerk hire and every other expense amounted to between $3,000 and $4,000. There was no agreement between the attorney and the board as to compensation. He collected and appropriated to his own use, of costs and penalties in these actions, the sum of $10,000.

This is the character of the services performed by the attorney, and their amount has been thus substantially detailed, and upon this branch there was no contradictory evidence.

The plaintiff, to prove their value, called six witnesses, one of whom had been one of the commissioners of excise during the time inquired about; and they substantially said that in their opinions, in the absence of any agreement, the attorney was entitled to be compensated at the rate of the statutory costs, and that the number of the cases would not alter their view of the matter in the least; that if it was worth that sum for one case it was for fourteen thousand. One witness seemed to regard the matter much in the same light as if the attorney had discovered a gold mine and was entitled to the rewards of his good fortune. He thought that if two hundred suits were commenced in one day (in the manner above described by the mere filling in of a name and a date in blanks left for that purpose), it was worth $10 in each suit, and therefore $2,000 a day for that service would be a fair and reasonable charge against the county. He said he looked at the whole thing, "it would only occur once in his life probably." At the same time he said that an attorney capable of doing this business could probably have been hired by the year for from $1,500 to $2,000. This he subsequently explained by saying he meant one could be hired for that sum, who superadded to his clerical ability a sufficient quantity of character to entrust him with the charge of the papers in the office—not performing the "brain work," but the mere manufacture of the paper after he had been advised by the counsel in the case. The compensation which this witness would award, including $2,000 per day for the commencement of two hundred suits, and $12,000 a month for term fees, for cases on the calendar which required no attention, and other things in like proportion, the witness said he regarded as compensation for the attorney, for "him for the moments of leisure in his life spent in the acquiring of sufficient knowledge to carry on and conduct a prosecution successfully through."

Another witness who estimated the same amount of $10 for a term fee in each case, which would amount to $12,000 a month, said such amount was in his opinion fair and just, even when nothing was done in the causes, they being simply on the calendar and requiring no watching, so long as he had cases enough to make up such total at the specified sum for each. He said in regard to all the services for which he gave an opinion as to their value, that he did not regard them "as services which involve the question of ability or professional skill," and that was the reason he gave the answer he did, which was that services of a skilled nature should be compensated more liberally in the case of an experienced lawyer than another, but that for such services as their attorney performed he would make no difference in the compensation so far as regarded any reputable member of the Bar. The matter is alluded to only to show what is, indeed, otherwise perfectly plain: that even in the opinion of at least one of plaintiff's witnesses the services of the attorney were not of a high grade, certainly, of skilled labor.

The rest of the evidence for the plaintiff is substantially of a like nature and based upon the same principles and reasoning, viz.: that however large might be the difference between the taxable costs in all these causes and the amount for which such services could have been obtained, by making an agreement with a perfectly reputable and competent attorney in regard to it beforehand, yet if that precaution happened to have been neglected, such fact was entirely unimportant in forming an opinion as to the value of those services. It is to be gathered that this surprising fact was based upon the belief of the plaintiff's witnesses that, in the absence of an agreement, the attorney was entitled to be compensated for his services in any and in all cases, no matter how great their number, at the rate of the taxable costs in each case.

The defendant on its side of the case called thirteen witnesses, many of them among the leading members of the Bar in New York City, and they one and all declared that while in the ordinary run of suits of a not very intricate nature, the compensation of an attorney might be reasonably based upon the taxable costs in a case, yet in their judgment where the cases were of the simplest possible nature, and were of such an enormous number, and the labor involved was so largely reduced to that of mere machinery as in the case under discussion, the compensation under such circumstances at the rate of taxable costs was enormously extravagant, and each one gave his opinion as to the value of such services taking it as an employment by the year (as the attorney was appointed annually), and also judging of such value by considering it with reference to each suit.

The difference between the highest amount as given by the defendant's witnesses and the lowest as measured by the plaintiff's witnesses amounted to the difference between about $40,000 or $45,000, and $313,570.

The referee signed a report for the sum last named with interest, amounting in all, after deducting what the attorney had received, to the sum of $388,156.41, for which sum with costs judgment was entered. The defendant appealed and the general term of the supreme court reversed the judgment, as well upon the facts as the law, and so stated in its order of reversal. The plaintiff then appealed to this court from the order granting a new trial, and gave the usual stipulation.

The order of the general term reversing the judgment entered upon the report of the referee and granting a new trial should be affirmed. The most limited construction of our power in reviewing questions of fact, arising as they do in this case by a reversal in the general term of the findings of fact by a referee, is broad enough to permit and to compel an affirmance of the general term ordered. The result arrived at by the referee ought to shock the common sense of every intelligent man. The idea that a lawyer of respectable character could by any possibility earn over $300,000 in the space of four or five years by services of a legal nature requiring no more legal ability than was involved in making out a summons and complaint and taking judgments by default in these excise cases, is a delusion simply; and any judicial tribunal that should determine it to be a fact would be absurdly at war with the truth and the common and universal experience of mankind.

As I have said, the testimony of plaintiff's witnesses seems to have been based upon the assumed law that if no bargain were made the attorney was entitled to the taxable costs in every case.

As a mere measure of compensation for services as an attorney performed in an ordinary case or in a very small number of such cases that rule may be very well and may furnish, under such circumstances, a fair rate of compensation. But upon a question of compensation for services performed in an enormous number of cases involving no complicated questions of law, and only the most simple of all questions of fact, taxable costs granted in each case as a measure of compensation would make it most grossly excessive. I do not think there is in truth any general rule of law that, since the Code, makes the compensation of the attorney necessarily coextensive with the taxable costs in the absence of an agreement. The counsel for the plaintiff cites, to prove that there is such a rule, certain cases, and among them, *Scott* v. *Elmendorf*, 12 Johns. 315; *Brady* v. *Mayor*, 1 Sandf. 569, and some cases in the supreme court since the Code.

The cases just above cited arose under the old fee bill, and do not touch the question under the Code. In *Rooney* v. *Second Ave. R. R. Co.* 18 N. Y. 368, which was only a question as to an attorney's lien on a judgment under the Code, Harris, *J.*, said, as a mere expression of an opinion on a subject not decided by the court, that "In the absence of any agreement on the subject I suppose the sum recovered by the party as an indemnity for his expenses would be the measure of compensation allowed to the attorney."

Comstock, *J.*, in the same case said: "It is not important now to determine what may be the implied agreement of the client with his attorney."

There are some cases in the supreme court which say that *prima facie* the implied agreement is to pay at the rate specified by the statute. I assume this statement to mean that it is in the absence of every other fact which courts might think material in judging what the implied agreement was; and as thus construed no fault need be found with it as furnishing under such circumstances *prima facie* evidence of what is the reasonable value of the services. But this court has said substantially what the implication is in case no special agreement was made.

In *People* v. *Supervisors of Del. Co.* 45 N. Y. 196, 202, Folger, *J.*, said: "By the Code (§ 303) the measure of such compensation is left to the agreement, express or implied, of the parties. There was no express agreement between the relator and the board of commissioners of excise what should be his compensation if it became a charge against the county. He should be paid then what his services were reasonably worth; not according to what they produced to his client, but what such services, in themselves considered, were reasonably worth, looking at the labor, time, talent and skill expended in the bestowal of them."

In *Van Every* v. *Adams*, 10 Jones & S. 126, the same rule is laid down, that the attorney in the absence of an agreement is entitled to recover what his services were reasonably worth.

If this explanation of the basis for the opinion of the plaintiff's witnesses be not accepted, and their testimony is to be construed as holding that the number, simplicity and perfect similarity of cases put in an attorney's hands by his client should have no weight in determining the principles upon which compensation is to be made, or its amount in each case, then such evidence disregards the general experience of men, which teaches all of us that in all dealings between man and man, whether of a mercantile or a professional nature, the mere fact of a large number of precisely similar things sold or services rendered, is one of the most important factors in its bearing both upon the price of the commodities sold and the amount of compensation for professional services.

A lawyer who does all the business of a solvent client, where the business amounts to a great deal, will of course take such fact into account in making up his charges, and to a still greater extent where the services were all of a similar nature and almost clerical in their character. Every lawyer knows this and has a right to remember it, whether acting as a judge or referee. Looking at it in this light the evidence for the plaintiff appears to have been given under a misapprehension of the law or else in defiance of facts which are known to every intelligent man, lawyer, judge or layman. Under such circumstances the evidence on the part of the plaintiff as to value appears to be worthless and to be wholly overwhelmed by the evidence given on the part of the defendant.

The learned referee says that all the witnesses agree that in the absence of an agreement the reasonable and usual charge is, at least, the taxable costs. I have looked through the evidence very carefully and have been unable to concur in that view. On the contrary there is a singular unanimity of dissent on the part of all the witnesses for defendant, as to the existence of any such rule under the circumstances herein detailed. If the referee were at first inclined to believe that there was any such rule applicable to a case like this, yet when he saw the enormous proportions which the compensation based thereon would assume, he might well have paused and made a most thorough review of his opinion as to the existence of any rule which in the application to the case before him would lead to so unprecedented an award.

In our judgment, based upon the whole case, the evidence was overwhelming in its nature and degree in favor of the contention of the defendant as to the value of the services performed by the plaintiff's assignor.

The order of the General Term reversing the judgment in favor of plaintiff and granting a new trial should, therefore, be affirmed with costs, and judgment absolute awarded against him upon his stipulation.

All concur.

Elizabeth A. L. HYATT, *Respt.*, *v.* DALE TILE MANUFACTURING CO., LIMITED, *Appt.*

1. Where the assignee of **letters patent** licensed defendant to manufacture and sell the patented article within certain territory, he agreeing to pay **royalties** therefor to the plaintiff, and the plaintiff agreeing to refrain from manufacturing, *held*, that the defendant, while continuing to manufacture under the license, could **not escape liability to pay** the **royalties on** the **ground** that the reissue of the **patent** to the plaintiff **was void.***
2. There was **consideration** enough **for** the **promise to pay** such **royalties**, in that the plaintiff bound herself not to manufacture and because the defendant could not be called to account as an alleged infringer while manufacturing under the license.
3. **So long as** defendant **continues to manufacture under** its **license** (the patent not having been legally annulled), and thus elects to treat the agreement as in existence, it prevents plaintiff from treating defendant in any other light than that of **licensee.** If defendant desired to **repudiate** the **obligation** under the agreement, it should have given **notice** to plaintiff of its intention to do so.
4. Where, at the request of defendant, plaintiff withdrew her notice of forfeiture of the license and reinstated defendant in its possession, and freed it from

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* See Bovaird's Appeal (Pa.) 4 Cent. Rep. 40.

the liability to be proceeded against as an infringer and put to expense of a litigation, upon its special promise to pay the royalties then due, this was a good and sufficient consideration for defendant's promise.

(Decided June 7, 1887.)

APPEAL from a judgment of the General Term of the Court of Common Pleas of New York City, affirming a judgment of the General Term of the City Court of New York, which affirmed a judgment entered upon report of a referee in favor of plaintiff in an action to recover royalties. *Affirmed.*

In 1867 letters patent were granted to the plaintiff's assignor for an improvement in illuminating roofs and roof pavements, and in August, 1878, a reissue of the same was granted.

By an agreement dated November 21, 1878, the plaintiff licensed certain firms to manufacture and sell, within a certain territory named, the articles covered by the patent of 1867 as reissued in 1878, and at the same time granted to each of the said parties a license in pursuance of such agreement. On the part of the plaintiff it was agreed that she would not carry on the manufacture of articles covered by the patent, and would not grant any other license without the consent of such other parties.

The license fees were to be seventy cents per square foot manufactured, but until a court should give a decision sustaining the validity of the patent only thirty cents per square foot was to be paid; and in case the decision should be adverse, which should not be appealed from within three months, the fees under the agreement were to cease.

The parties licensed under such agreement manufactured and sold the patented articles and paid royalties therefor until some time in the year 1879, when a controversy arose between them and plaintiff, and that having been settled, an agreement was entered into November 24, 1880, reaffirming the agreement of November 21, 1878, and permitting the plaintiff to license the defendant in this action upon the same terms and conditions as those contained in the agreement of November 21, 1878. Thereafter the plaintiff and defendant, on December 28, 1880, entered into an agreement wherein the Dale Tile Manufacturing Company, Limited, consented "that the said E. A. Lake Hyatt may, without prejudice to this agreement, hereafter reissue when and as often as she shall choose, the said patent of August 27, 1867, as reissued August 6, 1878."

By such agreement the plaintiff licensed the defendant to manufacture and sell articles patented within certain territory of the United States, including the territory theretofore licensed by the plaintiff to the parties named in the agreement of November 21, 1878. It was also provided in this agreement that the parties should comply and be bound by the terms of the conditions of said agreement of 1878 and the agreement of November 24, 1880. It was also agreed that the defendant should render a regular quarterly statement of the number of square feet of illuminating work sold and sent away from its place of business, the names of the persons to whom sold, etc., and that it should pay royalties therefor at such time. Defendant proceeded to manufacture the articles patented and duly accounted for and paid royalties to August, 1881, and rendered a statement pursuant to agreement for the quarter ending October, 1881, which statement showed an indebtedness of $524.55, which sum the defendant thereafter refused to pay.

On September 27, 1881, the plaintiff caused the letters patent to be issued a second time. Defendant claimed that such reissue was absolutely void and was no protection to the licensee and absolved it from payment of royalties.

The case was referred to a referee, who found for plaintiff, and judgment was entered accordingly. On appeal to the general term of the city court the judgment was affirmed, and was again affirmed on appeal to the general term of the court of common pleas; and defendant appealed to this court.

Mr. **Edward D. McCarthy,** for appellant:

All liability of the defendant to the plaintiff arises out of the contract of 1878, to which it was admitted in 1880, and of the license granted thereunder.

When, therefore, the letters patent were surrendered, which was done September 21, 1881, these letters being the sole foundation of the license, the right of action perished. The surrender was a cancellation of the letters; from and after that date they ceased to exist.

1 Black, 273 (66 U. S. bk. 17, L. ed. 207); 23 Wall. 364 (90 U. S. bk. 23, L. ed. 110); 70 N. Y. 383.

But the plaintiff claims an escape from this conclusion because, as she says, she reissued the same patent on the same day, and that this reissue is now in force. This argument, to avail the plaintiff, rests on two very important assumptions, both of which must concur: first, that the issued patent was not invalid and void; and second, that the reissue was with the licensee's consent; because, of course, a void patent is no patent; and probably also a reissue without the licensee's consent would not bind him; that is to say, it would not prevent him from taking a hostile position to the patent, even assuming it to be valid, and thereby putting the patentee to an action for an infringement.

The defendant is not estopped from claiming the invalidity of the reissue.

A fundamental rule controlling the doctrine of equitable estoppel is that it must repose on a consideration. An estoppel cannot be predicated upon a *nudum pactum.*

Saxton v. *Dodge*, 57 Barb. 114.

An act or an admission of a person which shall afterwards estop him from showing the truth, must be of such a nature that the promisor will get a benefit out of it; or that the promisee will sustain an injury therefrom.

Dezell v. *Odell**, 3 Hill, 221.

"It must, moreover, be certain to every intent and not to be taken by argument or inference."

Co. Litt. 252 b.

The promise or the act on which an estoppel can be predicated must be made or done with a bad intention.

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*See digested citations at close of case, Lawyers' edition. [Ed.]

Heane v. *Rogers*, 9 Barn. & C. 577; *Welland Canal Co.* v. *Hathaway*, 8 Wend. 483.

"The whole law of estoppel seems to rest on the ground of fraud."

2 Pars. Cont. 799.

A person is not estopped from receding from an act or an admission when it is not a breach of faith to do so.

Tilton v. *Nelson*, 27 Barb. 595; *Hawley* v. *Griswold*, 42 Barb. 23; *Young* v. *Bushnell*, 8 Bosw. 17.

Therefore, when void letters patent are the sole consideration of a contract, whether of sale or of license, the purchaser or the licensee is not estopped from showing want of consideration.

Bliss v. *Negus*, 8 Mass. 48; *Hayns* v. *Maltby*, 3 Term Rep. 438; *Cross* v. *Huntly*, 13 Wend. 385.

Marston v. *Swett*, 66 N. Y. 206, and the cases there cited, are not in opposition, because in them a good consideration existed for the licensee's promise.

The formal admission by a licensee that the letters patent under which he held were valid would not in itself estop him from showing the truth. It would be a naked promise only, on which estoppel could not be predicated.

Mitchell v. *Barclay*, Law, Dig. Pat. Cas. p. 464; *Burr* v. *Duryee*, 2 Fish. Pat. Cas. 275.

Of course, if the licensee derived a benefit from the license, as was the fact in the case of *Marston* v. *Swett*, he would have been estopped from showing the invalidity of the letters, when sued for fees.

Taylor v. *Hare*, 1 Bos. & P. N. R. 260; *Williams* v. *Hicks*, 2 Vt. 36.

If the licensee received what he bargained for, it would be a breach of good faith to refuse to pay for it. Hence, the universal rule which controls between landlord and tenant. A tenant in possession is estopped from denying the title of the landlord, who has given him possession and quiet enjoyment, and to whom he has promised to surrender at the end of the term. But this rule does not obtain between vendor and vendee, although a deed of conveyance was passed.

Blight v. *Rochester*, 7 Wheat. 535 (20 U. S. bk. 5, L. ed. 535); *Robertson* v. *Pickrell*, 109 U. S. 615 (Bk. 27, L. ed. 1051).

Nor is there the least analogy between a tenant in possession, and the holder of a license. A license is nothing but a permission to make use of an invention exclusively reserved to another. If there is no exclusive right, no invention, no protection, the licensee gets nothing at all.

Neither would the principle of estoppel be applied in favor of a pretended landlord, who had never given possession, nor use, and who never had the power to do so.

Saxton v. *Dodge*, 57 Barb. 113.

In *Marston* v. *Swett*, the plaintiff and the defendant were tenants in common of the patent, all believing it to be valid. Each had the right to manufacture, and to license others to manufacture under it. The defendants desired the exclusive right to use the invention and hence made the agreement with the plaintiff. Under it, they actually enjoyed the exclusive right which they sought, and the plaintiff gave up all right to manufacture, or to license others to manufacture.

In the case at bar, reissued letters were not even apparently valid. They could have conferred upon licensees no privilege whatever, because infringers were almost numberless; and no action against any of them could have been or was maintained.

The defendant took no license, nor made any contract under these letters. A contract can be implied, only on the assumption that the reissue was valid and within the permission given in a former license.

The manufacture of the product of the alleged invention was free to the public. Not one element set forth as controlling in *Marston* v. *Swett*, exists in this case.

The underlying facts in *Marston* v. *Swett* were that the patent was apparently valid; that it was generally respected; and that it gave protection to its licensee; otherwise, that contract would not have been upheld.

Mr. **George W. Van Slyck**, for respondent:

It is well settled law in this State that in a suit upon a contract for license the validity of the patent cannot be inquired into.

Marsh v. *Dodd*, 4 Hun, 278; *Marston* v. *Swett*, 66 N. Y. 206; *S. C.* 82 N. Y. 526.

Peckham, *J.*, delivered the opinion of the court:

We think this case is controlled by that of *Marston* v. *Swett*, reported upon two appeals to this court. See 66 N. Y. 206; 82 N.Y. 526.

The general and material features of the two cases are similar. In both there was an agreement on the part of the plaintiff to refrain from manufacturing in consideration, among other things, of the promise of defendant to pay the royalties. While continuing the manufacture under the license, the defendant ought not to escape liability to pay the royalties.

The defendant's counsel, it is true, seeks to distinguish this case from *Marston* v. *Swett*, *supra*, because, as he says, since the reissue of the patent in 1881, which he insists was wholly void, the defendant has had no protection from the manufacture by others, for the reason that by the surrender of the patent of 1878, and the reissue of 1881, there was no valid patent in existence; and the consideration for the promise to pay royalties had therefore wholly failed.

There was consideration enough for the promise to pay such royalties, in that the plaintiff bound herself not to manufacture, and because the defendant could not be called to account as an alleged infringer while manufacturing under the license.

If it were a question of the validity of the reissue of 1881, and a decision of that question were necessary to the decision of this case, the defendant is of course correct in his claim that a state court has no jurisdiction to determine such an issue. But within the decision of the *Marston Case* no such question arises. The defendant has protection enough to base its promise to pay royalties upon, as long as it so conducts itself towards plaintiff as to prevent her from treating it as an infringer.

In other words, so long as the defendant continues to manufacture under its license (the patent not having been legally annulled), and thus elects to treat the agreement as in existence, it prevents the plaintiff from treating defendant in any other light than that of a licensee. If defendant desired to repudiate any obligation under this agreement, it should have given notice to plaintiff that it refused to longer recognize its binding force, and that it would thereafter manufacture under a claim of right founded upon the alleged invalidity of the patent. Otherwise, the defendant (in claiming to manufacture under the license and in refusing to pay the royalties thereunder) would, if successful, prevent the plaintiff from recovering any thing from it. She could not treat the defendant as an infringer, because it was manufacturing under a license from her; and she could not collect the royalties under the license (although herself refraining from manufacturing, as she had agreed), because the defendant would allege the invalidity of the patent, although continuing to manufacture under cover of a license from its owner.

Such doctrine cannot stand a moment. Of course, as is said in the *Marston Case*, from the time that the patent is annulled by proper legal proceedings no royalties could be collected, even though no notice of a repudiation of the agreement had been thereafter served.

There is another ground upon which it seems to me this judgment might well rest. Under the clause in the agreement between the parties which provided for a forfeiture of all rights thereunder, if one party should willfully violate one of its provisions, the plaintiff gave notice of such forfeiture to defendant based upon its refusal to pay the royalties which it had acknowledged to be due for the quarter ending October 31, 1881, the very quarter in question here, an account of which it had rendered under the oath of its secretary, as provided for in such agreement. Subsequent to the service of such notice the plaintiff withdrew the same at the request of defendant, and upon its promise to pay these very royalties which it had already acknowledged to be due. A failure to carry out such promise gives, as it seems to me, a good cause of action.

The defendant says there was no consideration for such a promise because there was no patent upon which to ground a license, and the defendant therefore had no license and no protection. But the plaintiff of course contended that the reissued patent was valid, and at the request of defendant the plaintiff withdrew her notice of forfeiture of the license, and thus reinstated the defendant in its possession and freed it from the liability to be proceeded against as an infringer, and put to expense and inconvenience in the defense of such a litigation. This was saved at the request of defendant and upon its special promise to pay the royalties. Plainly, here was a good and sufficient consideration for defendant's promise.

The judgment should be affirmed, with costs.

All concur.

Alice LAFFLIN, *Respt.*

v.

BUFFALO & SOUTHWESTERN R. R. CO., *Appt.*

1. As a general rule, **when** an appliance, or machine, or **structure** not obviously dangerous, has been in daily use for years, and **has uniformly proved** adequate, **safe** and convenient, **its use may be continued without** the **imputation of** culpable imprudence or **carelessness.**

2. A **woman, in alighting from a railroad car** at a station, in the night time, fell and was **injured,** and sued the railroad company for negligence in that the station **platform** was **too far from** the **car.** The evidence was that the plaintiff passed from the car to the second step of the car platform, which was two feet and two inches from the side of the station platform and about four inches lower than the top thereof, and without having hold of the iron railing, and without looking to see the station platform, she stepped out, and failing to reach it, fell. The car had a third step which was eight inches below the top of the station platform, and one foot and seven inches from the side thereof. The station platform, as then constructed, had been in use for several years, and no one had ever before been injured or inconvenienced on account of its distance from the cars. *Held*, that the **company** was **not legally responsible** for the accident.

(Decided June 7, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Fifth Department, affirming a judgment of the Niagara Circuit on a verdict of $2,000 damages in an action to recover for injuries sustained in alighting from defendant's car. *Reversed.*

The facts appear from the opinion.

Mr. **George C. Greene,** for appellant.

Mr. **W. S. Oliver,** for respondent.

Earl, *J.*, delivered the opinion of the court:

This action was brought to recover damages for injuries sustained by the plaintiff in alighting from one of the defendant's cars, and the circumstances of the accident are as follows: the train in which she was a passenger reached the station at Dayton in this State, on the 20th day of January, 1880, at 8 o'clock in the evening, and she left the car for the purpose of changing to another train at that place, and in her effort to step from the car to the station platform, she fell between it and the car, and sustained the injuries of which she complains. She alleges that the space between the platform and the car was too great, and that, in consequence thereof, when she stepped off from the car she failed to reach the platform and was thus caused to fall. There is no complaint that the platform was out of repair, or that it was improperly constructed. The only complaint is that it was too far from the car. The platform was 2¼ feet higher than the top of the iron rail, and about three feet above the top of the ground. The distance between the outer line of the car and the platform was eleven inches. There were three steps at the end of the car, and the lower one was eight inches below the top of the platform and one foot and seven inches from the side thereof. The second step was two feet and two inches from the side of the platform and about four inches lower than the top thereof. The height of the platform of the car above the iron rails was about four feet. The plaintiff passed out of the car on to the car platform and then to the second step, and without having hold of the iron railing on either side, and without looking to see the station platform, she stepped out and, failing to reach it, fell.

There was no proof that the platform was not constructed in the ordinary way, not that the space between it and the car was any greater than the exigencies of the business and the operations of the railroad required. There was no evidence that any accident had ever happened at that station before on account of the construction of the platform, or that there had ever been any complaint in reference to it. On the contrary, the evidence shows that the platform had been used for many years by men, women, and children, and that no one but the plaintiff had ever been injured or had suffered any inconvenience on account of the distance of the platform from the cars. Thousands of men, women and children must have passed from the cars to this platform in entire safety.

Under such circumstances, how can it be properly said that the defendant was guilty of any carelessness in its construction and maintenance? It was not bound so to construct this platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient and useful. It was bound simply to exercise ordinary care, in view of the dangers attending its use, to make it reasonably adequate for the purposes to which it was devoted. In the case of a platform which had always been safe, and answered its purpose for men, women and children, in all kinds of weather, by night and by day, for many years, what was there to suggest to any prudent person any change or improvement for the purpose of making it more safe or convenient?

In the case of *Dowgan* v. *Champlain Transp. Co.* 56 N. Y. 1, the plaintiff's intestate, a passenger, slipped under the gangway rail of a steamboat, fell overboard and was drowned; and it appeared that all the boats upon Lake Champlin were constructed in the same manner, that they had been so run for many years, and there was no proof tending to show that anyone had ever before gone overboard in that way. It was held that the plaintiff was properly nonsuited. Grover, *J.*, writing the opinion said:

"It will be seen that the only proof of negligence was the omission to inclose the space between the railing and deck so as to preclude the possibility of slipping under it. Had there been any proof tending to show that any such danger would be apprehended by a reasonable, prudent person, the evidence should have been submitted to the jury. But the evidence showed that all the passenger boats upon the lake had been constructed and run in the same way in this respect; that boats had so been run for a great number of years, and there was no proof tending to show that anyone had ever before fallen and gone overboard under the railing, or that any such danger had been apprehended by anyone. It is obvious that no such thing was likely to occur."

In *Loftus* v. *Union Ferry Co.* 84 N. Y. 455, plaintiff's intestate, a child six years old, while leaving one of defendant's boats, fell through one of the openings in the guard rails into the water and was drowned. The plaintiff recovered; and it was held that the verdict was properly set aside. Andrews, *J.*, writing the opinion of the court said: "The law does not impose upon the defendant the duty of so providing for the safety of passengers that they shall encounter no possible danger, and meet with no casualty in the use of appliances provided for it. It was possible for the defendant so to have constructed the guard that such an accident as this could not have happened; and this, so far as appears, could have been done without unreasonable expense or trouble. If the defendant ought to have foreseen that such an accident might happen, or if such an accident could have reasonably been anticipated, the omission to provide against it would be actionable negligence. But the facts rebut any inference of negligence on this ground. The company had the experience of years, certifying to the sufficiency of the guard. That it was possible for a child, even a man, to get through the opening was apparent enough; but that this was likely to occur was negatived by the fact that multitudes of persons had passed over the bridge without the occurence of such a casualty."

In *Burke* v. *Witherbee*, 98 N. Y. 562, while an empty car was descending a mine, the hook which fastened it to the cable became detached from the car and it ran down the mine and killed plaintiff's intestate. The judgment for plaintiff was reversed because there was not sufficient proof of actionable negligence on the part of the defendants. The judge writing the opinion said:

"In this mine alone cars drawn by a hook must have made several hundred thousand passages without a single accident. What more could any reasonable or prudent man have to justify him in believing that this convenient appliance was also a safe and proper one? What greater or different tests could it have been subjected to before a mine owner could use it without the imputation of negligence? It seems to us quite inadmissible, if not preposterous, to attribute negligence to a mine owner for using an implement which had been employed in different mines, and which under varying conditions, upon countless occasions, uniformly answered its purpose without injury to anyone."

The application of these authorities to this case is quite obvious. No structure is ever so made that it may not be made safer. But as a general rule when an appliance, or machine, or structure not obviously dangerous has been in daily use for years, and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of culpable imprudence or carelessness.

On the evening when this accident happened, the evidence tends to show that it was dark, and that the platform was not plainly visible. It was somewhat lighted by light which came from the car windows, the depot windows and a lantern in the hands of the conductor; and it does not appear that it was ever lighted in any other way, or that it was usual to light such platforms in any other way. The fact that it was dark made it incumbent upon the plaintiff to take the greater care. She could have kept hold of the iron railing until her foot touched the platform and then she would have been safe. It was not the duty of the defendant to furnish some one to aid her in alighting from the car.

There was some proof that about the time the plaintiff attempted to step from the car upon the platform, there was a slight jerk, or jar of the car; but it does not appear that that had anything whatever to do with the accident.

A careful consideration, therefore, of the whole case as it appears in this record, has led us to the conclusion that the defendant is not legally responsible for the accident which befell the plaintiff. It was a misadventure; and no rule of law will permit her to charge the misfortune in whole or in part to the defendant.

The judgment should, therefore, be reversed and a new trial ordered; costs to abide event.

All concur.

John G. AVERY, *Respt.*, *v.* NEW YORK CENTRAL & HUDSON RIVER R. R. CO., *Appt.*

1. The first count of a **complaint** seeking **to enjoin** the **maintenance of a fence,** alleged that **plaintiff was in possession of** certain **hotel premises** and that the **fence** in question, **built** and maintained **by the defendant railroad company,** was an obstruction to a public street adjacent to the hotel, and a nuisance; the second count alleged that defendant had failed to maintain an opening through the fence as it was bound to do, etc. At the trial defendant moved to dismiss the complaint, on the ground that so far as appeared therefrom plaintiff was a stranger to the whole matter and did not appear as party or privy to any contract. *Held*, that an **amendment of the complaint, setting up a lease** of the hotel premises from the owners thereof **to plaintiff, was properly allowed.**
2. **Although** the **first count** of the complaint, being **based upon the obstruction of a highway,** could **not** be **maintained** when it appeared that, by the failure of the public to accept a dedication, the land referred to was not a highway, yet the **second count, based upon a claim of a right to an opening from** the **railroad premises** into the alley appurtenant to the hotel, for the access of **passengers** and baggage, and stating that by erecting the fence defendant had violated that right, to plaintiff's damage, **was maintainable.**
3. *Held*, that said **lessee,** the present plaintiff, could **not raise** the **question of** the **validity of deeds** executed by his lessor, to convey certain interests to the defendant, amounting to an abandonment of all claims to the land in question as a highway.
4. The premises occupied by plaintiff and those the access to which was obstructed by defendant railroad company had originally belonged to the same person, and in the **deed** to defendant it was stated that "this conveyance is upon the express condition that the said railroad company, their successors or assigns, shall at all times maintain an opening into the premises hereby conveyed, opposite to the Exchange Hotel (the premises now leased by plaintiff), adjacent to the premises hereby conveyed, for the convenient access of passengers," etc. *Held*, from the language used and in view of the situation and use of the premises, that this provision was **not** intended to create **a condition subsequent, but** was intended to be **an agreement or covenant running with the land,** providing for access or right of way, so as to continue or enhance the value of the hotel property, in favor of its owner or **lessee,** the latter of whom has such an interest in its existence as the courts will recognize and protect; but the **relief** to which he is entitled is **limited to the language of** such **covenant,** viz.: an opening through the fence,—and he is not entitled to a removal of the entire fence.

(Decided June 7, 1887.)

APPEAL from a judgment of the General Term of the Superior Court of the City of Buffalo, affirming a judgment of the Trial Term in favor of plaintiff in an action to recover damages for the erection of a fence and to abate or remove the same. *Reversed nisi.*

The facts and questions raised appear from the opinion.

Mr. **George C. Greene,** for appellant:

I. The evidence fails to establish that the strip of land, thirty feet in width, adjoining the hotel, is or was a public street or highway.

To prove a highway by dedication, three facts must be shown: first, the intention to dedicate; second, an act of dedication; third, the acceptance by the public.

State v. *Green*, 41 Iowa, 693; *Buchanan* v. *Curtis*, 25 Wis. 99; *Manderschid* v. *Dubuque*, 29 Iowa, 73; *Cook* v. *Harris*, 61 N. Y. 454.

Without acceptance and ratification by the public, in this case of the City of Buffalo, there was no dedication, and the public acquired no rights under the deed from Wadsworth; and until acceptance the offer to dedicate could be withdrawn, or the dedication be revoked.

40 N. Y. 442–450; 19 Johns. 186; 16 Barb. 251; 2 Abb. N. C. 386, 395, 397; 14 Barb. 328; 61 N. Y. 454; 66 N. Y. 261–269; 94 N. Y. 16.

The plaintiff's case does not show that he has any right, title or interest in the thirty feet strip, by virtue of any lease, grant, covenant or condition, or otherwise. The complaint is based solely upon his alleged right to use the thirty feet strip as a public street; and that question being decided adversely to him, his complaint should be dismissed.

II. The clause in the deeds of 1857, under which plaintiff claimed some rights on the trial, is clearly and strictly a condition subsequent, and nothing else.

The words usually employed to create a condition, are "on condition." Where the explicit words which denote the condition are used, they will not be construed into a covenant.

1 Hilliard, Real Prop. § 26, p. 381; § 27, p. 382.

A covenant by grantee, not to build except under certain restrictions, constitutes a valid condition subsequent.

2 Abb. N. C. 56.

Conditions are strictly construed.

Woodworth v. *Payne*, 74 N. Y. 196; 62 N. Y. 592.

Conditions subsequent are not favored in the law, but are construed strictly. They can only be reserved for the benefit of the grantor and his heirs; and no others can take advantage of a breach of them. Right of re-entry for breach of condition subsequent does not pass by a conveyance of land, and until there is a re-entry by the grantor or his heirs, for the breach, the estate is not forfeited, but remains unimpaired in the grantee, and a mere stranger cannot take advantage of it.

Towle v. *Remsen*, 70 N. Y. 303, 312; *Nicoll* v. *New York etc. R. R. Co.* 12 N. Y. 131, 134, 135; 22 Wend. 201; 8 Am. & Eng. R. R. Cases, 734; 63 Mo. 68; 46 Barb. 109; 134 Mass. 82, 85; 70 N. Y. 303, 312.

III. The plaintiff has no easement in the thirty feet strip. None is granted to him by his lease, and if an easement existed and was held by his lessor, the lessor and not the plaintiff now has it. The plaintiff also claimed that his lessor is seised in fee of the ten feet strip (part of the thirty, and of an undivided half of the other twenty feet. If this be so, then no "easement" existed, because "No one can have an easement in his own land."

Huttemeier v. *Albro*, 2 Bosw. 546, 556.

IV. The clause in the deed of 1857 in question, cannot be construed as a covenant or a reservation.

Craig v. *Wells*, 11 N. Y. 315, 322.

It is well settled that an exception or reservation to a third person, not a party to the deed, is void.

Id.; Stevens v. *Adams*, 1 Thomp. & C. 587–589; 34 Barb. 566; 24 Hun, 430.

The plaintiff failed to show himself entitled to recover any damages of the defendant, or that he had sustained any damages by reason of the erection or maintenance of the fence.

Mr. **Truman C. White,** for respondent:

I. The amendment did not introduce a new cause of action; it tended to justice, and was, therefore, properly allowed.

Fogg v. *Edwards*, 20 Hun, 90.

If causes of action were improperly joined, the remedy was by demurrer.

Code, § 488.

The objection, not having been taken by answer or demurrer, was waived.

Code, § 499.

II. To establish a disputed right of way it is always competent to prove user; and twenty years' uninterrupted and unqualified enjoyment of a right of way is decisive evidence of a grant.

Wiswall v. *Lansing*, 5 How. Pr. 77.

III. The damages awarded were only to the commencement of the action, and therefore the evidence could not have affected the rights of the defendant injuriously. Its reception, even if erroneous, is not ground for reversal of the judgment.

Lathrop v. *Bramhall*, 64 N. Y. 365; *People* v. *Fernandez*, 35 N. Y. 49.

While the evidence of the difference in the receipts of the hotel and restaurant in corresponding months, with and without the nuisance there, may not have been admissible definitely to fix the damage, yet it was admissible as one of the means by which the court might arrive at the proper measure of compensation.

Albert v. *Bleecker St. R. R. Co.* 2 Daly, 389; Wood, Nuis. § 876; *St. John* v. *Mayor etc. of New York*, 13 How. Pr. 527.

But the case shows that the court held the measure of damages to be the difference in the rental value; and so it has been repeatedly adjudged by the courts in this State.

Wiel v. *Stewart*, 19 Hun, 272; *Francis* v. *Schoellkopf*, 53 N. Y. 152; *Jutte* v. *Hughes*, 67 N. Y. 267.

IV. The facts establish beyond question the existence of a right of way over the alley as an easement or appurtenant annexed to the fee of the hotel premises.

Re Opening of Eleventh Ave. 81 N. Y. 436; *Child* v. *Chappell*, 9 N. Y. 246; *Kings County Fire Ins Co.* v. *Stevens*, 87 N. Y. 287; *White's Bank of Buffalo* v. *Nichols*, 64 N. Y. 65; *Wiggins* v. *McCleary*, 49 N. Y. 346; *Cox* v. *James*, 45 N. Y. 557.

V. The language of the deeds in question does not constitute a condition subsequent, but does constitute a covenant.

2 Washb. Real Prop. 4th ed. pp. 2, 6, 7; *Craig* v. *Wells*, 11 N. Y. 315; *Bridger* v. *Pierson*, 45 N. Y. 601; 3 Wait, Act. & Def. p. 53; *Countryman* v. *Deck*, 13 Abb. N. C. 110.

Peckham, *J.* delivered the opinion of the court.

The plaintiff is lessee of certain premises in Buffalo which were originally divided from premises of defendant by a strip of land thirty feet wide, and running from east to west 240 feet, and thence north about 100 feet. All of the property once belonged to one James Wadsworth who in 1844 granted and conveyed a portion of it to defendant's predecessor for the purpose of a passenger and freight depot, and for no other purpose, and described this above mentioned strip of land, thirty feet wide, as thereby dedicated for the purpose of a public street.

Some question was made upon the trial as to the right of defendant to use, for the purpose of a railroad restaurant, any portion of the property thus conveyed; but the court held under the other facts in the case that defendant's right to so use it could not now be successfully questioned, and there has been no appeal from such decision, and so the question may be dismissed from our consideration.

In 1850 James Wadsworth died, leaving a will by which he devised to his children the land not theretofore conveyed to defendant's predecessor, being one quarter to each of his two sons, and one quarter to his executors in trust for his daughter Elizabeth Wadsworth, and one quarter to his executors in trust for his grandson, Martin Brimmer, Jr.

So far as the evidence in the case shows, this left the title, not only to the premises leased by the plaintiff but also to the thirty feet strip of land already mentioned, in the devisees under the will of James Wadsworth, because of the lack of any acceptance of the dedication on the part of the public authorities, which will be again referred to.

In 1853 partition of the lands now leased by plaintiff (which lands excluded the thirty feet strip) was made, by which one half of such premises was conveyed to the trustees of Martin Brimmer, Jr., and one half to Charles James Murray, who was then an infant. Both conveyances bounded the premises by the line of this thirty feet strip, called therein an "alley."

In 1857 the trustees of Brimmer and the general guardian of Murray, conveyed by quitclaim deeds to defendant's predecessor an undivided one half part of that portion of the strip in question being twenty feet wide and adjoining the lands of the said predecessor theretofore conveyed to it by James Wadsworth in his lifetime. This left the title to the remaining ten feet of such strip unaffected, while an undivided half of the interest in the twenty feet just mentioned remained in the other devisees under the will of Wadsworth, assuming that Brimmer's and Murray's trustees and guardian held title to one quarter each, and that it was conveyed to the defendant's predecessor by the deeds above mentioned.

These deeds of the twenty feet contained a provision permitting the construction of a building thereon at the discretion of the Railroad Company by a wall along the line bounding on the remaining ten feet, and with roof projecting over such ten feet strip a reasonable width for eaves trough and water conductor, such projection to be on sufferance of the grantors provided they should want at any time to build on the land. Both these deeds also contained the following language:

"This conveyance is upon the express condition that the said Railroad Company, their successors or assigns, shall at all times maintain an opening into the premises hereby conveyed opposite to the Exchange Hotel, so called," the premises now leased by plaintiff, "adjacent to the premises hereby conveyed, for the convenient access of passengers and their baggage to and from said premises hereby conveyed, which opening shall at no time be closed against such passengers and their baggage; subject, however, to all proper regulations of police and railroad discipline of persons on the said premises."

Subsequent to the execution of these deeds and in May, 1857, defendant's predecessor executed quitclaim deeds to the trustees of Brimmer above mentioned, and to the general guardian of Murray, of an undivided half of the remaining ten feet of said "alley;" although it nowhere appears that such predecessor had any title to such ten feet. By mesne conveyances in or about September, 1873, Edward R. Hammatt having become trustee for Brimmer, Jr., as such trustee became, and has ever since been, the owner of the premises now leased to plaintiff, which premises are bounded by, and do not include in the conveyances or lease, any portion of the strip of land heretofore spoken of, although plaintiff claims a right of way over the thirty feet strip dedicated for a public street by said James Wadsworth in his deed of January, 1844.

Soon after the execution of the deeds to the Railroad Company above mentioned, the Company laid its tracks along this twenty feet of the thirty feet strip which lies south of the premises leased by plaintiff, and has ever since used the tracks for running its cars into and out of its depot at the west end of such strip. It appears also that there has been, since the conveyance by Wadsworth in 1844, and upon the premises retained by him and bounded by this thirty feet strip, a hotel, which has been accessible from defendant's depot across its tracks, and which has depended largely for its patronage and custom upon the passengers arriving at and departing from such depot of defendant; and up to August, 1881, this thirty feet strip (excepting as twenty feet of it were used by defendant's tracks as above stated) has been open and used by the occupants of the hotel and by travelers as above described, and by the public. In May, 1881, the said Hammatt, as trustee of Brimmer, leased to plaintiff the hotel spoken of for three years, at the annual rent of $4,000; and the plaintiff entered into possession under such lease, and has been and is now carrying on such hotel and restaurant.

The further fact was proved that the right of way across this thirty feet strip is beneficial to the hotel and restaurant, and to the plaintiff's possession, and is an appurtenance thereto of great value.

In August, 1881, the defendant entered upon the said strip or alley and built a high and substantial fence the whole length of the strip, and on the edge of the twenty feet bordering on the remaining ten feet thereof; and such fence has been kept closed against the plaintiff and all others; and the defendant has thus wholly excluded the plaintiff, his servants, the guests of the hotel and all others from entering upon such twenty feet. The fence is thus a total obstruction in the way of any passage across such twenty feet to all persons coming from the depot to the hotel, or from the hotel to the depot, who might otherwise reach either place by traveling over this twenty feet, and in this way such obstruction has very greatly lessened the patronage of the hotel and damaged thereby the plaintiff, up to the commencement of this action, in the sum of $300 as found by the trial judge.

This action was brought to enjoin the continuance of such fence and to recover damages for the time which it had stood. The complaint contained two counts, the first one stating the facts of the conveyance to defendant's predecessor and the dedication of the strip as a public street, and that the parties to the conveyance agreed mutually that the strip should remain and be a public street, and that it was necessary for the proper enjoyment of the hotel and restaurant that this strip should remain a public street. The plaintiff then set forth the erection of the fence, and thus, as he said, defendant wrongfully excluded him from the public street; and he further alleged that such fence was a nuisance.

In the second count the strip was called an *alley* or public highway, and the plaintiff claimed to have an easement or right of way or access across or to the twenty feet strip in question. The plaintiff also alleged (evidently with reference to the language of the deeds to the Railroad Company in 1857) that the defendant had not, since the erection of the fence, maintained an opening into that part of the alley appurtenant to the southerly side of said hotel for the convenient access of passengers and their baggage "to and from the alley or public highway as of right it should have done and was bound to do," and that it had thereby deprived passengers and their baggage of convenient access to said alley or public highway, and thus prevented such passengers and their baggage from entering said hotel at all across or by means of said alley or public highway.

The plaintiff then alleged the tracks and the fence to be a nuisance, and asked for an injunction restraining defendant from continuing to permit its tracks to remain in the public street or alley, or from continuing the fence, etc. The answer of defendant was substantially a general denial.

When the case came on for trial the counsel for the defendant moved to dismiss the complaint because, so far as the complaint therein showed, the plaintiff was an entire stranger to the whole matter, as the only allegation on that subject was that he was in possession of the premises, and he did not appear as party or privy to any covenant or provision whatever. The plaintiff then moved to amend by, in effect, setting up his lease from the owner; to which defendant's counsel objected that the amendment was not such a one as could be made upon the trial, and that it set up a new and distinct cause of action, and one which was on contract or covenant, and which could not be joined with an action for damages for a nuisance. The objections were overruled, and the trial proceeded. The facts heretofore stated were found by the judge, who tried the cause without a jury, and a judgment was decreed enjoining the continuance of the fence, and providing for its removal and for the recovery of the damages sustained by plaintiff, being the sum of $800. The general term affirmed the judgment, and the defendant appealed to this court.

We think the amendment allowed by the court was a proper exercise of discretion. It was in no sense the introduction of a new cause of action. Upon defendant's own objection, and assuming it to be well founded, the cause of action in the complaint was defectively stated, because it showed no right or interest on the part of plaintiff to take advantage of the rights, if there were any, of the owner of the premises known as the hotel property. For the purpose of obviating that objection and to show that the plaintiff had the same rights in the property so far as to take advantage of the covenants in regard to it which its owner had, the allegation of the lease was added to the other allegations in the complaint.

The defendant's counsel now claims that it appears from the uncontradicted facts that there never was any public street over or on this thirty feet strip, because there never was any acceptance of the dedication on the part of the city authorities or any control over it ever assumed by them. He further argues that the plaintiff, under the pleadings, is not entitled to any relief, for the reason that his rights are therein based upon the alleged fact of the strip being a public street, and when that fact fails his rights fail with it.

The concession that there was no public street must be made, and for the reasons stated. It must also be conceded that the plaintiff does in his complaint allege, especially in his first count, that this strip is a public street or highway, and he alleges the fence to be a nuisance for that reason. In the second count, however, we think there are facts enough alleged, especially when the question does not appear to have been very clearly raised before, upon which can be spelled out the assertion of a right on the part of the plaintiff to have access to, and to some extent a right of way over, this strip, even if it be not to all intents and purposes a public highway.

In the second count the plaintiff speaks of there being, as appurtenant to the hotel, an easement which he describes, it is true, by metes and bounds, but which a reading of the whole count enables one to say is the allegation of an easement consisting of a right of way over or across some portion of this strip of land for passengers and their baggage, and that the defendant, having erected the fence, had left no opening therein at certain places which were appurtenant to the southerly side of said hotel which of right the defendant should have done.

This is clearly a claim founded, not upon the fact that this strip was a highway, and that as such any obstruction thereof was illegal, but it is a claim founded upon a totally different basis; a claim of a right to an opening into the alley appurtenant to the southerly side of the hotel, and for the convenient access of passengers and their baggage; and it was a statement that by erecting this fence the defendant has violated that right and has thereby prevented such passengers and their baggage from entering said hotel, to plaintiff's damage. All that was lacking in this language, to show exactly what fact the claim was founded upon, was the statement that the right of way was reserved by the deeds of Wadsworth, as trustee and guardian, executed in 1857. It might have been ground for a motion to make the complaint more definite and certain; but the claim is obviously not based upon rights arising solely from the assumption that the strip of land was at all events a public highway. If the plaintiff is, therefore, entitled to any relief on this branch of the case by virtue of the reservation in those deeds and which he could obtain on no other ground, I think it should be granted him without the necessity of a reversal of the judgment, because that ground was not specially alleged, and an application to amend his complaint by setting up that right in exact and plain language before entering upon the new trial which would be awarded.

By the failure to accept the dedication the thirty feet in question remained the property of Wadsworth, and descended to his devisees at his death. By the deeds of the trustees of Brimmer and the guardian of Murray, all the estate of Brimmer and Murray in the twenty feet of the strip in question was conveyed to the Railroad Company. Such interest was said to be the equal undivided one half part of such portion. But whatever it was, up to that amount, such estate was conveyed to the Company. The title of Murray to about one half of the property upon which the hotel stands, and which was bounded upon the said strip was substantially conveyed to the trustee of Brimmer who is the lessor of the plaintiff. Whatever rights therefore, which the other devisees under the will of James Wadsworth may have in this twenty feet of the original thirty feet strip, as tenants in common with the Company, about which we say nothing, as nothing is required to be said in this case, it is clear that the present plaintiff who claims as lessee of the lessor who executed these deeds of 1857, to the Railroad Company, cannot raise the question of their invalidity to convey the interest of the *cestui que trust* and infant Brimmer and Murray. They must be regarded as valid deeds and as conveying all the interests of Brimmer and Murray in this twenty feet to the Railroad Company; and such grantors must be regarded as thereby abandoning all claim to the same as a public street or highway. They are no longer tenants in common with anyone.

The sole remaining question therefore is: What rights, if any, were reserved to Brimmer and Murray by those deeds of 1857? The grantors in those deeds contemplated the possible if not probable erection of a building over this twenty feet, showing thereby a clear intent to abandon all pretense of a claim for its use as a public street or highway, even if such abandonment were not otherwise conclusively shown by the execution of the deeds.

But the deeds contained, in addition, language providing for an opening and access to this twenty feet, which language has already been quoted; and the plaintiff claims that if the deeds are valid, this language under all circumstances must be construed to be a covenant and the burden thereof as running with the land conveyed and in favor of those having a legal interest in the hotel lands, and that such covenant makes the right of access and transit to and across this twenty feet a right or easement appurtenant to the hotel premises. On the other hand the defendant claims that the language used makes a condition subsequent which cannot be taken advantage of by any but the grantor and his heirs.

We incline to the construction contended for by the plaintiff. The fact that the deeds use the language "upon condition," when referring to the conveyance by the grantors, is not conclusive that the intention was to create an estate strictly upon condition. The question is always: What was the intention of the parties? And while such intention is to be gathered from the language used, yet its construction may frequently be aided by reference to all the circumstances surrounding the parties at the time of the execution of the deeds, because the court is thus enabled to be placed exactly in their situation, and to view the case in the light of such surroundings.

From the language of the first deed from Wadsworth to defendant's predecessor, in which the land is conveyed to it for the purpose of a passenger and freight depot only (taken in connection with the fact of the existence of a hotel and restaurant at that time on the land retained by him), and looking at the further fact that from 1844 to 1857 this strip in question had been kept open, and full access to the depot and the hotel on Wadsworth's property was had over this strip by passengers, guests and the public in general, and that the patronage of the hotel was largely dependent upon the traveling public coming to and departing from said depot—all these facts would lead one to the unhesitating conclusion that the language used in those deeds in 1857 was for the benefit of the hotel property and was not meant to create a condition subsequent, which courts regard with no very friendly eye, upon a failure to perform which the estate was to be forfeited, and which none but the grantor or his heirs could take advantage of. It was intended to be an agreement or covenant between the parties running with the land, providing for this access or right of way so as to continue or enhance the value of the hotel property by providing for such easy access to it from defendant's depot for passengers and baggage. See *Stanley* v. *Colt*, 5 Wall. 119 [72 U. S. bk. 18, L. ed. 502]; *Countryman* v. *Deck*, 13 Abb. N. C. 110.

Courts frequently in arriving at the meaning of the words in a written instrument construe that which is in form a condition, a breach of which forfeits the whole estate, into a covenant on which only the actual damage can be recovered. See Hilliard, Real Prop. 4th ed. p. 526, § 13; 2 Washb. Real Prop. 3d ed. chap. 14, subd. 3, p. 3 *et seq.*

It is asserted, however, that if this language be treated as a covenant, still the plaintiff cannot take advantage of it, as he is not a party or privy to it.

The grantors in these deeds were also the owners of the hotel property, and the easement provided for in the deeds for the transit of passengers and their baggage over this twenty feet must be construed as reserved, not for their benefit in any sense, but as an easement reserved for the benefit and in favor of the grantors being owners of the remaining hotel property, and as appurtenant to it, and fairly necessary for its full and proper enjoyment. It therefore runs with the hotel property and in favor of its owner or lessee, the latter of whom has such an interest in its existence as courts will recognize and protect.

As the rights of the plaintiff are in our view dependent upon the deeds of 1857, the judgment must be in accordance with their terms. The courts below erred in not limiting the relief granted to plaintiff by the language of such deeds. As the judgment provided for a full and entire destruction of the fence in question, it must be reversed and a new trial ordered, or else it must be modified so as to provide for an opening into the strip through that or any other fence or obstruction, of a size reasonable, proper and fit, which shall be opposite to the hotel and adjacent to the premises conveyed by the deeds, and large enough for the convenient access of passengers and their baggage to and from the said strip, which opening must at no time be closed against such passengers and their baggage, and which access must be subject to all proper regulations of police and railroad discipline of persons on the said premises.

We shall order a reversal of the judgment, although a modification as above stated could be easily provided for, unless the plaintiff consents to waive the damages he recovered in the courts below. We do this because we are greatly dissatisfied with the evidence upon which the recovery as to the damages was based. It was exceedingly vague and loose, if not, to some extent, guess work.

It seems also to have been made, to some extent at least, upon a mistaken view as to the defendant's rights and liabilities under its deeds from Wadsworth to the trustee and guardian. Evidence seems also to have been offered and received upon assumption of the right of the plaintiff to a totally unobstructed access to and transit across this whole thirty feet in controversy at all times, ignoring the limitations of the right, as contained in the deeds of 1857, to the Railroad Company. Some portion of the damages may also have been awarded on account of the restaurant in defendant's depot, and its consequent effect upon the patronage of plaintiff's restaurant, and upon the rental value of plaintiff's hotel, which the learned judge thought after all was the criterion for the damages sustained by plaintiff.

Under these circumstances we are disposed to order a new trial for the errors as to the general rights of the parties contained in the judgment appealed from, so that upon a new trial with those rights plainly defined, the evidence on the subject of damages may be more direct and confined within smaller limits than it was upon the trial. This reversal, however, may be avoided in the discretion of the plaintiff by his consenting to waive the damages. If the plaintiff choose, he may consent to waive and remit his recovery for the past damages which he alleges he has sustained, and in that case we will then modify and affirm the judgment as modified in accordance with this opinion, and after striking out the amount recovered for damages.

The order will, therefore, be that the judgment of the court below is reversed and a new trial granted, unless plaintiff stipulates to waive the damages contained in such judgment, in which case the judgment will be modified as already stated in this opinion, and as modified, affirmed without costs to either party in this court.

All concur.

Ellis R. THOMAS *et al.*, *Respts.*,
v.
Thomas J. EVANS *et al.*, *Appts.*

1. A **claim to recover back property** which has been **fairly sold and paid for** at its full value, and the consideration of which has accrued to the benefit of the plaintiffs, without offering to one who, honestly believing himself to be its lawful owner, expended large sums in its improvement (which constitutes its greatest value) **is unjust and inequitable.**
2. The **purchase price** originally paid for the land **and** the value of the **improvements** to the extent that they have added to its permanent value, constitute an equitable claim; and even if plaintiffs should establish an equitable right to the property it would **not entitle** them **to judgment** therefor, **except upon** the condition of **refunding** the **amount** so expended.
3. A court of equity, called upon to settle the equitable rights of the parties, may **charge remaindermen with** the reimbursement of **moneys** actually and honestly **expended for** the **benefit of** their **estate,** and which they were legally liable to pay.
4. When a **person in** peaceable **possession** under claim of lawful title, but really **under a defective title,** has in good faith made **permanent improvements,** the true owner who seeks the aid of equity to establish his own title will be compelled to reimburse the occupant for his expenditure.
5. Where the deed from executors apparently conferred the legal title under the power of sale contained in the will, the **purchaser is under no responsibility for** any **misapplication by** the **executors,** of the consideration paid by him for the land, and is entitled to rely upon their apparent power given to them by the will.

(Decided June 7, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Kings Special Term in favor of plaintiffs in an action to vacate and annul certain deeds and for a conveyance and accounting. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **George H. Starr,** for appellants:

The plaintiffs have no equity to maintain this bill. The inheritance was not injured, but received a large pecuniary benefit and was saved from loss, by the sale of the two lots, and there was no fraud or bad faith shown.

Greenleaf's Cruise, Real Prop. title 15, chap. 4, § 55; *New* v. *Nicoll*, 73 N. Y. 127; *Austin* v. *Munro*, 47 N. Y. 366.

As the price paid was entirely adequate, and the avails went directly to the benefit of the estate in remainder, the bill should be dismissed.

Osgood v. *Franklin*, 2 Johns. Ch. 22-29; *Morse* v *Royal*, 12 Ves. 355; *Cobb* v. *Hatfield*, 46 N. Y. 585.

The deed was not void, and should not be held voidable, because of the investment that was made of the proceeds. The will conferred upon the executors a valid power in trust over the proceeds of any real estate sold, to continue during the life of the life tenant. It was not a mere naked power of sale.

Osgood v. *Franklin*, 2 Johns. Ch. 1, 20-22; *Clark* v. *Clark*, 8 Paige, 152, 160, 161; *Livingston* v. *Murray*, 68 N. Y. 492, 498; *Tyson* v. *Blake*, 22 N. Y. 561, 562; *Smith* v. *Van Ostrand*, 64 N. Y. 281, 282; *Champlin* v. *Haight*, 7 Hill, 245.

The proceeds of sale were personal assets in the hands of the executors for the payment of debts and legacies, and for general purposes of administration.

Lent v. *Howard*, 89 N. Y. 176-178; *Bogert* v. *Hertell*, 4 Hill, 492, 508; *Meakings* v. *Cromwell*, 5 N. Y. 142.

Had there been any debts, an imperative power of sale would have been implied for the purpose of paying them; as the will, by devising the residue only, after payment of debts, charges the real estate. It would have been the executor's duty to sell the real estate for that purpose.

Perry, Trusts, § 570; *Greville* v. *Browne*, 7 H. L. Cas. 689; *Reynolds* v. *Reynolds*, 16 N. Y. 259; *Erwin* v. *Loper*, 43 N. Y. 525, 526.

Although not trustees of the proceeds in a strict sense, the terms of the power coupled with the law imposed the same duty as if they were.

Skinner v. *Quin* and *Erwin* v. *Loper*, 43 N. Y. 99, 525; *Hepburn* v. *Hepburn*, 2 Bradf. 75; *Stilwell* v. *Doughty*, 2 Bradf. 311, 317, 318; *Osgood* v. *Franklin*, 2 Johns. Ch. 22.

Even in England, where money has been expended to put the estate in remainder into or to restore it to a tenantable condition, for the benefit of both life tenant and remainderman, such investments have been upheld.

Re Skingley, 3 Macn. & G. 221, 228; *Re Barrington's Settlement*, 1 Johns. & H. 143; *Harris* v. *Poyner*, 1 Drewry, 182; *Gregg* v. *Coates*, 23 Beav. 33-39.

Uniformly in the United States, where investments upon real estate security are sanctioned, the application of some of the corpus of the personal estate to the restoration or protection of the real estate in remainder, has been sanctioned as a proper investment, unless it appears that a discretion has been improperly exercised; and executors or trustees are presumed to have acted in good faith, unless the contrary is shown.

Perry, Trusts, § 458; *Sohier* v. *Eldredge*, 103 Mass. 345-354; *Parsons* v. *Winslow*, 16 Mass. 361; *Watts* v. *Howard*, 7 Met. 478; *Gambril* v. *Gambril*, 3 Md. Ch. 259 and cases cited; *Kearney* v. *Kearney*, 17 N. J. Eq. 70; *Lent* v. *Howard*, 89 N. Y. 178, 179; *Davis* v. *Stover*, 58 N. Y. 474; *Young* v. *Brush*, 28 N. Y. 671, 674; *Osgood* v. *Franklin*, 2 Johns. Ch. 18-29; *King* v. *Talbot*, 40 N. Y. 83, 87; *Sutphen* v. *Ellis*, 35 Mich. 446.

Although it is held that they cannot bind the estate upon executory contracts of their own, although beneficial to the estate, yet they can make such contracts an express charge upon the estate when within their discretion and they appear to be for its benefit.

New v. *Nicoll*, 73 N. Y. 129; *Noyes* v. *Blakeman*, 6 N. Y. 567, 579-580; *Randall* v. *Dusenbury*, 39 Superior Ct. (7 Jones & S.) 174; 63 N. Y. 645.

Where there are no funds in hand, they can make a charge that will bind future funds or income.

It is a rule of equity that trustees may safely do what the court would direct them to do; *e. g.*, where great loss might occur to estates unless they exercised rights of absolute ownership.

Perry, Trusts, § 476; *Inwood* v. *Twyne*, 2 Eden, 152; *Caldecott* v. *Brown*, 2 Hare, 146.

In *Moseley* v. *Marshall*, 22 N. Y. 202, the rule is stated to be that where an existing incumbrance binds the whole estate and there are no special equities between remaindermen, the life tenant must keep down the interest and the remainder pay off the principal.

The above rule is where the incumbrance is to stand. Where it is to be paid off at once, and the life tenant and remaindermen are called upon to contribute, the above rule is applied as respects the tenant for life, by ascertaining from Northampton tables the probable duration of life, and the aggregate amount of interest payable on such duration, which sum must be contributed by him, and the balance by the remaindermen.

Gunning v. *Carman*, 3 Redf. 70; *Stilwell* v. *Doughty*, 2 Bradf. 311, 317-318; *Williams* v. *Cox*. 3 Edw. Ch. 178; *Cairns* v. *Chabert*, 3 Edw. Ch. 312; *Fleet* v. *Dorland*, 11 How. Pr. 491; *Re Estate of Miller*, 1 Tucker, 346.

The statute provides for such case that in event that either fail to contribute, a bill may be brought for a sale of the lands to satisfy the incumbrance.

R. S. part 1, 6th ed. chap. 13, title 3, §§ 149-158.

In this case the executors, having the funds in hand, applied the same rule in another way, viz.: as respects the assessments (the life tenant being entitled to the interest if the fund had been otherwise invested), by the paying off of the assessments, he got the use of the premises free from the liens as an equivalent for his interest.

House v. *House*, 10 Paige, 158; *Stilwell* v. *Doughty*, 2 Bradf. 311-317, 318.

The bill, to avoid a sale, such as the one to Evans, must be brought within a reasonable time.

The power to sell, and the control of the question of the propriety of the sale to Evans, was vested in the executors; and the discretion was properly exercised, and a sale to him was as valid as to another, unless there are facts to show that he owed some duty to the *cestui que trust* inconsistent with his making a purchase. It is mainly a question of fact. The executors had their reasons for desiring to sell, which they deemed for the best interests of the estate as a whole; and if they could secure as large or a larger price by a sale to him than to another we can imagine no reason, resting upon any duty owing by him toward the remaindermen, that would prejudice his right to purchase.

Howard v. *Ducane*, 1 Turn. & Russ. 81; *Dicconson* v. *Talbot*, L. R. 6 Ch. App. 32; *Lloyd* v. *Johnes*, 9 Ves. 51; *Ten Eyck* v. *Craig*, 62 N.Y. 419-427; *Nellis* v. *Lathrop*, 22 Wend. 121; *McGuire* v. *McGowen*, 4 Desaus. (S. C.) 486; Sugden, Powers, chap. 19, § 1 subd. 79, 80, pp. 867, 868; Sugden, Vendors, chap. 20, § 2, subd. 15, p. 692.

The application of the proceeds to pay off the assessments, and to pay Evans' bill for improvements, did not render the sale voidable.

Davis v. *Stover*, 58 N. Y. 474; *Lent* v. *Howard*, 89 N. Y. 178, 179; *Dicconson* v. *Talbot*, L. R. 6 Ch. App. 37.

If the sale is to be avoided, defendant should be allowed the amount of the purchase money, and the costs of the improvements put upon the two lots, with interest from the date of Mrs. Evans' death, May 16, 1878, and the property should be put up for resale.

2 Sugden, Vendors, chap. 20, § 2, subd. 23,

p. 694; *Hawley* v. *Cramer*, 4 Cow. 744; *Evans* v. *Peacock*, 16 Ves. 511, 517; *Davoue* v. *Fanning*, 2 Johns. Ch. 252, 270, 272; *Michoud* v. *Girod*, 4 How. 552 (45 U. S. bk. 11, L. ed. 1098); *Ex parte Hughes*, 6 Ves. 617; *Ex parte James*, 8 Ves. 337, 350; *Ex parte Bennett*, 10 Ves. 385, 399; *York Bldg. Co.* v. *MacKenzie*, 8 Bro. P. C. 42, 70, 71; *Moody* v. *Van Dyke*, 4 Binn. 43, 44; *Bailey* v. *Robinsons*, 1 Gratt. 4; *Gambril* v. *Gambril*, 3 Md. Ch. 260; *Bright* v. *Boyd*, 1 Story, 478; *Jones* v. *Jones*, 4 Gill, 87.

The allowance to the purchaser in this class of cases of all moneys expended upon the purchase and for permanent improvements seems to be placed upon two principles or doctrines of equity, to wit:

1. That a purchaser who buys and puts improvements upon the land upon the supposition that he acquires a good title, is to be protected to the extent of his outlay; as in *Putnam* v. *Ritchie*, 6 Paige, 390, 402–406; *Mickles* v. *Dillaye*, 17 N. Y. 80; *Benedict* v. *Gilman*, 4 Paige, 58; and *Bright* v. *Boyd*, 1 Story, 478.

2. On the broader principle, that he who comes into court and asks equity must do equity, and must restore what he has received; as in *Madison Ave. Bap. Ch.* v. *Oliver St. Bap. Ch.* 73 N. Y. 82, 98; *Ford* v. *Knapp*, 3 Cent. Rep. 411, 102 N. Y. 137–143, and cases cited.

Mr. **William G. Cooke** with *Mr.* **William C. Wallace,** for respondents:

Under the will the widow took a life estate.

Jennings v. *Conboy*, 73 N. Y. 236–237.

The devise to the children was of a vested remainder in fee, limited upon the particular estate in the widow, and subject only to the proper execution of the power of sale conferred upon the executors.

Morse v. *Morse*, 85 N. Y. 58; *Manice* v. *Manice*, 43 N. Y. 304.

The fact that after a sale of the land the executors are to have the handling and investment of the proceeds does not make the authority conferred upon them any the less a naked power.

Crittenden v. *Fairchild*, 41 N. Y. 289; *Hetzel* v. *Barber*, 69 N. Y. 1; *Prentice* v. *Janssen*, 79 N. Y. 479.

In the absence of an express declaration to that effect, an intent to create an express trust will not be presumed, where the whole design of the instrument can be accomplished under a power conferred.

Heermans v. *Robertson*, 64 N. Y. 332.

The conveyance by the executors to Swackhamer was not a lawful execution of the power of sale. A power of sale, contained in a will, can be exercised only in the manner and for the precise purpose contemplated by the testator.

Allen v. *DeWitt*, 3 N. Y. 276; *Roome* v. *Philips*, 27 N. Y. 357; *Russell* v. *Russell*, 36 N. Y. 581; *Hetzel* v. *Barber*, 69 N. Y. 1.

No question can arise as to the rights of *bona fide* purchasers. The defendant Evans devised the whole scheme, in pursuance of which the property was conveyed to Swackhamer and finally to him.

As to the defendants Scofield, there is no pretense that they paid a dollar for the property conveyed to them; it is admitted that the conveyances were intended as gifts.

It was not necessary as a condition of recovery in the action that plaintiffs should restore to defendant Evans the amount he paid for the land; nor has he any equitable lien for the value of his improvements.

Evans married the widow in 1841. Her life estate thereupon vested in him by the common law.

2 Kent, Com. 134; *Wood* v. *Wood*, 83 N. Y. 575.

This right was not affected by the Married Woman's Act of 1848.

Westervelt v. *Gregg*, 12 N. Y. 202; *Ryder* v. *Hulse*, 24 N. Y. 372; *Wood* v. *Wood*, 83 N. Y. 579.

Upon him, then, rested all the obligations to the remaindermen, which the law imposes upon life tenants:

To preserve the estate from waste.

4 Kent, Com. 76, 77, 81.

To pay all taxes laid upon the land during the tenancy.

Cairns v. *Chabert*, 3 Edw. Ch. 312; *DeWitt* v. *Cooper*, 18 Hun, 67.

To keep down the interest on incumbrances.

1 Washb. Real Prop. 123, 4th ed.

As life tenant he cannot charge the remainder with the cost of his improvements. *Id.*

But he claims to occupy the position of one who has purchased, paid for and improved land, supposing that he had obtained a good title.

It is not pretended that he has any absolute legal right to reimbursement or a lien; but that a court of equity will not permit plaintiffs to take the land with the improvements, and suffer an innocent defendant to lose all benefit of his expenditures upon it.

There is no inflexible, or even well defined rule, upon which the courts proceed in determining whether or not a party shall be so reimbursed, but each case will turn upon its own natural right and justice.

Madison Ave. Bap. Ch. v. *Oliver St. Bap. Ch.* 73 N. Y. 96.

Two things, however, must always exist before the court will entertain such a claim:

1. The party must have honestly believed that he had a good title.

Moore v. *Cable*, 1 Johns. Ch. 387; *Woodhull* v. *Rosenthal*, 61 N. Y. 382, 397.

2. It must, of course, appear that otherwise the party will be injured by having made the improvements.

The defendant Evans was not a *bona fide* purchaser; he had actual notice and positive knowledge that the sale to him was void. He was familiar with the will, in which it was written, as plain as words can speak, that a sale should be made only for the purpose of investment. He knew that one object of selling was to pay him for having made improvements upon the estate, of which he was to have the benefit as long as he lived.

But he will sustain no damage by being denied compensation. It was plainly to the interest of the life tenant to make the improvements and he has been more than reimbursed.

The purchase price of the land was $2,000, the cost of the building $6,000; in all $8,000. According to his own testimony he must have received at least $30,000 from the rents of these houses.

Ruger, *Ch. J.*, delivered the opinion of the court:

In July, 1841, Thomas Thomas died, leaving him surviving Catharine Thomas, his widow, and four children, aged respectively three, five and six, and Sarah Thomas, who has since died intestate. At the time of his death Thomas owned in fee eight small city lots in Williamsburgh, six of which were situated on South First, and two of lesser value on South Second Street and with the exception of two lots on South First Street were vacant and unimproved.

So far as appears from the case Thomas had no other property, real or personal; and such as he had he devised to his widow for life with remainder to his four children. By the will he appointed his wife executrix and John L. Bulkley executor of his estate and authorized them to "sell the whole or any part of his real estate when they may deem best for those interested therein, either at public or private sale, and invest the proceeds in bonds and mortgages or other securities as they may believe best." He also appointed his wife guardian of all of his children.

In December, 1841, the widow intermarried with the defendant Evans and lived with him as his wife until the year 1878, a period of thirty-seven years and nearly twenty years after all of the children had arrived at maturity.

It is conceded that by the will the widow took a life estate in the property of her husband, and that upon her marriage with Evans he became entitled to the enjoyment of her interest therein, and that the four children took a vested estate in remainder in such property. Between the years 1841 and 1850 the defendant Evans made considerable improvements upon the property on South First Street, and rendered some of it productive which before was a burden and expense to the estate. For the purpose partly of paying the liability of the estate to Evans for these improvements and partly to raise money to meet anticipated assessments upon the property the executors, in 1850, sold and conveyed to Evans for the agreed price of $1,000 the two vacant lots on South Second Street. Of this sum $350 was applied as a payment to Evans for the expenses incurred by him, and the balance of $650 was secured by a mortgage upon the property, given by Evans to the executors. The price paid was a fair consideration for the land, and all parties then supposed that Evans acquired a valid title under the power of sale contained in the will. Subsequently, however, upon attempting to raise money upon the lots for building purposes, Evans was advised that by reason of his relationship with one of the grantors, his title was defective; and thereupon he consented to institute an action to have such title declared void and to reinstate the power of sale in the executors. Such proceedings were thereupon had in the supreme court that judgment was rendered declaring the conveyance from the executors to Evans null and void, and reinstating them, with the interest attempted to be conveyed.

Between 1850 and 1854 heavy assessments were levied upon the property of the estate for municipal improvements, and the executors had no means to pay them. These assessments were mainly levied upon the lots on South First Street. At the request of the executors Evans advanced some money to pay them; but the estate was still unable to meet the other burdens upon the property. Under the circumstances the defendant Evans, under an agreement with one Swackhamer that he would repurchase the property and repay him its cost and such money as he should expend upon it with a *bonus* of $500 for his risk and trouble, induced Swackhamer to enter into a contract of purchase of the two lots on South Second Street, with the executors, for the price of $2,000.

In 1858 the executors conveyed the property to Swackhamer, receiving therefor $300 in cash, Swackhamer's note for $700, and a release by Evans to the executors of their indebtedness to him for money advanced and expended for assessments and improvements upon the property. The price paid was more than the value of the property, and the Thomas estate received the full benefit thereof.

It does not appear that the executors had any knowledge of the agreement between Evans and Swackhamer, or that any of the parties had any doubt but that Swackhamer acquired a valid title to the property by the conveyance. Upon receiving his deed Swackhamer executed a mortgage upon the property to third parties for the sum of $4,500, which sum was wholly expended in erecting three substantial brick dwellings upon the two lots. In 1856, in accordance with his agreement with Evans, Swackhamer conveyed the property to him, receiving in payment therefor the sum of upwards of $7,000. Immediately upon receiving his deed Evans caused it to be placed upon record, and from that time forward claimed to be the absolute owner of the property.

Since Evans' occupation of the lots he has continued to make additions to and improvements upon them, the value of which, including the original cost of the houses, as found by the trial court, exceeded $9,000 at the time of the trial. In 1879 Evans conveyed to each of the two other defendants Catharine J. Scofield and Jessie E. Scofield, one of the houses erected on the two lots on South Second Street, as a gift, out of consideration of love and affection for them as his daughters.

This action was brought by two of the remaining children of Thomas, the other one refusing to join therein as a plaintiff, in April, 1881, for the purpose of vacating and annulling the deed given by the executors to Swackhamer, and all subsequent conveyances of the property, and having it adjudged that the two lots with their improvements were the property of the plaintiffs, and requiring the defendants to release and convey the property to them, and that the defendant, Thomas J. Evans, render an account of all of his transactions with the estate of Thomas Thomas, and be decreed to pay to the plaintiffs such sums as might be found due upon such accounting. The right to relief was based exclusively upon the allegation in the complaint that the defendant Evans obtained title to the property from the executors "for the purpose of enabling the executors more conveniently to manage the said estate through the defendant, Thomas J. Evans, and with a view to increase the revenue for the said real estate and to put the title thereof in the said Thomas J. Evans as trustee for the said Catharine Evans and the children of the said Thomas Thomas, deceased."

Upon the trial no proof was offered by the plaintiffs of the existence of the trust and agreement alleged in the complaint; but the action was sustained, upon the ground that the conveyance by which the land was transferred from the executors of Thomas to Swackhamer was not a valid exercise of the power of sale given to them by the will of Thomas, and constituted a cloud upon the title of the true owners which should be removed. The decree also denied to the defendant the right to compensation for the improvements made to the property by him. The ground upon which this conclusion was reached is stated to be that Evans was not a *bona fide* purchaser of the premises. This conclusion was based upon the finding of law made by the trial court: that neither Evans nor the other defendants were *bona fide* purchasers of the land.

It is not entirely clear what the trial court meant by this finding of law; but if it was intended to convey any other idea than that it was simply a legal deduction from the assumed fact that the conveyances to Swackhamer and Evans were void by reason of the alleged invalidity in the execution of the power of sale, it is contrary to the findings of fact made by the court, and is unsupported by any evidence in the case.

It was found by the trial court that from 1856 Evans always claimed to be the absolute owner of the property; and that this claim was known to and acquiesced in by the plaintiffs appears from the allegations of the complaint. It is therein averred that "The plaintiffs have all been for many years of full age, and have not requested the transfer of said title to them because of the positive assurance they all had from the said defendant and from the said testatrix in her lifetime, that the same was held for the estate, and because their mother, the said testatrix, was entitled to the income of the same until her death." This excuse so far as it alleges any assurance from the defendant Evans, or his wife, of the existence of a trust, is not, as we have seen, supported by the evidence.

It also appears that some, if not all, of the surviving children of Thomas, after their majority, had knowledge of the expenditures that the defendant Evans made, not only upon the property in dispute but also upon the other real estate remaining unsold, and so far from making any objection thereto, actually requested them to be made.

A careful perusal of the evidence in the case shows us that Evans, in the right of his wife, came into the possession of the eight lots in 1841; and although both he and the estate were destitute of means to improve it or to pay the taxes or assessments levied thereon, it was so managed as to make it more valuable and productive and to preserve for the remaindermen the greater part of the estate. In the meanwhile he provided a home for the widow and children of Thomas, and educated and supported the children, not only until their majority but some of them until long after that time. Under these circumstances it is not strange that the remaindermen have hesitated so long to assert any rights to the two lots in question, and that one of them refused altogether to become a party to the proceeding.

A claim to recover back property which has been fairly sold and paid for at its full value and the consideration of which has accrued to the benefit of the plaintiffs, without offering to render compensation to one who, honestly believing himself to be its lawful owner, expended large sums in its improvement, and which now constitutes its greatest value, seems to be unjust and inequitable. We are of the opinion that the purchase price originally paid for the land, and the value of the improvements (to the extent that they have added to its permanent value) constitute an equitable claim, and that even if the plaintiffs should establish an equitable right to the property, it would not entitle them to judgment therefor, except upon the condition of refunding to the defendant Evans the amount so expended.

It was found by the trial court that the purchase price was mainly paid in relieving the land from the assessments imposed upon it. These assessments were a charge upon all of the land, and the interest of the remaindermen, as well as that of the life tenant, was liable to be sold therefor. It is provided by statute, in the case of real property in which several persons have successive interests incumbered by taxes and assessments rendering it liable to sale therefor, that upon the application of any of the parties interested the court may order a sale of the fee or a part thereof for the purpose of discharging the liens upon the remainder. Laws 1841, chap. 341; Laws 1855, chap. 357; *Jackson* v. *Babcock*, 16 N. Y. 246; *Dikeman* v. *Dikeman*, 11 Paige, 484.

Thus the property of the plaintiffs was legally liable for the payment of these assessments. Although the method provided by statute was not pursued, we see no reason why a court of equity, called upon to settle the equitable rights of the parties, should not charge remaindermen with the reimbursement of moneys actually and honestly expended for the benefit of their estate and which they were legally liable to pay.

The general rule applicable to the relation of life tenants and remaindermen does not authorize the former to charge the latter with the cost and expense of permanent improvements put upon the property by him during the life tenancy. *Dent* v. *Dent*, 30 Beav. 363; *Moore* v. *Cable*, 1 Johns. Ch. 385.

This rule is founded upon principles of justice having reference to the rights and interests of remaindermen, and should not be inconsiderately impaired or evaded.

It is also the general rule that municipal assessments for permanent improvements upon land are apportionable between the life tenant and the remaindermen, according to the circumstances of the case and their respective interests in the property; *Stillwell* v. *Doughty*, 3 Bradf. 359; *Peck* v. *Sherwood*, 56 N. Y. 615: while the ordinary taxes of government are properly chargeable to the life tenant alone. *Deraismes* v. *Deraismes*, 72 N. Y. 154; *Cairns* v. *Chabert*, 3 Edw. Ch. 312.

Such are the rules applicable to those relations, when they are open and acknowledged and no special circumstances exist authorizing the application of principles of equity to reimburse one who in good faith has increased the intrinsic value of the property by expending his own means in making permanent erections and valuable additions thereto under the belief that he was its lawful owner. Such circumstances are held to exist when a trustee or mortgagee in possession, supposing in good faith that he has acquired title in fee to the property, goes on and deals with it as his own and makes improvements which are of permanent benefit to the property. *Putnam* v. *Ritchie*, 6 Paige, 390; *Mickles* v. *Dillaye*, 17 N. Y. 86.

In the *Putnam Case* the chancellor laid down the rule, as expressed in the head note, that "Where industrial accessions have been made to property in good faith by a person who has the legal title to the property, so that the real owner is compelled to resort to the court of chancery to assert his equitable title to such property, this court acts upon the civil law rule of natural equity, and compels the complainant to compensate the adverse party for such industrial accessions, or improvements, as a condition of granting the equitable relief asked for in the suit."

That was the case of a guardian in socage, of infants having a leasehold estate in fee in certain lands, which lease during the infancy of the wards was, for a good consideration, surrendered by such guardian to the heir of the lessor. It was held that a guardian in socage has no right to surrender a lease in fee belonging to his wards, but that when the legal title is in a trustee or when the guardian of an infant has complete legal control over the property so as to place it fully within the power of the chancellor, as the general guardian of infants, the court may sanction the acts of the trustee or guardian, although not strictly legal, if the same are done in good faith and for the benefit of the estate of the infant.

In *Mickles* v. *Dillaye*, 17 N. Y. 86, the rule was applied to a mortgagor who attempted to redeem from a mortgagee in possession under a voidable sale; and the rule adopted is expressed in the head note of the case as follows: "When valuable and permanent improvements have been made in good faith by a person standing upon the legal footing of a mortgagee in possession, but who supposed himself to have acquired the absolute title, and such mistake was favored by the omission of the owner (for several years before and after the improvements) to assert any interest in the premises, the mortgagor, on asking the aid of equity to redeem, will be compelled to allow the value of the improvements though exceeding the rents and profits received."

In *Bright* v. *Boyd*, 1 Story, 478, lands had been sold by an administrator; but the sale was void because he had not given security according to the statute. The heir sued the purchaser and recovered possession of the land. The purchaser then filed his bill in equity to recover from the heir the value of certain improvements, including the cost of building a large dwelling house which he had in good faith put upon the premises while occupying them. *Judge* Story referred the case to a master to take an account of the enhanced value of the premises, with a strong intimation that the plaintiff was entitled to recover that expense, but postponed the final decision of the question until the coming in of the master's report.

Judge Denio, citing this case in *Mickles* v. *Dillaye*, entertained some doubt whether it could be sustained here, except upon the principle of estoppel against one fraudulently standing by and seeing another expend money upon his land, although he expressly approved the rule laid down by the chancellor in *Putnam* v. *Ritchie*.

In the same case he also approved of the doctrine laid down by *Judge* Hand in *Wetmore* v. *Roberts*, 10 How. Pr. 51. In that case the defendant had bought the premises from one who had purchased them upon a sale on a prior mortgage in the foreclosure of which a junior mortgagee had not been made a party. Upon a foreclosure of the junior mortgage it was held that the premises should be sold and the defendant should be paid from the purchase money, not only the amount due on the elder mortgage but also for improvements made by him during his occupation of the property.

In *Miner* v. *Beekman*, 50 N. Y. 345, it was said by Grover, *J.*, that "When a plaintiff has permitted his right to satisfy a mortgage to remain dormant for nearly thirty years, during which others have paid the assessments and taxes and made improvements in the belief that they had title under a foreclosure of the mortgage, he cannot complain that, as a condition of regaining possession, he is compelled to account for and pay such taxes, assessments, and for such improvements, according to the just and enlightened principles of courts of equity."

Pomeroy, in a note to section 1242 of his work on Equity Jurisprudence, states the rule as follows: "When a person in peaceable possession under claim of lawful title, but really under a defective title, has, in good faith, made permanent improvements, the true owner who seeks the aid of equity to establish his own title will be compelled to reimburse the occupant for his expenditure."

Many authorities are cited in support of the proposition.

In *Ford* v. *Knapp*, 8 Cent. Rep. 411, 102 N. Y. 135, the principle is laid down that in an action by a cotenant out of possession for a partition of the premises, upon which the other tenants in common have paid taxes and made improvements in good faith, which have largely increased the value of the property, the amount of such taxes and improvements shall, in case of a sale of the property, be first deducted from the gross sum received, and paid to the improving tenants, and the balance only divided among the parties according to their respective interests. The case was decided upon the rule that "One who seeks equity must do equity;" and that the tenant out of the actual occupation, who seeks a court of equity to award him partition, is entitled to relief only upon condition that the equitable rights of his cotenant shall be respected.

We think the circumstances of this case bring it within the principles of the cases above cited.

Previous to the year 1860 all of the remaindermen had arrived at years of maturity, and were aware that the defendant Evans claimed to be the absolute owner of the property in question. For over twenty years they not only neglected to dispute such claim but permitted the defendant to go on in apparent security as to his title, and make improvements upon the property and deal with it as his own. There seems to exist here the natural equity which entitles a party who has in good faith, with his own means, improved the property of another to reimbursement by the parties benefited thereby; but this equity is strengthened by the conduct of the owners who stood by and saw such party without notice or objection incur expense under the belief that he was improving his own property.

We are, therefore, of the opinion that the trial court should have imposed, as the condition of any relief to the plaintiffs, the reimbursement by them to Evans of the original price paid by Swackhamer for the lots, and also of such sums as were expended by Swackhamer and Evans in their improvements, so far as they have increased the value of the land; and in case Evans is charged with the rents received from the property since the death of the life tenant he should be allowed interest on the amount payable to him.

The plaintiffs have sought their remedy in equity, and that course seems to have been requisite as the condition of a right to the relief demanded. The deed from the executors to Swackhamer apparently conferred the legal title under the power of sale contained in the will. The purchaser was under no responsibility for any misapplication by the executors of the consideration paid by him for the land and was entitled to rely upon their apparent power to receive such consideration and to convey the land given to them by the will. 3 R. S. 7th ed. 2138, § 66.

We have altogether refrained from discussing the question as to whether the conveyance by the executors to Swackhamer was a valid execution of the power of sale.

There seems to be much reason for saying, under the peculiar condition of this property, its unproductive character and the want of means in which the testator left his family, the liability of the property to be sold for taxes and assessments for municipal purposes, that the real limitation intended to be put by the testator upon the power of sale, was contained in the words that it should be sold when his executors "may deem best for those interested therein" and not in the language by which they were directed "to invest the proceeds in bonds and mortgages or other securities as they may believe best." Some diversity of opinion, however, exists among the members of the court upon this question; and we therefore refrain from determining it, believing that the point decided will substantially dispose of the case upon a retrial.

The judgments, both interlocutory and final, of the courts below are reversed and a new trial ordered, with costs to abide the event.

All concur.

Humphrey SISSON *et al.*, *Respts.*,
v.
Cecelia CUMMINGS *et al.*, *Appts.*

1. **Ejectment** cannot be maintained against defendants who are not in possession of the premises sought to be recovered and who do not claim any title to or right to the possession of the same.
2. **Defendants,** who did **not** appear by the pleadings or evidence to have been **in possession** of the premises or to have claimed title thereto, as remaindermen or otherwise, at or before the commencement of the action, are **entitled to** a **dismissal of** the **complaint.**

(Decided June 7, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Fourth Department, affirming a judgment of the Jefferson Special Term in favor of plaintiffs in an action of ejectment tried at Circuit before the court without a jury. *Reversed.*

Reported below, 35 Hun, 22.

The facts bearing upon the question decided are sufficiently stated in the opinion.

Mr. **Wayland F. Ford,** for appellants:

Against the infant defendants the plaintiff proved no cause of action. They were not in possession of any land and claimed no right to the possession of any; they had never interfered with this land and claimed no title to the same or right to its possession.

To maintain the action of ejectment it would be necessary to show defendants in possession, exercising acts of ownership, or that they claimed the title.

Redfield v. *Utica etc. R. R. Co.* 25 Barb. 54; *Abeel* v. *Van Gelder*, 36 N. Y. 514; *Banyer* v. *Empie*, 5 Hill, 48; *Lucas* v. *Johnson*, 8 Barb. 244; Code Civ. Proc. §§ 1502, 1503.

There was no proof that defendants had done any act to make them *tort feasors* as was done in *Abeel* v. *Van Gelder*, 36 N. Y. 514.

Mr. **D. O'Brien,** for respondents:

The infants were properly made parties defendant. They interposed an answer denying plaintiffs' right to recover, and contested the same upon the trial. They claimed to own the land to high water mark, and denied the right of plaintiffs to recover below that line; and they have successively appealed to the general term and to this court.

Being the owners of the land, the title to the property in question could not be finally determined without their presence as parties; and it is now the policy of the law to have all the persons made parties that are necessary to a final determination of the questions involved. Upon these facts the infants were not only proper but they were necessary parties defendant.

Code Civ. Proc. §§ 1502, 1503; *Stewart* v. *Patrick*, 68 N. Y. 450, 455; *Martin* v. *Rector*, 30 Hun, 138.

Andrews, *J.*, delivered the opinion of the court:

We deem it unnecessary to decide the interesting questions argued at the Bar, respecting the construction of a grant by the State, of lands bordering on the River St. Lawrence above the ebb and flow of the tide, which bounds the granted premises by the margin of the shore of the river, and whether under such a description the title of the grantee extends to the margin of the water at its low stage, or only to high water mark.

We are of opinion that the judgment against the infant defendants, who are the only appellants here, must be reversed upon a preliminary question. Assuming that the plaintiffs' title under the Macomb patent extended to the line of low water, and that they established title to the water front and to the land under water to low water mark, lying southwest of and adjoining the premises embraced in the deed of July 5, 1861, from John W. Fuller to David and William Woodworth, under which the defendants claim, we think, nevertheless, the appellants were entitled to a dismissal of the complaint, on the ground that it did not appear on the trial by the pleadings or evidence that they were in possession of the demanded premises, or claimed title thereto as remaindermen or otherwise at or before the time of the commencement of the action.

Upon the death of Ellen Cummings, January 31, 1875, the title to the Woodworth lot descended to her two children, the infant defendants, subject to a life estate in Peter Cummings, the husband, as tenant by the curtesy. Ellen Cummings acquired title to the lot by deed from David Woodworth, November 10, 1871, subject to a reservation (so called) to Fuller (the original grantor of the Woodworths), contained in the original deed from Fuller to them, of "all his rights to the land now under water and to the water front beyond or southwest" of the southwest line of the lot conveyed. She entered into possession under her deed from Woodworth and occupied the lot and the house upon it, with her husband and children, until her death.

The premises in controversy are those embraced in this reservation. It neither appears that Ellen Cummings ever entered upon or that she claimed any right or interest in the premises in question. There is evidence that, subsequent to her death, Peter Cummings, her husband, one of the original defendants in the action, entered upon the premises in dispute, and built a hog pen and privy thereon, and tore down a wharf constructed by the defendants, between the lot conveyed to Ellen Cummings and the river.

It may be admitted that enough was shown to entitle the plaintiffs to maintain ejectment against Peter Cummings. He has submitted to the judgment below and has not appealed, and his rights are not now in controversy. But the case discloses no ground upon which a judgment against the infant defendants can be supported. There is no pretense of any act on the part of the infants by way of assertion of title in themselves to the premises in question, nor is there any evidence that they have ever questioned or disputed the title of the plaintiffs.

The complaint alleges that the defendants, after the death of Ellen Cummings, wrongfully entered into possession of the real estate described and wrongfully withheld the same from the plaintiffs, and that the defendants, "*or some of them*," claim to own the same and deny the plaintiffs' title thereto. These allegations are not admitted by the infant defendants in the answer, but are denied; and they expressly aver that they have no interest in any lands except those of which their mother Ellen Cummings, was seised at the time of her death, to wit: the lands embraced in the Woodworth deed, and they insist that the action cannot be maintained against them.

It is clear, we think, that the infant defendants are not bound by the acts of their father, the tenant for life. It is true that both his rights and the rights of the infants in the land conveyed to Ellen Cummings are derived through her. But as we have said, the deed to Ellen Cummings carried no part of the premises in dispute, which lie wholly outside the boundaries in the deed. The evidence also tends to show that Peter Cummings, in entering upon the land in controversy, was asserting a supposed right as riparian owner to use the shore between high and low water mark, adjacent to his land. But his acts must be referred to his own interest and title, and not to the title of the remaindermen. The infants could not control his conduct, and it would be grossly unjust to make them responsible for wrongs committed by him without their sanction or authority.

The joinder of the infant defendants is not justified by section 1503 of the Code. That section authorizes any person claiming title to, or the right to the possession of, real property sought to be recovered in an action, as landlord, remainderman, reversioner, or otherwise, adversely to the plaintiff, to be joined as defendant. The infants, so far as appears, neither claimed title to, or the right to the possession of the land in controversy; nor did they do any act in hostility to the plaintiffs' title, and the complaint as to them should have been dismissed.

Judgment reversed as to the appellants and a new trial ordered, with costs to abide the event.

All concur.

William B. HOLDSWORTH, as Master and Agent for the Owners of the British Bark "Bessie," *Appt.*,

v.

P. A. DE BELAMZARAN *et al.*, *Respts*,

Defendants chartered a vessel, of which plaintiff was master and agent, **for a voyage** from New York **to Cadiz and return;** the charter-party provided that defendants should pay plaintiff a stipulated sum for the round trip, of which a **certain amount** was made due and **payable** upon delivery of the cargo **at Cadiz,** in gold coin, without credit, discount or commission. Plaintiff was instructed by defendants to consign himself to a certain firm in Cadiz who "had full instructions to serve the master in any manner concerning his vessel." At Cadiz, plaintiff received from said consignees in cash a portion of the amount there due him, and on being asked by them whether he wished to remit any portion of his charter money to his principals, replied that he did wish to remit to them through Baring Bros., London. Said consignees thereupon said that they would purchase, and thereafter said that they had purchased, a bill of exchange for said amount due, and had remitted the same to Baring Bros., and **plaintiff**

settled with the **consignees** in **reliance upon** such **statements**, and sailed from Cadiz. Thereafter it appeared that said consignees had not purchased or remitted a bill as they had represented, but that they had drawn their own draft on defendants at New York, payable sixty days after sight, to order of Baring Bros., and had transmitted the same to Baring Bros. Acceptance and payment of this draft were refused by defendants, and plaintiff brought this action for the balance of the charter money due at Cadiz not paid there in cash. *Held*, that the **facts** connected with the draft did **not constitute a payment of** the **defendants' debt**, and that plaintiff was entitled to recover.

(Decided June 7, 1887.)

APPEAL from an order of the Supreme Court at General Term in the First Department, reversing a judgment entered upon report of a referee in favor of plaintiff in an action to recover an alleged balance due under a charter of a vessel, and ordering a new trial. *Reversed.*

Reported below, 34 Hun, 382.

The facts and questions raised appear from the opinion.

Mr. **Joseph A. Shoudy,** for appellant:

The order appealed from does not state that the new trial is granted upon any question of fact. It is therefore upon the law only.

Code, § 1338.

It stands admitted by the answer and proved by the uncontradicted evidence, that the vessel fully performed all the terms and conditions of the charter party, and became entitled to receive the stipulated charter money. It was therefore incumbent upon the defendants to prove affirmatively the payment of the full charter money.

Board of Education v. *Fonda*, 77 N. Y. 362.

There is no finding of payment in any manner or acceptance of anything in lieu of payment. The question here is whether when the creditor agrees to accept what is the equivalent of gold coin, in lieu of the coin itself, he may, by false and fraudulent pretenses, be compelled to put up with something that is perfectly worthless which he never agreed to accept.

Sandford v. *Handy**, 23 Wend. 260, 266; *Bennett* v. *Judson*, 21 N. Y. 238; *Hathaway* v. *Johnson*, 55 N. Y. 96; *Lee* v. *Sandy Hill*, 40 N. Y. 442, 448; *Krumm* v. *Beach*, 96 N. Y. 398; *Craig* v. *Ward*, 3 Keyes, 387; *Sharp* v. *Mayor*, 40 Barb. 271.

In a civil suit the principal is liable to third persons for the frauds, deceits, concealments, misrepresentations, torts, negligence and other malfeasances and misfeasances of his agent in the course of his employment, although the principal did not authorize, justify or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved them.

Lee v. *Sandy Hill*, 40 N. Y. 448; Story, Agency, § 452.

The fraudulent acts of Poggio were within the scope of his authority, and were therefore binding upon the defendants.

Sandford v. *Handy*, 23 Wend. 265, 266; *Mott* v. *Consumers Ice Co.* 73 N. Y. 543; *Lee* v. *Sandy Hill*, 40 N. Y. 448 and cases cited.

The contention that Poggio, at some stage of this transaction, ceased to be the agent for the defendants and became the agent for the plaintiff is unfounded.

The provision in regard to the payment was for the benefit of the vessel, and might be waived without the relinquishment of any right to the charter money.

Shepard v. *De Bernales*, 13 East, 565; Abb. Ship. 276; *Tapley* v. *Martens*, 8 Term Rep. 451; *Christy* v. *Row*, 1 Taunt. 300.

Mr. **George L. Rives,** for respondents:

The referee finds that Poggio Hermanos were the defendants' agents for the purpose of the charter-party, and not otherwise.

Maclachlan, Ship. pp. 180, 357.

It is the general rule of law that where payment is stipulated to be made at a particular place and in a particular manner, and the debtor puts the requisite funds in the hands of his agent at that place, if the creditor chooses not to receive payment in the manner stipulated, he does so at his own risk.

Darnall v. *Morehouse*, 45 N. Y. 64; *People* v. *Cromwell*, 3 Cent. Rep. 341, 102 N. Y. 477; *Strong* v. *Hart*, 6 Barn. & C. 160; Abb. Ship. 414–420; Maclachlan, Ship. 2d ed. 484; 1 Pars. Ship. & Adm. 305; 1 Maude & P. Merchant Ship. 378.

Ruger, *Ch. J.*, delivered the opinion of the court:

In November, 1881, the defendants chartered the British bark "Bessie" for a voyage from New York to Gibraltar and Cadiz and for its return to New York, or some other port of the United States to be named by the charterers at Cadiz. The charter-party provided that the defendants should pay the plaintiff £1,100 for the round trip, of which sum £620 were made due and payable upon proper delivery of the cargo at Cadiz "in Spanish gold coin at the rate of $4.80 to the pound sterling," "all payments to be made in cash, without credit, discount or commission."

Other portions of the stipulated sum of £1,100 were made payable at Gibraltar and at the home port, but no question arises in the case over the performance by the defendants, in that respect, of their contract obligations.

The defendants loaded the bark at the Port of New York with a general cargo, consigned to various persons at Gibraltar and Cadiz, under bills of lading in the usual form, specifying the amount of freight payable by the consignees on each parcel of goods. The full performance by the plaintiff of the obigations of the charter-party is admitted by the defendants, and their liability for the payment of the full amount stipulated according to the provisions of the charter party, follows as the necessary consequence of this performance by the plaintiff.

The only question in the case is, therefore, whether the defendants have performed their obligation by causing payment of the sum of £620 to the plaintiff at Cadiz, according to the terms of the charter-party.

Before leaving New York the defendants handed to the plaintiff a letter of instruction by which he was directed to proceed directly to

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*See digested citations at close of case, Lawyers' edition. [Ed.]

Gibraltar, consigning himself to one Gomez, and, after discharging the consignments at that place, to proceed to Cadiz, consigning himself to Poggio Hermanos, who, it was stated, had full instructions to serve the master in any matter concerning his vessel. It was shown by the evidence that Poggio Hermanos paid to the plaintiff at Cadiz the sum of $528.40 of the sum of £620, leaving apparently unpaid thereon £509 18*s* 4*d*, or $2,447.60, and this is the sum in dispute in this action.

As to the transactions at Cadiz between the plaintiff and Poggio, the referee has found as follows: "That while discharging the cargo of said vessel at the Port of Cadiz, the said Salvador Poggio inquired of the plaintiff whether he wished to remit any portion of his charter money to his principals; and the master replied that he did wish to remit to his principals through the firm of Baring Brothers of London; that thereupon the said Poggio said to the plaintiff that he would purchase a bill of exchange and remit the same to the said firm of Baring Brothers, and a few days thereafter, when the cargo was about half unloaded, he represented to the plaintiff that he had purchased a bill for £509 18*s* 4*d*, at 47*d* to the dollar, and had remitted the same to Baring Brothers for the account of the master and agent of the said vessel; that said master believed the said statement and representation of said Poggio and relied thereon, and had the accounting hereinafter referred to, and settled with said Poggio upon the faith of said representation being true; that the statement and representation of the said Poggio that he had made such remittance to Baring Brothers was false and untrue, but, on the contrary, the said Poggio on or about the 16th day of February, 1882, drew his draft in the firm name of Poggio Hermanos upon the defendants by their firm name, for the sum of £509 18*s* 4*d*, payable at sixty days after sight to the order of Baring Brothers, and transmitted the same to Baring Brothers; that Baring Brothers received the same and presented it to the defendants on or about the first day of March, 1882, for acceptance, and thereafter, when the same became due, presented it for payment, and the said bill was neither accepted nor paid, but was protested for nonpayment, and has never been paid;" that the firm of Poggio Hermanos had no funds with the defendants and had no authority to draw upon them; "that the master of said vessel received no more than $2,833.40 on account of said charter-party, leaving a balance of $2,447.60, which was due and payable at Cadiz, aforesaid, according to the terms of the charter-party. No part of this sum has been paid;" that "The plaintiff never agreed to receive the said draft in payment thereof, and did not know that the same had been drawn until long after he left the Port of Cadiz, but supposed that a remittance had been made as agreed by the said agent."

Shortly before leaving Cadiz the master applied to Poggio for a final settlement of the money payable to him at that place, and Poggio rendered an account in which he charged the master with the sum of £509 18*s* 4*d*, sent to Baring Brothers February 14, 1882, and various other items of account, together with a sum paid in cash, February 28, 1882, sufficient to make up the whole amount of £620.

The plaintiff first learned of the mode of remittance attempted by Poggio, when he was at Gloucester after his voyage was completed, and never at Cadiz or elsewhere approved of or accepted the method of remittance adopted by Poggio.

We have also carefully read the evidence upon which the findings were based, and are of the opinion that they were quite as favorable to the defendants as the proof would warrant. Upon these facts the referee made a report in favor of the plaintiff upon which judgment was entered. The general term, upon appeal to that court, reversed the judgment and ordered a new trial. From that order the plaintiff appealed to this court upon the usual stipulation for judgment absolute in case of an affirmance here.

The ground upon which the defense to the action was based is stated in the answer to be as follows: "The said firm of Poggio Brothers offered to give the plaintiff, instead of cash, their draft or bill of exchange for the said last mentioned amount ($2,447.60), to which the plaintiff assented, and requested the said Poggio Brothers to draw the said bill of exchange to the order of Baring Brothers & Co., of London; that the plaintiff accepted the said draft voluntarily and for his own convenience, and did not insist upon payment in cash of the said balance of $2,447.60."

It is quite unnecessary to discuss the question of the validity of such a defense, if it had been established by proof, because in all of its material allegations it was in direct conflict with the findings of the referee and the fair and reasonable deductions to be made therefrom. The general term, however, seems to have become impressed with the idea, notwithstanding the express findings of the referee and the positive character of the testimony of the plaintiff, that the personal draft of the Poggios, payable sixty days after sight by the defendants in New York, had in some manner been accepted by the plaintiff in satisfaction of the sum payable by the terms of the charter-party at Cadiz.

The discussion of the case in the courts below has elicited not only an able opinion from the referee but also one from each of the judges of the general term of the supreme court, in which a radical difference of views, as to the merits of the case, has been shown to exist, two of the judges favoring a reversal of the judgment for the plaintiff ordered by the referee, and one favoring an affirmance. The theory upon which the majority of that court proceeded will best be presented by brief extracts from their respective opinions.

Judge Brady says: "According to the charter-party, payment was to be made at Cadiz by the agent of the defendants, and that the draft which was taken by the plaintiff in lieu of money was drawn at his request that he might make remittances, and of course without the knowledge of the defendants; and it is to be further noted that the plaintiff, relying upon the statement of the agent that the bill was drawn upon Baring Bros., made no personal inspection of it, and thus enabled the defendants' agent to practice what appears to have been a fraud."

Judge Davis, also writing for reversal, says: "The freight to an amount exceeding the sum due to the plaintiff was collected by Poggio

Brothers, and was known to the plaintiff to be in their hands * * * The plaintiff had only to demand and receive them. He did receive a portion of them, but the residue he desired, for his own purposes, to remit to Baring Brothers as soon as possible. The defendants were under no obligation to do that for him, and Poggio Brothers were not their agents to make such a remission * * * The act of leaving the money due him in the hands of Poggio Brothers to purchase such draft was solely that of the plaintiff."

We think the conclusions were not warranted by the findings of the referee; and as the reversal must be deemed by us to have been based altogether upon questions of law and not upon the facts, we conclude that the order of reversal was erroneous. The argument of the learned judges writing for reversal ignores the referee's finding that the plaintiff never agreed to accept the draft of Poggio, and seems to us to have proceeded upon a misapprehension of the facts of the case, and the nature of the relations existing between the defendants and Poggio Hermanos.

It should be borne in mind that the Poggios were, for all purposes connected with the vessel and its cargo, the agents of the defendants, and, as is now claimed by the defendants, were also agents to make payment to the plaintiff of the sum due him upon the charter-party at Cadiz. The provision of the charter-party for partial payment at Cadiz was for the benefit of the plaintiff and he could waive performance of that stipulation, or any of its conditions, without injury to the defendants. Thus he could receive payment in other funds than Spanish gold coin, or could allow discount or commission, or extend credit to the agent without prejudicing the interests of the defendants. If, however, he dealt with the agent and accepted payment in any other form than that provided by the charter-party, he would act on his own responsibility, and would thereby take the risk of any loss arising out of the change in the mode of performing the contract.

By the performance of the stipulations of the charter-party by the plaintiff the defendants became indebted to him in the full sum of the compensation earned by the vessel. They then rested under an active obligation to make this payment, and could be relieved from it only by showing payment or a readiness and ability to pay by themselves or their agents at the time and place of performance. By consigning the vessel and cargo to Poggio Hermanos with authority to collect the freight payable at Cadiz they had indeed placed their agents in funds to meet their obligations; but it was also their duty to pay or offer to pay the stipulated sum, when opportunity offered, to the plaintiff. The charter money was not payable to the plaintiff until after delivery of the cargo, and he had no control over the collections for freight made by Poggio, or the defendants' funds in their hands.

Although the defendants consigned the bark and its cargo to the Poggios and authorized them to collect the freight payable by its different consignees at that place, there was no express language either in the charter-party or the defendants' letter of instructions to plaintiff, making them his agents to pay the plaintiff, or requiring him to call upon Poggio Hermanos or any other person for the amount due him at Cadiz or directing him to make demand of that sum of any person. If there was any duty resting upon the plaintiff to make demand from anyone, it arises from the fact that Poggio Hermanos were the defendants' agents and consignees at Cadiz, and the usual course of trade pointed to them as the persons through whom the defendants had elected to perform their obligation of making payment at that place.

The plaintiff had no lien upon the cargo for his charter money and no means of compelling payment of the amount due him at Cadiz, for it was payable only after delivery of the cargo, and in the natural course of things there would be no one in funds to make payment until the defendants' agents had collected freight from the various consignees of the cargo. This could take place only by the delivery of the cargo, from time to time, to its consignees and the collection of the freight money due thereon by defendants' agents. The plaintiff had no control over the collection of this freight or the defendants' money in the hands of Poggio Hermanos. He had no other means of obtaining money of the Poggios, except by asking for it; and when he had done this and had been refused or his request had been ignored or evaded, he had done all that was required of him to fix the defendants' liability. The defendants' contract was that the agents at Cadiz would pay the plaintiff £620. The plaintiff frequently made application for payment of the charter money to the Poggios; and when he asked for a final settlement the agents' reply was substantially an allegation that they had already paid such moneys to the plaintiff's principals.

It is true that the plaintiff might have denied this statement, or still insisted upon receiving his freight money, but there is no reason to suppose that the Poggios would have retracted their statement or have repaid money which they falsely, but yet deliberately, asserted they had already paid. It would have been quite ungenerous in the plaintiff to dispute the assertion of the agents to whose kind offices the defendants had commended him, and it would have been quite ineffectual if he had done so. He had no power to make them pay money, payment of which they had avoided by falsehood, and no means, except persuasion, to induce them to fulfill the obligations they owed to the defendants.

It was impossible for plaintiff then to determine whether Poggios' statement was true or not. He never had an opportunity to inspect the bill said to have been remitted, or to elect between the reception of the gold coin by himself or the remittance of the bill. The allegation that they had remitted was the excuse given by defendants' agents for not making payment according to the terms of the charter-party; and therefore he had no alternative, except to rely upon it, and in case it proved untrue to look to his charter-party for indemnity.

The plaintiff had no legal, enforceable demand or claim against the Poggios; and to require him now to accept them as his debtors and to prosecute the Poggios upon their draft, would make a contract for him to which he has never assented. The defendants' contract was to pay the plaintiff at Cadiz £620; and when the plaintiff has shown that he afforded the defendants' agents at that place an opportunity to make such payment and they declined to do so, it constitutes a breach of the contract by the defendants, rendering them liable for the sum unpaid.

The case is simply that the defendants' agents converted the money intrusted to them by their principals to their own use, and when called upon to discharge their principals' obligation falsely alleged that they had applied it to that purpose. The plaintiff had no power to prevent the fraudulent conversion of the money by the agents or to compel its lawful application. All that he did was to acquiesce in its remittance to the ship's owners after it was claimed that that had been done; and if it had actually been remitted, it would have discharged the charterers' debt. The plaintiff simply assented to a mode of payment which was not pursued, and the condition upon which this assent was given was never performed. This did not constitute in any sense a payment of the principals' debt.

It cannot be disputed that if the plaintiff had at Cadiz accepted the personal draft of the Poggios for the amount due to him, or had extended a credit to them for such sum in satisfaction of the defendants' obligation, it would have operated as a discharge to the defendants; but it is indisputable that the plaintiff never did so, and in fact never knew the mode of the pretended payment until after such knowledge was of no benefit to him.

The legal principles applicable to this case are so elementary and familiar that it needs no citation to illustrate them. In truth the main cause of difference arises over the different views of the facts taken by the learned judges writing in the court below, and not over any question of law.

The order of the General Term should be reversed and the judgment entered on the report of the referee affirmed.

All concur, except **Earl** and **Peckham,** *JJ.*, dissenting.

William C. N. SWIFT *et al.*, *Respts.*,
v.
PACIFIC MAIL S. S. CO. and Panama R. R. Co., *Appts.*

1. **Where a party in control of merchandise contracts with common carriers** for its transportation, and is both consignor and consignee, it must, in the absence of proof to the contrary, be **assumed** that **he had sufficient title** and right **to maintain an action** for damages for negligence of the carriers in the transportation of such merchandise, and to enforce the contract.
2. Where **parties having control of** whale **oil,** taken **from whaling vessels** at Panama, **delivered it** to the Panama Railroad Company for transportation by that Company and the Pacific Mail Steamship Company to New York, **and** thereafter **sued** the **carriers for** damages for **negligence** in the transportation of the oil, *held*, that evidence that certain **seamen** "were **interested in the oil**" was not sufficient to establish that such seamen were either partners or joint owners with plaintiffs, and, hence, such seamen were **not necessary parties to** the **action.**
3. A **corporate carrier over a portion of** a **continuous line** of transportation **may** (within reasonable limits and under such circumstances as are fairly incident to its legitimate corporate business) **contract to carry from** a point **beyond its own terminus** to its terminus and thence over its own route, as well as to carry beyond the terminus of its own route, and such contract is not *ultra vires*.
4. Where each of two **connecting common carriers,** forming a continuous line of transportation, is competent to contract alone for transportation over the entire line, they are **competent to make a joint contract** for such transportation **and** thus **become** joint carriers and **jointly liable** for loss or damage to goods transported under such joint contract.
5. Where the evidence warrants a finding that the merchandise transported was delivered to and accepted by the carriers under **a special contract,** and there is no conclusive evidence that the consignor consented to accept bills of lading in place of such contract, the carriers' liability is fixed by such special contract and can **not be abrogated** or altered **by** the **subsequent** signing and mailing of **bills of lading** by the carriers, which did not reach the consignor (who was also the consignee) until after the loss occurred.

(Decided June 7, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Circuit in favor of plaintiffs against defendants jointly in an action to recover damages for the breach of a shipping contract. *Affirmed.*

Statement by **Earl,** *J.*:

This action was brought by the plaintiffs as shippers against the defendants as common carriers to recover damages for breach of a joint contract for the carriage of whale oil from Panama to New York. The complaint alleged that the plaintiffs were copartners and that the defendants were corporations organized under the laws of this State; that the business of the Panama Railroad Company, among other things, was the transportation of freight from Panama by rail to Aspinwall, and there to deliver the same to the Pacific Mail Steamship Company, whose business it was, among other things, to transport the freight so received by vessel to New York; that the defendants, for a single price named, entered into a joint contract to carry the oil from Panama to New York; that they entered upon the performance of their contract in the months of January and February, 1873, and delivered a portion of the oil received by them from the plaintiffs in the City of New York about the 23d of April, 1873; that owing to the negligence, delay and improper handling of the oil, and the casks containing the same, by the defendants, the oil was greatly damaged and injured, and a large part of it was lost by leakage while at Panama, on its way across the Isthmus, at Aspinwall, and also on the passage from Aspinwall to New York; and that by reason of negligence, improper conduct and mismanagement of the defendants the plaintiffs suffered damages in the sum of $20,000, besides interest.

Each of the defendants by a separate answer, among other things, denied the joint contract and the joint liability alleged in the complaint; alleged that the oil was delivered and carried under a special contract, printed and in writing, copies of which were delivered to plaintiffs, wherein the several rights and liabilities of plaintiffs and defendants and each of them (with respect to plaintiffs and to each other relative to the subject matter of the complaint) were limited, defined and determined, and that its undertaking in regard to the oil was only under such contract which it had fully performed; that it was not liable for losses accruing upon the route of the other defendant; and each defendant also alleged as a separate defense that there was a defect of parties plaintiff, and that several other persons named were then, and also at the time of the making of the contract and the transportation of the oil, jointly interested with the plaintiffs in the oil.

The action was brought to trial at a circuit, and the jury rendered a verdict in favor of the plaintiffs for upwards of $23,000. From the judgment entered upon that verdict the defendants appealed to the general term, and from affirmance there to this court.

Messrs. **George Hoadly** and **R. H. Griffin,** for Pacific Mail S. S. Co., appellant:

By the proofs in the case there was shown to be a defect of parties plaintiff, and the plaintiffs Swift and Perry were not entitled to recover.

1 Greenl. Ev. §§ 56, 58; *Addington* v. *Magan*, 20 L. J. N. S. C. P. 82; *Hawes* v. *Inhabitants of Waltham*, 18 Pick. 451; Freeman, Judgments, § 161.

The Pacific Mail Steamship Company had no legal authority to enter into the alleged contract.

The charter of the Steamship Company was granted April 12, 1848. It was amended April 8, 1850. The original charter authorized the ownership of vessels and their navigation in the Pacific Ocean. The amendment extended this power to the navigation of the Atlantic.

Neither of these Acts conferred on the Company the power to build, own or operate a railway, or to do business by rail or upon land, except as far as may be incidental to the business conducted by a carrier by sea; nor is any authority conferred upon the Pacific Mail Steamship Company to go into partnership with a railway company, or to conduct business jointly with a railway company. In the original charter its powers are limited to navigating the Pacific Ocean. By the amendment they are extended to navigating the Atlantic Ocean.

It must be remembered that this is not the ordinary case of a corporation receiving property and agreeing to transport it beyond its own line. The property here was received by the Railroad Company, not by the Steamship Company. As against the Steamship Company, therefore, the action is for breach of a contract, the beginning and earlier performance of which were to be by the Railroad Company.

We submit that there is a difference of substance, and not of form, between the two cases.

We do not contend that a railway corporation may not by special contract receive goods upon its own line, and lawfully contract to transport them over all or any part of it, and forward them further, or even deliver on the line of another carrier. It must be admitted that the uniform holding, except in Connecticut, is to this effect.

Weed v. *Saratoga etc. R. R. Co.* 19 Wend. 534; Schouler, Bailments, p. 336; *Perkins* v. *Portland etc. R.R. Co.* 47 Me. 573; *Muschamp* v. *Lancaster etc. R. Co.* 8 Mees. & W. 421, 430; *Converse* v. *Norwich etc. Transp. Co.* 33 Conn. 166; *Hood* v. *New York etc. R. R. Co.* 22 Conn. 1.

The supposed joint contract of the Railroad and Steamship Companies, upon which the judgment below is founded, was not established.

The fact that Bellows, who made the contract on which plaintiffs recovered, was vice president of both Companies, does not help plaintiffs' position. Before there should be a judgment against the defendants, jointly, as upon a joint contract, such contract should be clearly made out.

Lippincott v. *Low*, 68 Pa. 314; *St. Louis Ins. Co.* v. *St. Louis etc. R. R. Co.* 104 U. S. 146 (Bk. 26, L. ed. 679); *Mich. Cent. R. R. Co.* v. *Myrick*, 107 U. S. 102 (Bk. 27, L. ed. 325); *Champion* v. *Bostwick*, 18 Wend. 175; *Pattison* v. *Blanchard*, 5 N. Y. 186; *Merrick* v. *Gordon*, 20 N. Y. 93; *Milnor* v. *New York etc. R. R. Co.* 53 N. Y. 363; *Briggs* v. *Vanderbilt*, 19 Barb. 222; *Hunt* v. *New York & Erie R. R. Co.* 1 Hilt. 228; *Cincinnati etc. R. R. Co.* v. *Pontius*, 19 Ohio St. 221; *Darling* v. *Boston & Worcester R. R. Corp.* 11 Allen, 295; *Gass* v. *New York etc. R. R. Co.* 99 Mass. 220.

No partnership or joint liability between carriers is created by the fact that one rate is given for a carriage of a continuous route.

Burroughs v. *Norwich etc. R. R. Co.* 100 Mass. 26; *Aigen* v. *Boston & Maine R. R. Co.* 132 Mass. 423; *Block* v. *Fitchburg R. R. Co.* 139 Mass. 308; *Hot Springs R. R. Co.* v. *Trippe*, 42 Ark. 465; *Goldsmith* v. *Chicago & Alton R. R. Co.* 12 Mo. App. 479; *Snider* v. *Adams Exp. Co.* 63 Mo. 383; *Citizens Ins. Co.* v. *The Kountz Line*, 4 Woods, 268.

The only contract with the Pacific Mail Steamship Company proved in the case was created by the bills of lading.

Shelton v. *Merchants Dispatch Transp. Co.* 59 N. Y. 258; *Bishop* v. *Empire Transp. Co.* 48 How. Pr. 119; *Oliver* v. *Mut. Commercial Marine Ins. Co.* 2 Curt. C. C. 277, 290, 291; *Bristol & Exeter Railway* v. *Collins*, 7 H. L. Cas. 214. See case cited in note 3 Wood, Ry. Law, p. 1577-78; *Fibel* v. *Livingston*, 64 Barb. 179. See cases cited by *Messrs.* Da Costa and Seward, *arguendo*, at pp. 182-7; *Germania Ins. Co.* v. *M. & C. R. R. Co.* 72 N. Y. 90; *Madan* v. *Sherard*, 73 N.Y. 334; *Bostwick* v. *Balt. & O. R. R. Co.* 45 N.Y. 712; *Hill* v. *Syracuse etc. R. R. Co.* 73 N. Y. 351.

The oral communications did not constitute the contract. The presumptions are against it. The presumption is that carriers always transport merchandise under a bill of lading.

Long v. *N. Y. Cent. R. R. Co.* 50 N. Y. 77; 3

Wood, Ry. Law, 1577, note 2; *Isaacson* v. *N. Y. Cent. etc. R. R. Co.* 94 N. Y. 284; *McDonald* v. *Western R. R. Corp.* 34 N. Y. 501; *Maghee* v. *Camden etc. R. R. Transp. Co.* 45 N. Y. 524; *Fairfax* v. *N. Y. Cent. etc. R. R. Co.* 5 Jones & S. 580.

The Isthmus route is the coast route between the East and West of the United States.

Bank of Ky. v. *Adams Exp. Co.* 93 U. S. 174 (Bk. 23, L. ed. 872).

The presumption is that the oral communications were mere preliminary negotiations about the rate of freights, etc. (This court has taken judicial notice of this); these presumptions are not rebutted, they are affirmed.

Plaintiffs expected a bill of lading. They got one. They got such a bill of lading as they expected. They insured under the bill of lading. All probabilities are against them.

Hollister v. *Nowlen*, 19 Wend. 241.

The contract is void for indefiniteness.

Burroughs v. *Norwich etc. R. R. Co.* 100 Mass. 26; *Myrick* v. *Mich. Cent. R. R. Co.* 107 U. S. 102 (Bk. 27, L. ed. 325).

In any event the contract as to this defendant was at most to transport from Aspinwall to New York.

Harris v. *Grand Trunk R. Co.* 2 New Eng. Rep. 623; *Washburn & Moen Mfg. Co.* v. *Providence etc. R. R. Co.* 113 Mass. 490; *Nutting* v. *Conn. River R. R. Co.* 1 Gray, 502; *Hoagland* v. *Hannibal etc. R. R. Co.* 39 Mo. 451.

The bills of lading constitute the contract.

They are established by the course of business between plaintiffs and defendants.

Shelton v. *Merchants Dispatch Transp. Co.* 59 N. Y. 258; *Bishop* v. *Empire Transp. Co.* 48 How. Pr. 119; *Ins. Co.* v. *R. R. Co.* 104 U. S. 146 (Bk. 26, L. ed. 679); *Van Santvoord* v. *St. John*, 6 Hill, 157; *Stewart* v. *Terre Haute etc. R. Co.* 3 Fed. Rep. 768; *Pemberton Co.* v. *N. Y. Cent. R. R. Co.* 104 Mass. 144; *Wabash etc. R. Co.* v. *Jaggerman*, 115 Ill. 407; *Merchants Dispatch & Transp. Co.* v. *Moore*, 88 Ill. 136.

They are established as the contract by the course of business between defendants.

Washburn & Moen Mfg. Co. v. *Providence etc. R. R. Co.* 113 Mass. 493; *Darling* v. *Boston etc. R. R. Corp.* 11 Allen, 295; *Hinkley* v. *N. Y. Cent. etc. R. R. Co.* 3 Thomp. & C. 281; *Blitz* v. *Union Steamboat Co.* 51 Mich. 558.

In any event, the bills of lading are established as the contract of the Pacific Mail Steamship Company.

Hinkley v. *N. Y. Cent. etc. R. R. Co.* 3 Thomp. & C. 281; *Schiff* v. *N. Y. Cent. etc. R. R. Co.* 52 How. Pr. 91; affd. 16 Hun, 278, 81 N. Y. 638.

The receipt without objection, and use made, of the bills of lading, by Swift and Perry and their agent, Hunt, constitute a ratification of Crooker's assumption of agency for them, and a waiver of all objections thereto.

Story, Ag. § 242; Whart. Ag. § 63; *Codwise* v. *Hacker*, 1 Cai. 526; *Cairnes* v. *Bleecker*, 12 Johns. 300, 305; *Vianna* v. *Barclay*, 3 Cow. 281, 283; *Hazard* v. *Spears*, 4 Keyes, 469; *S. C.* 2 Abb. App. Dec. 353; *Gold Mining Co.* v. *Nat. Bank*, 96 U. S. 640, 645 (Bk. 24, L. ed. 649, 650); *Andrews* v. *Ætna Life Ins. Co.* 92 N. Y. 596, 604; *Towle* v. *Stevenson*, 1 Johns. Cas. 110; *Armstrong* v. *Gilchrist*, 2 Johns. Cas. 424.

These acts also amount to the waiver of all objections to the bills of lading.

Germania Fire Ins. Co. v. *Memphis etc. R. R. Co.* 72 N. Y. 90, 93; *Hill* v. *Syracuse etc. R. R. Co.* 73 N. Y. 351; *Long* v. *N. Y. Cent. R. R. Co.* 50 N. Y. 76.

If the letters and oral communications constitute a contract, they were never acted on.

Ricketts v. *Balt. & O. R. R. Co.* 61 Barb. 18; *S. C.* 4 Lans. 446; affirmed in 59 N. Y. 637; *Chicago & Great Eastern R. Co.* v. *Dane*, 43 N. Y. 240, 243.

Mr. **William G. Choate**, for Panama R. R. Co. appellant:

I. There was no prior parol contract on the part of this defendant, the Panama Railroad Company, to carry the oil through from Panama to New York, and there was no evidence on which the jury could find such a contract on its part.

The rule of law is well settled that although a railroad corporation may contract to carry beyond its own line, yet it requires an express contract so to bind it. Such contract is not to be inferred from its sharing in a through freight, nor from its receiving and transporting the goods over its line in the course of a continuous passage under an agreement for a through freight. And these are the only facts in this case on which to base the liability of this defendant.

Root v. *Great Western R. R. Co.* 45 N. Y. 530; *Faulkner* v. *Hart*, 82 N. Y. 422; *Condict* v. *Grand Trunk R. Co.* 54 N. Y. 500.

A contract whereby the liability of the company is sought to be extended beyond its own line will not be inferred from loose and doubtful expressions, but must be established by clear and satisfactory evidence.

Myrick v. *Mich. Cent. R. R. Co.* 107 U. S. 102 (Bk. 27, L. ed. 325).

II. The bills of lading were the only contracts between the parties.

These written agreements, when issued and received without objection, superseded the prior parol agreement, if there was one.

Hill v. *Syracuse etc. R. R. Co.* 73 N. Y. 351; *Germania Fire Ins. Co.* v *Memphis etc. R. R. Co.* 72 N. Y. 92.

There was nothing in the prior negotiation and understanding inconsistent with that provision of the bills of lading, stipulating for a restriction of liability of this defendant to its own line. And this restriction was fairly within the contemplation of the parties, even if the parol agreement was not superseded by the bills of lading.

Mr. **Austin G. Fox**, for respondents:

I. The uncontradicted evidence established a contract between the plaintiffs and the Pacific Mail Steamship Company to carry the oil through from Panama to New York, and it would have been proper for the court to direct a verdict in favor of the plaintiffs against that defendant. The letters that passed between the plaintiffs and Bellows established such a contract.

Mactier v. *Frith*, 6 Wend. 139; *Ogdensburg etc. R. R. Co.* v. *Pratt*, 22 Wall. 123 (89 U. S. bk. 22, L. ed. 827); *Peck* v. *Vandemark*, 99 N. Y. 29.

But there was also evidence of an oral acceptance of the terms of carriage offered by Bellows.

The oil was received for transportation under the contract contained in the letters. For damages resulting from a default in the performance of this contract the Pacific Mail Steamship Company is liable as a common carrier, even if it made the contract solely on its own behalf.

Maghee v. *Camden etc. R. R. Transp. Co.* 45 N. Y. 514, 518, 519; *Root* v. *Great Western R. R. Co.* 45 N. Y. 524; *Burtis* v. *Buffalo etc. R. R. Co.* 24 N. Y. 269; *Quimby* v. *Vanderbilt,* 17 N. Y. 306; 53 N. Y. 367; *Hart* v. *Rensselaer etc. R. R. Co.* 8 N. Y. 37; *Cary* v. *Cleveland etc. R. R. Co.* 29 Barb. 35, 56; *Le Sage* v. *Great Western R. R. Co.* 1 Daly, 306; *Schroeder* v. *Hud. Riv. R. R. Co.* 5 Duer, 55.

If the Pacific Mail Steamship Company had authority to and did make this through contract for itself and the Panama Railroad Company jointly, then the latter is liable also, but the liability of the former remains.

Whether the charter of the Pacific Mail Steamship Company expressly authorizes this contract or not the defense of *ultra vires* is not good. It will not defeat the action for damages for breach of the executed contract.

Bissell v. *Mich. South.* and *North. Ind. R. R. Cos.* 22 N. Y. 258; 63 N. Y. 69; *Buffett* v. *Troy etc. R. R. Co.* 40 N. Y. 168; *Weed* v. *Saratoga etc. R. R. Co.* 19 Wend. 534, 537; *Baltimore Steamboat Co.* v. Brown, 54 Pa. 77.

The uncontradicted evidence was sufficient to support the finding of the jury that in making the through contract of carriage with the plaintiffs, Bellows acted not only on behalf of the Steamship Company, but also on behalf of the Panama Railroad Company, a corporation of which he was vice president, and which received more than one half of the freight money paid under the contract.

Wylde v. *North. R. R. Co. of N. J.* 53 N. Y. 156; *Barter* v. *Wheeler,* 49 N. H. 9; *Case* v. *Baldwin,* 136 Mass. 90; *Gill* v. *Manchester etc. R. Co.* L. R. 8 Q. B. 186; *Hart* v. *Rensselaer R. R. Co.* 8 N. Y. 37; *Cobb* v. *Abbot,* 14 Pick. 289; *Cincinnati etc. R.R. Co.* v. *Spratt,* 2 Duvall, 4.

After the plaintiffs had parted with the oil and the defendants had begun its transportation, under the contract that the jury had found was made, the defendants could not abrogate or alter that contract by merely signing and mailing bills of lading which did not reach the plaintiffs until after much of the loss had occurred.

The defendants certainly gave no conclusive evidence that the plaintiffs had consented to accept the bills of lading in place of the prior contract.

Guillaume v. *General Transatlantic Co.* 1 Cent. Rep. 723, 100 N. Y. 491, 498; *Bostwick* v. *Balt. & O. R. R. Co.* 45 N. Y. 712; *Coffin* v. *N. Y. Cent. R. R. Co.* 64 Barb. 379, affirmed in 56 N. Y. 632; *Strohn* v. *Detroit etc. R. Co.* 21 Wis. 554; *Park* v. *Preston,* 22 N. Y. Week. Dig. 359; Lawson, Cont. of Carriers, §§ 114-5.

II. The plaintiffs can maintain this action for damages for the breach of the contract to which they were parties.

The party to a contract of carriage could maintain an action for its breach, at common law, whether he was the owner or not.

Sargent v. *Morris,* 3 Barn. & Ald. 283; *Dunlop* v. *Lambert,* 6 Cl. & Fin. 600; *Blanchard* v. *Page,* 8 Gray, 281; *Finn* v. *Western R. R. Corp.* 112 Mass. 524; *North. Packet Line Co.* v. *Shearer,* 61 Ill. 263; Hutch. Carr. § 723.

This rule has not been altered by the Code.

Considerant v. *Brisbane,* 22 N. Y. 389; *Sargent* v. *Morris,* 3 Barn. & Ald. 283; Bliss, Code Pleadings, § 59.

This rule is not altered by the fact that the plaintiffs may be accountable to others for a part of the recovery.

Allen v. *Brown,* 44 N. Y. 228; *Meeker* v. *Claghorn,* 44 N. Y. 349; *Noe* v. *Christie,* 51 N. Y. 270, 274.

It is not necessary, even at common law, to join as plaintiffs the seamen who had an interest in the oil.

Baxter v. *Rodman,* 3 Pick. 435; *Grozier* v. *Atwood,* 4 Pick. 234; 23 Pick. 494, 495.

As the joint contract to carry through from Panama to New York made both the defendants liable as insurers, errors in the charge, or in the admission of evidence, except as to the existence of the contract, are immaterial.

Alden v. *N. Y. Cent. R. R. Co.* 26 N. Y. 102, 105; *Chicago etc. R. R. Co.* v. *Ross,* 112 U. S. 377 (Bk. 28, L. ed. 787).

Notwithstanding the complaint states a joint contract, the plaintiff is entitled to judgment against either, according as the evidence warrants a joint, or only a several recovery.

McIntosh v. *Ensign,* 28 N. Y. 169; *Brunskill* v. *James,* 11 N. Y. 294.

Consequently judgment may be affirmed as against one defendant, even if reversed as to another.

Montgomery Co. Bank v. *Albany City Bank,* 7 N. Y. 459, 465; *Loomis* v. *Buck,* 56 N. Y. 462, 466.

Earl, *J.*, delivered the opinion of the court:

A point is made on behalf of the defendants that the plaintiffs cannot maintain this action on the ground that some of the seamen on the whaling vessels were to some extent joint owners with them of the oil. It is undoubtedly the general rule in this State that an action against a common carrier for the breach of his contract, or of his duty to carry, must be brought in the name of the owner of the goods, although the contract may have been made or the goods shipped by another. *Green* v. *Clarke,* 12 N. Y. 343; *Krulder* v. *Ellison,* 47 N. Y. 36.

The rule has, however, been much questioned and has some exceptions. *Blanchard* v. *Page,* 8 Gray, 281; *Finn* v. *Western R. R. Corp.* 112 Mass. 524; *Arbuckle* v. *Thompson,* 37 Pa. 170.

Where the consignor, although not the general owner, has a lien upon or a special interest in the goods and makes the contract and pays the consideration for their carriage, he may bring an action for the breach of the contract in his own name, in order that he may protect his rights. Here these plaintiffs made this contract in their own names, and with their own money paid the agreed freight, and they were both consignors and consignees. It does not appear what ownership the seamen had in the oil, if any, nor does it appear what the relations between the plaintiffs and them were. For aught that appears the plaintiffs were under a special duty to deliver this oil in the City of New York, and had a special interest to protect in the whole of the oil. As they were in control of the oil and made the contract for its transportation; being both consignors and consignees, in the absence of proof to the contrary it must be assumed that they had sufficient title and right to maintain this action and enforce their contract with the defendants; and in so holding it is believed that we are in conflict with no authority.

But the evidence does not show that the seamen were joint owners with the plaintiffs of the oil. It was simply testified that "they were interested in the oil," and that evidence was not sufficient to establish that they were either partners or joint owners with the plaintiffs. It is more reasonable to suppose from such evidence that they were simply interested in the proceeds of the oil; and such is believed to be the common arrangement between the owners of whaling vessels and their seamen, when the latter have an interest in the product of the whaling voyage. *Baxter* v. *Rodman*, 3 Pick. 435; *Grozier* v. *Atwood*, 4 Pick. 234; *Bishop* v. *Shepherd*, 23 Pick. 492.

We are, therefore, of opinion that the seamen were not necessary parties to the action.

The Panama Railroad Company was organized to construct, maintain and operate a railroad across the Isthmus from Panama to Aspinwall, and the Pacific Mail Steamship Company was organized to navigate steamships on the Pacific and Atlantic Oceans. Laws 1848, chap. 266, and Laws 1850, chap. 207.

It is not disputed that the Panama Railroad Company could receive freight at Panama and contract to carry it beyond its terminus through to the City of New York, nor that the Pacific Mail Steamship Company could receive freight at the City of New York and contract to carry it to Aspinwall and thence by the railroad to Panama. It is the well settled law in this State that a carrying corporation over a portion of a continuous line of transportation may contract to carry beyond the terminus of its route, and that such a contract is not *ultra vires*. *Weed* v. *Saratoga etc. R. R. Co.** 19 Wend. 534; *Wylde* v. *North. R. R. Co. of New Jersey*, 53 N. Y. 156; *Root* v. *Great Western R. R. Co.* 45 N. Y. 524; *Condict* v. *Grand Trunk R. R. Co.* 54 N. Y. 500.

Such contracts have been upheld sometimes upon the ground of estoppel, and sometimes upon the ground that they were incident to the business for which the contracting corporation was organized. While the defendants admit that such contracts could be made they contend that the Pacific Mail Steamship Company could not contract to receive goods away from its terminus and to transport them to such terminus over the route of another carrier, and thence transport them over its own route to their destination. That is, while they admit that the Steamship Company could receive goods at the City of New York and contract to carry them to Panama on the Pacific coast, they deny that it could receive goods at Panama and agree to transport them to the City of New York.

We see no reason for distinguishing between the two kinds of contracts, and for holding that the Company could make the one kind and not the other. If when it receives goods at New York for transportation to Panama it is engaged in business authorized by its charter or incident to such business, then when it procures freight at Panama for transportation to Aspinwall and thence to New York it is also engaged in promoting the legitimate business for which it was organized. It thus procures freight for transportation upon its steamships; and the business it thus does at Panama and across the Isthmus is just as legitimate as it would be to establish agencies on the Pacific coast to solicit freight for transportation from Aspinwall to New York, or to contract with newspapers there to advertise the carrying of such freight. Cannot a railroad company take freight for transportation at a point a few rods from its depot? And if it may a few rods why not a few miles? If it may have a depot for the receipt of freight one mile from its terminus, why may it not have a depot fifteen or twenty miles therefrom and transport the freight thence to its road by any means that it chooses to adopt?

The Panama Railroad Company terminated on the Pacific coast at Panama, and there it owned lighters to go out into the ocean to take freight from vessels. If it could send its lighters out one mile, why could it not send them out several miles for the same purpose to some convenient port or roadstead? The main business of the Steamship Company between Aspinwall and New York was to transport passengers and freight which came from the Pacific coast; and instead of taking the passengers and freight at Aspinwall why could it not take them at Panama? We see no reason for holding that it might not do so in the prosecution of its corporate business and as incident thereto. Then again, if when the Steamship Company receives goods at New York under contract to carry them to Panama it is estopped from denying its authority and power to make the contract, why when it receives goods at Panama under contract to be carried to New York should it not be equally bound by estoppel?

We think, therefore, that it is clear upon principle and authority that both defendants were competent to enter into contract to carry this oil from Panama to New York. And as each was competent to contract alone it cannot be doubted that they were competent to make a joint contract to do it. They could even become partners in the transportation business between Panama and New York; and so far as we have discovered, the power of corporations thus to become joint carriers has never been denied but has frequently been recognized. *Aigen* v. *Boston & Maine R. R. Co.* 132 Mass. 423; *Block* v. *Fitchburg R. R. Co.* 139 Mass. 308; *Gass* v. *N. Y. etc. R. R. Co.* 99 Mass. 220; *Hot Springs R. R. Co.* v. *Trippe*, 42 Ark. 465; *St. Louis Ins. Co.* v. *St. Louis etc. R. R. Co.* 104 U. S. 146 [Bk. 26, L. ed. 679]; *Barter* v. *Wheeler*, 49 N. H. 9; *Wylde* v *North. R. R. Co. of New Jersey, supra;* Hutchinson, Carr. § 160.

The right of a corporate carrier to go beyond its terminus to procure freight and passengers, and to transport them to its terminus for carriage over its route, is not absolute and unqualified, but has some limitations. What those limitations are it is not possible in a general

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*** See editorial note and digested citations, Lawyers' edition. [Ed.]**

way to define. The New York Central & Hudson River Railroad Co. could not establish a line of steamers between Liverpool and New York to carry passengers and freight from Liverpool to New York in order that it might secure the business of transporting such passengers and freight over its route to Buffalo; but it might run ferry boats from Staten Island, or from the New Jersey shore for the purpose of securing passengers and freight for transportation over its route. The right to go beyond its terminus to procure passengers and freight for transportation over its route, by a corporate carrier, must be exercised within reasonable limits and under such circumstances that it may fairly be said to be incident to its legitimate corporate business; and our holding is that the Pacific Mail Steamship Company engaged in transportation upon both the Pacific and Atlantic Oceans, did not go beyond reasonable limits in contracting to take freight at Panama and transport it over the Panama Railroad for delivery to its steamships at Aspinwall, its main business being to take freight coming to it over that railroad.

The plaintiffs claim that the contract for the carriage of this oil was made in the City of New York between them and one Bellows, who was the vice president and general agent of both defendants at that place, and that it was made by correspondence with Bellows and a personal interview had with him. On the other hand the defendants claim that the contract was contained in and evidenced by the bills of lading signed at Panama by one Corwin, who was the agent of both defendants at that point, which bills of lading expressly stipulated that the defendants should not be jointly liable for any loss or damage to the oil; that neither of them should be liable in any event for any loss or damage accruing upon the route of the other, nor accountable for leakage arising from improper or defective casks, nor for damages of any kind to articles perishable in their nature, nor for unavoidable detention and delay. The trial judge submitted all the evidence bearing upon the contract to the jury, and instructed them to find whether it was made with Bellows as claimed by the plaintiffs, or whether it existed in the bills of lading as claimed by the defendants; and he also instructed them to find whether the contract was the joint contract of the defendants or the individual contract of the Pacific Mail Steamship Company; and he charged them that if they found the contract existed in the bills of lading they should render a verdict in favor of the defendants; but that if they found it was made with Bellows as claimed by the plaintiffs, and that it was the joint contract of both defendants, they should then render a verdict in favor of the plaintiffs against both defendants. The jury must, therefore, have found that the contract was made with Bellows as claimed by the plaintiffs and that it was joint; and the only further inquiry is whether there was any evidence to authorize their finding.

There was no proof that Bellows was not authorized to contract for both defendants; nor was there any positive proof that the defendants were not engaged jointly in the business of transportation between New York and Panama. Both defendants had the same agents at Panama and Aspinwall. Bellows was vice president of both and appears to have acted for both in the City of New York. Both had officers there in the same building, and the interview between Bellows and the plaintiffs took place in the office of the Steamship Company. He corresponded and held the interview with the plaintiffs in reference to through freight from Panama to New York, and the receipt of the oil at Panama and the care to be taken of it while upon the isthmus without, so far as appears, consulting with any other agent or officer of either Company. It does not appear that any other person acted or was authorized to act for either Company at that time and place in making special contracts for the transportation of goods between New York and San Francisco across the isthmus. It is not disputed that he was authorized to act for and to represent the Steamship Company, whose office for the transaction of its business he occupied, and he was in the habit of making special contracts for the carriage of freight through between New York and San Francisco.

One of the by-laws of the Steamship Company provided that the vice president should be the assistant executive officer of the Company and together with the president should exercise a general superintendence over each department of business in the Company's office. Goods on the Pacific coast were brought in vessels and were taken by lighters from the vessels and carried to the docks of the Panama Railroad Company, and the through freight was divided between the two Companies as follows: compensation for the lighterage was first deducted for the Railroad Company, and the balance was equally divided, although the transportation from Panama to Aspinwall took but four hours, while the voyage from Aspinwall to New York took more than twice as many days.

The first letter written by Bellows to the plaintiffs was one dated September 18, 1871, in which he stated to them that "We will make the rate on whale oil, Panama to N. Y. 5¼ cts. gold per gal. Should you decide to send any ships to Panama with oil or bone for N.Y. you will please to give us early notice that we may be prepared to receive it." In August, 1872, the plaintiffs wrote Bellows, referring to his letter, and stating that their whaling vessels, on their way from the Arctic Ocean to Panama, would be due in San Francisco early in November, and inquiring whether there would be facilities for landing 5,000 or 6,000 barrels of oil without delay at Panama. To this letter on the 24th of August, 1872, Bellows replied by letter in which he renewed his offer to carry the oil at the rate previously stated in his letter of September, 1871, and stated that there would be no delay in landing at Panama, and closed as follows: "We feel very sure if you once try this route for your oil shipment, you will ever after have all your shipments made over it."

In the same or the following month Swift, one of the plaintiffs, went from New Bedford, Massachusetts, where he resided, to New York, and there had the interview with Bellows at the office of the Steamship Company in which he alluded to the letter which he had received from him, told him the plaintiffs accepted his proposition and had concluded to order their ships to go to Panama to land their oil, and informed him that if there was any delay in the oil on the isthmus there would be a great deal of leakage, unless it was in charge of competent coopers. Bellows said they had good coopers on the isthmus. Swift proposed to send out to Panama some coopers from New Bedford who were very competent, and said that there would be no leakage if they went out. Bellows replied that he could send coopers to Panama but they would not be allowed to do anything there; that the Company had competent workmen to take care of the oil and plaintiffs' coopers would only be surplusage and entirely unnecessary. Swift also told Bellows that if loss occurred on the Isthmus from delay there on account of the casks not being properly coopered and taken care of, the plaintiffs would hold the company liable for such loss; and Bellows replied that there would be no loss by fault of the company.

Thereafter, on the 14th of October, 1872, the plaintiffs addressed a letter to Bellows in which they acknowledged the receipt of the letter dated August 24, and stated that their three ships might get from 5,000 to 6,000 barrels of oil, and that they would be due at Panama before the first of December, and further stated:

"We shall depend upon our cargoes having the first chance, and that they will not be crowded out or delayed by oil from other ships whose freight has been engaged subsequently to ours. Please be good enough to write to us on this point and assure us that there will be no delay at Panama or Aspinwall. Can you not send the oil direct to this port (New Bedford)? We beg to ask what facilities there are at Panama to repair the cutwater of The J. Perry, which has been knocked off by the ice quite low down under water. Please state your rate of freight for supplies sent our ships from N. Y."

To this on the next day Bellows replied, saying that they would send a copy of their letter "to our agent at Panama with instructions to give your oil after arrival there the best dispatch possible. We have a gridiron at Panama on which we take up our coast steamers, and there will be no difficulty in taking up your vessel for the repairs she needs. We inclose you tariff freight rates by our line to Panama." On the 9th of November the plaintiffs wrote Bellows that they had that day learned by telegram that their three vessels had left San Francisco for Panama with 4,150 barrels of oil, and they engaged again for freight rates from New York to Panama. To this letter, on the 11th of November, 1872, Bellows replied: "We are pleased to learn that you have three cargoes of oil on the way to Panama from San Francisco, and by steamer hence tomorrow we will advise our agent at Panama that he may be on the lookout for them;" and he gave rates of freight from New York to Panama.

This correspondence, together with what was said at the interview between Swift and Bellows, made a special contract between the parties under which the plaintiffs were to deliver the oil at Panama; and the principals of Bellows were to receive the oil from plaintiffs' vessels, take it upon lighters to the docks and promptly carry it across the isthmus to Aspinwall without delay, care for the oil upon the isthmus and see to the coopering of the casks so that there would be no leakage there, and from Aspinwall transport it to the City of New York. And all this was to be done for the single price stipulated.

The contract so far as it went was complete. It was doubtless expected that bills of lading would be executed, but it could not have been expected that by them the contract so made should in any way be modified.

Under this contract all the oil was delivered in January, 1873, from plaintiffs' vessels; and the only ground the defendants have for claiming that this was not the contract under which the oil was transported is the fact that two months afterward, on the 27th of March, 1873, the common agent of the defendants executed bills of lading which were sent to the plaintiffs and received by them April 7. By some delay on the isthmus the oil did not reach Aspinwall and was not delivered on the steamships until the second or third of April. After the receipt of the bills of lading the plaintiffs did not discover the peculiar stipulations contained in them at variance with the contract which they had previously made. Upon the landing of the oil in New York the loss of the oil from leakage was discovered, and the plaintiffs paid the stipulated freight, giving notice of their claim for the loss.

Under the evidence, the main features of which we have alluded to, it was certainly competent for the jury to find that the oil was parted with to the defendants, for transportation, and that the defendants entered upon the transportation thereof, under the contract claimed by the plaintiffs. The defendants could not, therefore, abrogate or alter that contract by merely signing and mailing bills of lading which did not reach the plaintiffs until after the oil had left Aspinwall and much, if not all the loss had accrued. There certainly was no conclusive evidence that the plaintiffs consented to accept the bills of lading in place of the prior contract, and that contract must therefore control. *Bostwick* v. *Balt. & O. R. R. Co.* 45 N.Y. 712; *Guillaume* v. *General Transatlantic Co.* 1 Cent. Rep. 723, 100 N.Y. 491; *Wheeler* v. *New Brunswick etc. R. R. Co.* 115 U. S. 29 [Bk. 29, L. ed. 341].

It is clear that the plaintiffs did not understand that they were making several contracts for the transportation of their oil from Panama to New York; but they evidently supposed they were making a single contract with an agent who had authority to contract for the entire route. While the evidence is not conclusive, nor even very satisfactory, that the defendants contracted jointly to carry this oil, yet we think there was enough to justify the jury in finding such a contract. Here was the Steamship Company engaged in transportation both upon the Pacific and Atlantic Oceans, making contracts to carry from ports upon one ocean to ports upon the other, and such contracts could be performed only by carriage across the isthmus over the Panama Railroad, and that railroad was engaged in transportation across the isthmus, of freight, almost wholly to or from vessels of the Steamship Company. The two Companies had common agents upon the isthmus and in New York. Goods were transported in all cases for a single through freight from ports on the Pacific to ports on the Atlantic, and that the freight money, after deducting compensation for lightering, was equally divided between the Companies, and the same person was vice president of both Companies. Taking into consideration all these matters, the situation of the two Companies and all the circumstances surrounding them, and the methods of their business as disclosed in the evidence, it is not an improbable nor an unjustifiable inference that they were jointly engaged in business and jointly contracted with the plaintiffs.

If the contract was made by the correspondence and personal interview with Bellows, as claimed by the plaintiffs and found by the jury, then if the defendants are not jointly liable for plaintiffs' loss, they are severally liable. The whole loss was apparently primarily due to unexplained, unjustifiable delay, and carelessness upon the isthmus while the oil was in the possession of the Railroad Company. For that delay and loss it is liable as a common carrier upon general principles. The Steamship Company made a special contract to transport the oil without delay from Panama to New York and to care for it and cooper the casks upon the isthmus, and it is liable for the loss by virtue of that special contract. Therefore the defendants are either severally or jointly liable for the loss, and whether they shall be held for the loss jointly or severally cannot be very important to them, because it is quite certain from their relations to each other that they will be able to adjust between themselves in a satisfactory manner the joint recovery.

The objection to the joint recovery, therefore, appears to be merely technical and should not prevail, unless the judgment is plainly and clearly wrong, and such we think it is not.

A careful consideration of the whole case has therefore led us to the conclusion that *the judgment should be affirmed, with costs.*

All concur.

Re ESTATE OF Robert SOUTTER, Dec'd.
The Duchess D'AUXY, *Appt.*,
v.
Timothy H. PORTER, *Respt.*

1. **Where a decree judicially settling the accounts of an executor is made** by the surrogate after all the parties interested have been cited, the presumption is that the accounts were correct and that the executor has accounted for all the property that came into his hands; and a **further accounting** should **not** be **ordered unless** it is made to appear that there are **other matters not embraced** in his **former account,** for which he is responsible and has not accounted.

2. Where there is alleged to be a claim due the estate which the executor has not collected, and it is not shown that his omission to collect has caused any damage to the estate, the **proper remedy** is, **not to order a further accounting** by him, **but to have an administrator de bonis non** with the will annexed **appointed,** who can proceed to collect the claim; and if it should turn out that the estate has been injured by the delay of the executor in its collection, he can then be called to account by the administrator *de bonis non.*

(Decided May 3, 1887.)

APPEAL from an order of the Supreme Court at General Term in the First Department, affirming an order of the Surrogate's Court of New York County denying an application for a further accounting by an executor. *Affirmed.*

The facts and questions raised appear from the opinion.

Mr. **Lewis Sanders,** for appellant:

A surrogate's decree is conclusive only of the matters submitted to him for adjudication. A decree passing an executor's accounts, on his application for leave to resign a partially executed trust, is not a more effectual discharge and bar to a further accounting than any other judicial settlement of his accounts.

Section 2742 of the Code provided that a judicial settlement of the account of an executor or administrator, either by the decree of the surrogate's court or upon an appeal therefrom, is conclusive evidence against all the parties who were duly cited or appeared, and all persons deriving title from any of them at any time, of the following facts and no others: 1, that the items allowed to the accounting party for money paid to creditors, legatees and next of kin, for necessary expenses and for his services are correct; 2, that the accounting party has been charged with all the interest for money received by him and embraced in the account for which he was legally accountable; 3, that the money charged to the accounting party as collected is all that was collectible, at the time of the settlement, on the debts stated in the account; 4, that the allowances made to the accounting party for the decrease and the charges against him for the increase in the value on property are correctly made.

The right to a further accounting as to matters not embraced within the account presented has been adjudicated in favor of appellant.

Bank of Poughkeepsie v. *Hasbrouck,* 6 N. Y. 221; *Re Hood,* 90 N. Y. 515.

The true effect of a decree allowing an executor to account and resign before he has executed his trust is to transfer his unexecuted trust to his successor; but his successor could not be held liable for the loss to the estate by reason of the acts of his predecessor; it follows that the latter is liable, and he does not obtain his discharge except for such matters as he submits to the surrogate for adjudication. His proceeding is a voluntary one; if he wants a complete discharge, he must render a full account. The account rendered is the measure of his discharge and not the measure of his liability.

The general term decided a point not raised below—that the appellant was not the proper party to make the motion—that it must be made by the nonappointed and the nonexisting successor to Mr. Porter, whose appointment rested in the nonexercised discretion of the surrogate.

By not taking this objection before the surrogate it must be deemed waived; the appellant was the real party in interest, and at common law had the right, to the exclusion of the administrator *de bonis non*, to call the executor to account for property administered upon by him. Only the property remaining *in specie* or trust funds kept separate passed to his successor in office. There was none.

Beall v. *New Mexico*, 16 Wall. 540, 541 (83 U. S. bk. 21, L. ed. 294); Wms. Exrs. 548, note 1, 783, note 1, 4th Am. ed.; 2 Redf. Wills, 91 and note.

Mr. **Stewart L. Woodford,** for respondent:

This motion was not made on the petition of the proper party.

This respondent's term of office had not expired by limitation; his letters were revoked; there is unadministered estate; and no one but a successor in office duly appointed can take any proceedings whatever in relation to the estate. No such person has been appointed, and this motion is therefore not properly made. The proper proceeding would be the appointment of a special administrator with the will annexed. That is the only correct practice. This moving party has no standing in court.

Only so much of a decree as is in error or was produced by fraud or deception can be vacated.

Re Ermand, 24 Hun, 1.

The matters concerning which the decree is sought to be opened or set aside and the account of the respondent falsified, or a further accounting compelled, are *res judicata* between the appellant and respondent.

Brown v. *Brown*, 53 Barb. 217; § 2742, subd. 4, Code Civ. Proc.; *Bank of Poughkeepsie* v. *Hasbrouck*, 6 N. Y. 221-2.

Earl, *J.*, delivered the opinion of the court:

James T. Soutter died in February, 1873, leaving a last will and testament in which Agnes G. Soutter and William K. Soutter, his son, were appointed executors. The will was admitted to probate, and both executors qualified as such. In that will, among other dispositions of his property, the testator gave his son Robert Soutter one tenth thereof.

Thereafter in July, 1873, Robert Soutter died leaving a last will and testament in which he appointed the respondent, Timothy H. Porter, his executor. That will was admitted to probate and Porter qualified as executor. In it the testator bequeathed one half of his estate to his widow, the present appellant, who has since remarried and become the Duchess D'Auxy. In the winter of 1884 the respondent Porter presented his petition to the Surrogate of New York praying for a judicial settlement of his accounts as executor and as trustee under the will of Robert Soutter, and that he be allowed to resign his trust and that his letters testamentary be revoked. In pursuance of that petition citations were issued to the appellant and to the other parties interested in the estate, requiring them to appear on a day named to attend the accounting and the hearing upon the petition; and the citation thus issued was served upon all the parties named therein.

The respondent filed his account as executor, which was duly examined and considered by the surrogate, and on the 10th day of March he made his decree, in which he ordered and adjudged that the account as filed be judicially settled and allowed, and the executor was directed to make certain payments to the appellant and to the trustee appointed in his place. It was further ordered and adjudged that after making such payments the letters testamentary to the respondent should be revoked and his resignation as executor and trustee accepted.

There is no dispute that the respondent fully performed the directions contained in the decree, and that his letters thus became revoked and his resignation accepted. Afterwards, on the 31st day of March, 1886, upon the affidavit and application of the appellant's attorney, the surrogate made an order that the respondent should show cause before him on the 15th day of April, 1886, why he should not file a further account as executor of Robert Soutter's estate, and why the decree entered on March 10, 1884, should not be set aside and the account reopened. That order was served upon the respondent, and in pursuance thereof he appeared before the surrogate, and after hearing the parties, on the 15th day of June, 1886, he made an order that the application to open the decree of March 10, 1884, and to compel a further accounting be denied. From that order the Duchess D'Auxy appealed to the general term, and from affirmance there to this court.

The appellant united in her motion before the surrogate two distinct applications for relief: one to vacate and set aside the decree and to reopen the account, and the other for a further accounting. Upon the argument before us her counsel distinctly abandoned her claim to vacate and set aside the decree and to reopen the account, and contended only that the courts below erred in denying her a further accounting.

The respondent denies the appellant's right to a further accounting, upon various grounds. It is, among other things, insisted that as legatee she has no right under the provisions of the Code to a further accounting, and that the decree made March 10, 1884, absolutely binds her until it shall be vacated or set aside, and that the only person who can call for a further accounting or pursue the assets which she seeks to reach is an administrator with the will annexed, to be appointed by the surrogate.

We will, however, assume that the decree judicially settling the respondent's accounts had no greater force or effect than is prescribed by section 2742 of the Code, and that the appellant had the right upon the presentation to the surrogate of proper facts to have a further accounting.

This decree judicially settling the accounts of the executor should have some force and effect. All the parties interested having been cited, the presumption should be indulged that the account was correct and that the executor had accounted for all the property that came into his hands as such; and a further accounting should not be ordered unless it is made to appear that there are other matters not embraced in his former account for which he is responsible and has not accounted. *Brown* v. *Brown*, 53 Barb. 217.

It is not too much to ask of a party, who seeks to compel an executor who has once accounted to make a further account, to present to the surrogate a clear case before he shall be required to grant the application.

Now what are the facts here upon which the further accounting is sought? It is not disputed that the respondent accounted for every dollar that came into his hands as executor of the estate of Robert Soutter. But the facts upon which a further accounting are asked concern the estate of James T. Soutter, and are these: at the time of the death of James T. Soutter, William K. Soutter, one of his executors, and the respondent Porter, were bankers and brokers in the City of New York under the firm name of Soutter & Co., and continued to do business as such until September 28, 1885, when they failed. After the death of James T. Soutter his executors loaned and placed in their hands as a firm a large amount of the assets of the estate of James T. Soutter, and at the time of their failure they were largely indebted to that estate. By the new accounting the appellant seeks to compel the respondent to render an account in reference to the assets of James T. Soutter which thus came to the firm of Soutter & Co., and for which they were indebted.

But those assets did not come to the respondent nor under his control as executor. No part of them was set aside or appropriated as the portion of Robert Soutter under his father's will. They remained subject to the control of the executors of James T. Soutter's will, and to those executors the firm were bound to account for them; and for aught that appears those executors and that estate are abundantly able to respond to the estate of Robert Soutter for his share of the former estate under his father's will. The assets belonging to the father's estate in the hands of Soutter & Co. are still subject to administration by the executors of the father's estate; and if any share of them belongs to the estate of Robert Soutter it must come through them. The respondent cannot be held to have received any portion of those assets as executor of Robert Soutter simply because he was a member of the firm of Soutter & Co. He could not become responsible for those assets as executor of Robert Soutter until they should come into his hands as executor.

It may turn out on the accounting of the executors of James T. Soutter that no part of those assets will be needed to discharge the obligation of the estate of James T. Soutter to that of Robert Soutter. So far as it is shown in this record, if there is any further obligation on the part of this respondent as executor, it is because he neglected for so long a time to procure (from the estate of James T. Soutter) Robert's share thereof; but it is not shown that that neglect has caused any damage to the estate of Robert Soutter; and whether it has or not cannot well be known until there has been an accounting of the executors of James T. Soutter.

The proper remedy of this appellant is to have an administrator *de bonis non* with the will annexed of her husband's estate appointed. He can call the executors of James T. Soutter to an account, and compel payment by them to him of whatever may still be due under the will of James T. Soutter to the estate of Robert Soutter, and he will have ample power by proceedings before the surrogate or by a proper action to call the proper parties to an account for the estate of James T. Soutter. It may turn out that that estate is still sufficient to pay whatever remains due to the estate of Robert Soutter, and if it is not, that the executors thereof are able to respond for whatever of that estate has been lost through their negligence or misfeasance.

If, however, it should turn out that the estate of Robert Soutter has been damaged by the delay of the respondent in collecting from the executors of James T. Soutter what was due to the estate of Robert Soutter, the respondent can then be called to an account by the administrator *de bonis non*. But in this proceeding, in the absence of any proof that any portion of the estate of James T. Soutter came to him as executor, or was ever set apart to the estate of Robert Soutter, or that the latter estate has been damaged by the delay, there is no ground whatever for calling him to an account.

We are therefore of opinion that the appellant did not make a case which required the surrogate to order the respondent to render a further account, and *the order of the General Term should be affirmed, with costs.*

All concur.

CASES
DETERMINED IN THE
COURT OF APPEALS OF NEW YORK.

1887.

CHIEF JUDGE,

HON. WILLIAM C. RUGER.

ASSOCIATE JUDGES,

HON. CHARLES ANDREWS,
HON. CHARLES A. RAPALLO,
HON. ROBERT EARL,
HON. GEORGE F. DANFORTH,
HON. FRANCIS M. FINCH,
HON. RUFUS W. PECKHAM.

HON. H. E. SICKELS, *State Reporter*.

Clarence T. SANFORD, *Respt.*,
v.
Louisa A. POLLOCK, *Appt.*

1. **Where a married woman resides with her husband** in a house which they occupy as a home, **she does not thereby render herself liable for** the **rent** of the house or the value of the use and occupation.
2. A **statement by** the **husband** that he has the right to sign for his wife is **no evidence of his authority to bind her** by hiring premises in her name.
3. The **fact** that the **wife subsequently resided on the premises** with her husband, without proof of knowledge on her part that they had been hired in her name, **is no evidence of** her **husband's authority to hire** them for her **as her agent.**

(Decided April 19, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Circuit entered upon a verdict for plaintiff in an action to recover rent. *Reversed.*

At the close of plaintiff's evidence at the trial, defendant's counsel moved for a nonsuit, on the ground that plaintiff did not show that William J. Pollock was the agent for his wife, Louisa A. Pollock, to rent the premises in question, or that plaintiff regarded Mrs. Pollock as being the lessee or having anything to do with the premises. This motion was denied.

At the close of the evidence on both sides no request was made to direct a verdict for the defendant, but both parties acquiesced in the submission of the case to the jury. A verdict was returned for plaintiff, upon which judgment was entered. A motion for a new trial was subsequently overruled. Upon appeal to the general term the judgment was affirmed, and defendant appealed to this court.

The facts and questions raised appear from the opinion.

Mr. **Augustus H. Vanderpoel** with **Aaron J. Vanderpoel,** for appellant:

The fact that the defendant resided on the premises with her husband W. J. Pollock, in no way rendered her liable for the rent. As a wife she was bound to live with her husband, and his residence became her residence.

Schouler, Dom. Rel. 54.

The defendant can only be held liable for the rent, on the ground that the signing and acceptance of the receipt or agreement was the act of her duly authorized agent.

Ganley v. *Troy City Nat. Bank*, 98 N. Y. 487; *Smith* v. *Fellows*, 9 Jones & S. 46.

The relation of principal and agent never existed, as between W. J. Pollock and the defendant. The defendant positively denied that she ever gave anyone any authority to hire the premises in question for her. There must be positive proof to establish the agency of W. J. Pollock. It cannot be presumed.

Rodgers v. *Bank of Pike Co.* 8 Rep. 593; *Chew* v. *Henrietta M. & S. Co.* 9 Rep. 704; *Morrison* v. *Thistle*, 67 Mo. 601.

The mere naked assertion of W. J. Pollock, that he was authorized to act for the defendant, or the performance of such act, even if uncontradicted, without further and sufficient proof, would not create the relation of principal and agent.

Stringham v. *St. Nicholas Ins. Co.* 4 Abb. App. Dec. 315; *Davenport* v. *Buckland*, Hill & D. Supp. 75; *Martin* v. *Farnsworth*, 49 N. Y. 555; *Nash* v. *Mitchell*, 71 N. Y. 199; *Ganley* v. *Troy City Nat. Bank*, 98 N. Y. 487.

The statement of W. J. Pollock, at the time of hiring, that he was acting for his wife and had authority to do so, should have at once put the plaintiff on his guard; and he should have investigated the nature and extent of Pollock's authority. The very existence of the marital relation should have caused such an investigation. There is no proof before the court that this was done.

Clancy, Rights of Women, 347; *Smith* v. *Fellows*, 9 Jones & S. 46; *Comstock* v. *Comstock*, 57 Barb. 453 *Hoffman* v. *Treadwell,* 2 Thomp. & C. 57; *Bank of Albion* v. *Burns,* 46 N. Y. 170; *Cowee* v. *Cornell,* 75 N. Y. 99, 100; *Bates* v. *First Nat. Bank of Brockport,* 89 N. Y. 286.

The mere living on the premises by the defendant with her husband was no ratification of his act as agent. There is no proof before the court to show that the defendant had any knowledge of the act of her husband, or had any intention to ratify such act. To prove ratification by the principal such intent must be shown.

Hayes v. *Stone,* 7 Hill, 128; 2 Story, Eq. Jur. § 1097; *Howell* v. *Christy,* 3 Lans. 238; *Nixon* v. *Palmer,* 8 N. Y. 398; *Brass* v. *Worth,* 40 Barb. 648; *Seymour* v. *Wyckoff,* 10 N. Y. 213; *Keeler* v. *Salisbury,* 33 N. Y. 648; *Sims* v. *Everhardt,* 102 U. S. 300 (Bk. 26, L. ed. 87); *Craighead* v. *Peterson,* 72 N. Y. 279; *Rathbun* v. *Citizens Steamboat Co.* 76 N. Y. 376; *Ritch* v. *Smith,* 82 N. Y. 627; *Whitney* v. *Martine,* 88 N. Y. 535; *Saratoga Co. Bank* v. *Pruyn,* 90 N. Y. 250; *Benninghoff* v. *Agricultural Ins. Co.* 93 N. Y. 495.

Mr. **P. H. Vernon,** for respondent:

The defendant's counsel virtually admitted that there was evidence enough to go to the jury, and to justify a verdict for the plaintiff, by neither moving to dismiss the complaint after the evidence on both sides was closed, nor asking the court to direct a verdict for the defendant, and having consented to a decision by a jury, and taken his chance of a favorable verdict, he was not entitled to ask for a new trial on the ground that the verdict was without evidence or against the weight of evidence.

Rowe v. *Stevens,* 12 Abb. Pr. N. S. 389; *Carnes* v. *Platt,* 15 Abb. Pr. N. S. 337; *Sickles* v. *Gillies,* 45 How. Pr. 94; *Barrett* v. *Third Ave. R. R. Co.* 45 N. Y. 628, 632.

The questions raised by this appeal are questions of fact and are not reviewable by this court, there having been, as admitted, enough evidence to warrant their submission to the jury, and the judgment of the general term affirming the judgment entered on the verdict of the jury and the order denying the motion on the minutes, to set aside the verdict and to grant a new trial is final.

Code Civ. Proc. § 1337; *Rowland* v. *Hegeman,* 59 N. Y. 643; *Re Ross,* 87 N. Y. 514; *Learned* v. *Tillotson,* 97 N. Y. 1; *Barrett* v. *Third Ave. R. R. Co.* 45 N. Y. 628, 633; *Bigelow* v. *Legg,* 2 Cent. Rep. 877, 102 N. Y. 653.

Rapallo, *J.,* delivered the opinion of the court:

We think that the motion for a nonsuit should have been granted. There was no evidence in the case which would have authorized the jury to find that the premises were hired by the defendant, or by her husband in her name by her authority. It is true that the plaintiff, on his direct examination, testified that he rented the premises to the defendant, and that she occupied them; but by his cross examination it appears that the whole matter was negotiated by her husband; that she was not present at the time of the making of the contract of letting, and that the only foundation for his statement that the letting was to the defendant, was that her husband, William J. Pollock, requested that the receipt for the half year's rent paid at the time of the letting, be made out in the name of the defendant; that this receipt contained the terms of the letting, and that William J. Pollock signed at the foot of it, "accepted, L. A. Pollock, per W. J. Pollock," and stated that he had the right to sign for his wife.

This statement was no evidence of his authority which could bind her; and there was no other evidence in the case of her husband's authority to hire the premises in her name. The fact that Mrs. Pollock subsequently resided on the premises with her husband, without proof of knowledge on her part that they had been hired in her name, was no evidence of her husband's authority; nor did it render her liable in an action for use and occupation. Where a married woman resides with her husband in a house which they occupy as a home, she does not thereby render herself liable for the rent of the house or the value of the use and occupation.

The evidence introduced after the denial of the motion for a nonsuit did not help the plaintiff's case. The defendant positively denied that she ever authorized her husband to hire the premises in her name, or had any knowledge that he had done so, until a claim was made upon her for the rent, long after the occupation had terminated; and her husband confirmed her statement. There was no evidence to the contrary, other than the plaintiff's statement on his direct examination that Pollock said he had a right to sign for his wife.

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur.

BANK OF BATAVIA, *Respt.,*
v.
NEW YORK, LAKE ERIE & WESTERN R. R. CO., *Appt.*

1. **Where** the **principal has clothed** his **agent with power to do an act upon** the **existence of** some **extrinsic fact** necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a **third person** dealing with such agent in entire good faith, pursuant to the apparent power, **may rely upon** the **representation, and** the **principal is estopped** from denying its truth to his prejudice.

2. A **local freight agent of a railroad company, having a right to issue bills of lading,** but only **upon** actual **receipt of property** for transportation, issued bills of lading for sixty-five barrels of beans to one Williams, describing them as received to be forwarded to one Comstock as consignee, but adding with reference to the packages that their contents were unknown. Williams drew a draft on the consignee, and procured the money upon it of plaintiff bank, by transferring the bills of lading as security. It turned out that no barrels of beans were shipped or received by the railroad company, and that the **bills of**

lading were the **product of a conspiracy** between Williams and the freight agent to defraud whoever could be induced to advance money upon the faith of the false bills. *Held*, in an action by the bank against the railroad company to recover damages for the fraudulent issue of the bills of lading, that the **facts brought** the **company within** the above **rule of estoppel,** and that it was liable to the plaintiff.

3. If a **carrier** desires **to limit** his **responsibility on bills of lading** to a delivery to the named consignee alone, he **must stamp** his bills **"non-negotiable;"** and where he does not do that he must be understood to intend a possible transfer of the bills and to affect the action of transferees thereof, and will furnish consideration for the basis of an equitable estoppel, without reference to negotiability or directness of representation.

(Decided June 7, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Fifth Department, ordered for plaintiff on the verdict, on motion by defendant for a new trial on exceptions taken at the Genesee Circuit and ordered heard at General Term in the first instance, in an action to recover for the fraudulent issue of bills of lading by defendant's agent. *Affirmed.*

The bills of lading, two in number, were in the following form, differing only in the dates and number of packages, one being dated March 7, 1881, for thirty-five barrels, the other dated March 9, 1881, for thirty barrels:

"New York, Lake Erie & Western Railroad Co.

Batavia Station, *March 7th, 1881.*

Received from *F. C. Williams* the following articles (contents unknown), in apparent good order, viz.: *35 barrels beans.*

I. T. Comstock, New York.

Marked and numbered as per margin, which the N. Y. L. E. & W. R. R. Co. agrees to forward from *Batavia* to *New York*, upon the following conditions, viz.: that the shipper or owner does hereby release said Company from liability for leakage of all kinds of liquids, breakage of all kinds of marble, glass, carboys of acid, or articles packed in glass, stoves and stove furniture, casting, machinery, carriages, furniture, musical instruments of all kinds, packages of eggs, or for loss or damage on hay, hemp, cotton, or any article the bulk of which renders it necessary to be shipped in open cars; or for damage to perishable property of all kinds, occasioned by delays from any cause, or change of weather, or for damage or loss by fire while in the Company's depots; and the acceptance of this receipt by the shipper constitutes the agreement for the transportation of the above described goods or property.

P. J. Weiss, Agent."

The other facts and the questions raised appear from the opinion.

Mr. **E. C. Sprague,** for appellant:

The receipts in question not having been delivered, and no false representations having been made by the defendant to the plaintiff, this action cannot be maintained.

A shipping receipt, like those in question, from which the words "or order, or assigns" are omitted, is not a negotiable instrument within the meaning of the law merchant; such an instrument constitutes a receipt for goods, and a contract between the original parties to carry safely and deliver the goods received to the consignee. So far as it acknowledges the delivery and acceptance of the goods, it is a mere receipt. As to the rest, it is a contract. While lacking all the essential elements of a negotiable instrument, it in a certain sense represents the goods; and an assignment of the instrument transfers such title to the goods as the transferer possessed.

Hutchinson, Carriers, § 122; Daniels, Neg. Inst. §§ 1729, 1730, 1733; 1 Smith, L. Cas. 859, 896; *Barnard* v. *Campbell*, 55 N. Y. 461; *Brower* v. *Peabody*, 13 N. Y. 121; *Henderson* v. *Comptoir d'Escompte de Paris*, L. R. 5 P. C. 253; *S. C.* 10 Alb. L. J. 104.

It was necessarily known to the person dealing with the agent that the acknowledgment of the latter as to the receipt of the property was false; and consequently the defendant is not bound to him by those representations.

Mechanics Bank v. *N. Y. etc. R. R. Co.* 13 N. Y. 629; *Griswold* v. *Haven*, 25 N. Y. 602, 604.

An indorsee or transferee of such a fraudulent instrument takes it subject to all defenses, and stands in no better position than his assignor. This is the general rule.

Dows v. *Perrin*, 16 N. Y. 325; *Commercial Bank* v. *Colt*, 15 Barb. 506; *Bush* v. *Lathrop*, 22 N. Y. 535; *Davis* v. *Bechstein*, 69 N. Y. 442; *Union College* v. *Wheeler*, 61 N. Y. 88; *Elliott* v. *Armstrong*, 2 Blackf. 212; *Hazard* v. *Fiske*, 83 N. Y. 287; *Wilcox* v. *Howell*, 44 N. Y. 398, 402; *Mechanics Bank* v. *N. Y. etc. R. R. Co.* 13 N. Y. 599, 629; *The Idaho*, 93 U. S. 575 (Bk. 23, L. ed. 978).

Weiss, the shipping agent, had neither real nor apparent authority to issue receipts for goods not received for transportation.

Robinson v. *Memphis etc. R. R. Co.* 9 Fed. Rep. 129, 137; *Mechanics Bank* v. *New York etc. R. R. Co.* 13 N. Y. 635; *Western Bank* v. *Addie*, L. R. 1 H. L. Sc. App. 146.

The defendant is not estopped to deny that it received the goods in question, or to deny that it is liable for the loss sustained by the plaintiff.

The action is not in the nature of an action of conversion, but is an action for damages on account of the fraudulent act of the agent in issuing the shipping receipts without having received the property.

Griswold v. *Haven*, 25 N. Y. 607, 608; Daniels, Neg. Inst. § 1729; *Sears* v. *Wingate*, 3 Allen, 103.

Estoppel must be pleaded; and if a party omits to do so, and tenders or takes issue on the fact, he waives the estoppel.

Philadelphia etc. R. R. Co. v. *Howard*, 13 How. 307 (54 U. S. bk. 14, L. ed. 157); *Richardson* v. *Boston*, 19 How. 263 (60 U. S. bk. 15, L. ed. 639); *Griffin* v. *R. R. Co.* 1 West. L. Month. 31.

An estoppel may not be based upon representations made to a third person, and not made with the purpose that they should be communicated to the one claiming the estoppel, although they are afterwards communicated to him by such third person, and he acts upon them.

The only representations made to the plaintiff were in fact made by Williams; consequently the doctrine of estoppel *in pais* cannot be invoked by plaintiff.

Maguire v. *Selden*, 4 Cent. Rep. 379, 103 N. Y. 642; *Mayenborg* v. *Haynes*, 50 N. Y. 675.

It is only when the instrument is negotiable that the representations in it may be deemed, in law, to have been made to every subsequent *bona fide* holder.

Farmers & Mechanics Bank v. *Butchers & Drovers Bank*, 16 N. Y. 137, 141; *Griswold* v. *Haven*, 25 N. Y. 602; *Mechanics Bank* v. *N. Y. etc. R. R. Co.* 13 N. Y. 638.

Plaintiff being a stranger to the instruments in question, and they not being made "to order or assigns," the representations therein cannot be deemed to have been made to it.

Cases cited *supra*.

It is well established that the mere fact that a representation has been made, will not allow a stranger to whom the representation was not made to invoke the doctrine of estoppel; and a contrary rule would disregard the maxim that the assignee takes subject to all equities between the original parties.

Mechanics Bank v. *New York etc. R. R. Co.* 13 N. Y. 638; *Reeves* v. *Kimball*, 40 N. Y. 311; Co. Litt. 227; Com. Dig. title, *Estoppel*; Bacon, Abr. title, *Estoppel*.

To make a case for estoppel it is necessary that representations apart from the acknowledgment in the receipt should be made to the plaintiff, in which case, as said by Selden, *J.*, in *Griswold* v. *Haven*, 25 N. Y. 607, defendant would be bound "by the verbal representations and not the representations in the receipt or there must have been gross negligence on the part of the defendant apart from the acknowledgment in the receipt."

Brant v. *Virginia Coal & Iron Co.* 93 U. S. 326 (Bk. 23, L. ed. 927); *Shaw* v. *R. R. Co.* 101 U. S. 565 (Bk. 25, L. ed. 894); *Re Jewett*, 7 Biss. 328.

The plaintiff cannot be considered in law as having advanced money, relying upon the shipping receipts as a representation by the carrier that it had received goods to the value of the advances made; his reliance upon the shipping receipt must be deemed to have been induced by the representations of Williams as to the value and contents of the packages claimed to have been delivered, and as to their having been delivered.

Miller v. *Hannibal etc. R. R. Co.* 90 N. Y. 430; *Abbe* v. *Eaton*, 51 N. Y. 410; *Clark* v. *Barnwell*, 12 How. 283 (53 U. S. bk. 13, L. ed. 989); *Nelson* v. *Stephenson*, 5 Duer, 538.

The only representation or acknowledgment in the shipping receipts is that there had been received a certain number of barrels, said to contain beans, but contents unknown.

Hoffman v. *Bank of Milwaukee*, 12 Wall. 181, 190 (79 U. S. bk. 20, L. ed. 366, 369); *Robinson* v. *Louisville etc. R. R. Co.* 2 Lea (Tenn.) 594.

The shipping receipts did not confer upon Williams the apparent absolute ownership of the goods described therein, and the plaintiff must have relied upon the assurance of Williams as to his having a title to any beans which he could pledge.

Barnard v. *Campbell*, 55 N. Y. 462: *Pollard* v. *Vinton*, 105 U. S. 7 (Bk. 26, L. ed. 998).

Thus, if Williams did not own the property represented in the bills of lading, or had stolen it or procured it through fraud, the plaintiff would have no claim against the defendant.

Meyer v. *Peck*, 28 N. Y. 590; *Mallalieu* v. *Hodgson*, 16 Q. B. 689.

The duty of the company and the authority of the agent to give the receipts depends upon the delivery of the property for transportation, and is merely incidental to such delivery. If liability can be imposed upon the defendant in a case like this, any one of these shipping agents may, by simply signing such a receipt, render the carrier liable to any amount, to the full extent of any property, however valuable, but which has existence only in the imagination of the agent and those who participate in his fraud. So, also, any subordinate bank employee having authority to enter upon a depositor's pass book sums actually deposited could bind the bank to any amount by entering upon the pass books sums not deposited.

The following cases are relied upon as showing that defendant is not liable under the circumstances of the case:

Robinson v. *Louisville etc. R. R. Co.* 2 Lea (Tenn.) 594; *Boucher* v. *Lawson*, Cas. *temp.* Hardwicke, 200; *Grant* v. *Norway*, 10 C. B. 665; *Coleman* v. *Riches*, 29 Eng. Law & Eq. 323; *Hubbersty* v. *Ward*, 8 Exch. 330; *Berkley* v. *Watling*, 7 Ad. & El. 29; *McLean* v. *Fleming*, H. L. 2 Sc. App. 128; *Brown* v. *Powell Duffryn Steam Coal Co.* L. R. 10 C. P. 562; *Jessel* v. *Bath*, L. R. 2 Exch. 267; Hutchinson, Carriers, § 123; *The Freeman* v. *Buckingham*, 18 How. 182 (59 U. S. bk. 15, L. ed. 341 and note); *The Lady Franklin*, 8 Wall. 325 (75 U. S. bk. 19, L. ed. 455); *Pollard* v. *Vinton*, and *Pollard* v. *Mail Line Co.* 105 U. S. 7, 12 (Bk. 26, L. ed. 998, 1001); *Lehman* v. *Central R. R. & Banking Co.* (Ala. 1882), 12 Fed. Rep. 595; *The Joseph Grant*, 1 Biss. 193; in Massachusetts, *Sears* v. *Wingate*, 3 Allen, 103: in Ohio, *Dean* v. *King*, 22 Ohio St. 118; in Maryland, *Balt. & O. R. R. Co.* v. *Wilkens*, 44 Md. 11; *Tirdeman* v. *Knox*, 53 Md. 612; in Louisiana, *Fellows* v. *The Powell*, 16 La. Ann. 316; *Adams* v. *Trent*, 19 La. Ann. 262; *Hunt* v. *Miss. Cent. R. R. Co.* 29 La. Ann. 446; in Missouri, *Louisiana Nat. Bank of New Orleans* v. *Laveille*, 53 Mo. 380.

The criticisms to which the case of *Grant* v. *Norway*, 10 C. B. (70 Eng. C. L. R.) 665, have been subjected have been on the grounds of the decision, and not of the result reached by it. It has in each case been held that the decision would be sustained if put upon the grounds upon which the defendant relies in this case.

Mechanics Bank v. *N. Y. etc. R. R. Co.* 13 N. Y. 619, 629, 638; *Dows* v. *Perrin*, 16 N. Y. 325; *Farmers & Mechanics Bank* v. *Butchers & Drovers Bank*, 16 N. Y. 134, 140; 14 N. Y. 623; *N. Y. etc. R. R. Co.* v. *Schuyler*, 34 N. Y. 73, 74, 91; *Griswold* v. *Haven*, 25 N. Y. 602, 604; *First Nat. Bank* v. *Shaw*, 61 N. Y. 283, 297; *Armour* v. *Michigan Cent. R. R. Co.* 65 N. Y. 111, 121; *McCombie* v. *Spader*, 1 Hun, 197.

The case of *Brooke* v. *N. Y. etc. R. R. Co.* 1

Cent. Rep. 123, 108 Pa. 529, which also grew out of the fraudulent dealings of Weiss, is not in point. In that case bills of lading were issued directly to the plaintiff, so that the representation in a certain sense was made directly to him.

That there is no necessary conflict between the doctrine of federal courts and those of the State upon the question at issue is further shown by the fact that the doctrine of the Supreme Court of the United States in cases growing out of the false certification of checks by the agent of a bank is the same as that of the courts of this State.

Merchants Nat. Bank v. *State Nat. Bank*, 10 Wall. 604 (77 U. S. bk. 19, L. ed. 1008).

The court below, in treating the issuing of the fraudulent shipping receipt as an act done negligently or wrongfully by the agent while acting in the course of his employment, overlooked the important distinction between a conditional authority, depending upon the existence of some fact as a condition precedent to any duty arising in the course of the employment, and a limitation upon the authority of an agent when he has a duty to perform in the regular course of his employment.

Farmers & Mechanics Bank v. *Erie R. Co.* 72 N. Y. 188; *Robinson* v. *Louisville etc. R. R. Co.* 2 Lea (Tenn.) 594; *Springport* v. *Teutonia Sav. Bank*, 75 N. Y. 397; *Craighead* v. *Peterson*, 72 N. Y. 279; *Wilcox* v. *Howell*, 44 N. Y. 398, 402, citing *Mechanics Bank* v. *N. Y. etc. R. R. Co.* 13 N. Y. 638; *Marvin* v. *Wilber*, 52 N. Y. 270; *People* v. *Bank of N. A.* 75 N. Y. 548; *Fowler* v. *Howe Machine Co.* 20 N. Y. Week. Dig. 521; *North River Bank* v. *Aymar*, 3 Hill, 262, citing *Attwood* v. *Munnings*, 1 Man. & R. 66.

Mr. **H. E. Sickels**, for respondent:

The question as to whether the bills of lading transferred to the plaintiff were negotiable or nonnegotiable is wholly unimportant in this case. That question can only arise as between the consignor and consignee, and it does not affect in any manner the liability of the defendant as carrier of the goods. The delivery of the bills of lading to the plaintiff with the drafts, under the circumstances disclosed in the case, had the goods been shipped, was sufficient to vest all the interest Williams would have had in the property for the purpose of security for the payment of the drafts. This proposition is elementary in commercial law, and is sustained by many adjudicated cases.

Emery's Sons v. *Irving Nat. Bank*, 25 Ohio St. 360; *First Nat. Bank* v. *Dearborn*, 115 Mass. 219; *Dows* v. *Greene*, 24 N. Y. 638; *City Bank* v. *Rome etc. R. R. Co.* 44 N. Y. 136; *Merchants Bank* v. *Union R.R. & Transp. Co.* 69 N.Y. 373.

A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts or omissions.

N. Y. etc. R. R. Co. v. *Schuyler*, 34 N. Y. 30; *Fishkill Sav. Inst.* v. *Nat. Bank of Fishkill*, 80 N. Y. 162.

It is submitted that the defendant is estopped, as against the plaintiff, from now asserting the invalidity of the act of its agent in issuing the bills of lading without the receipt of the goods.

N. Y. etc. R. R. Co. v. *Schuyler*, 34 N. Y. 30; *Armour* v. *Mich. Cent. R. R. Co.* 65 N. Y. 111; *Brooke* v. *N. Y. etc. R. R. Co.* 1 Cent. Rep. 123, 108 Pa. 529.

Nor is it necessary, in order to create an estoppel, that representations apart from the bills of lading should have been made to the plaintiff, by or on behalf of the defendant, as no privity is necessary to be established, except such as is created by the unlawful act and the consequential injury.

N. Y. etc. R. R. Co. v. *Schuyler*, 34 N. Y. 30; *The Eaton, Cole & Burnham Co.* v. *Avery*, 83 N. Y. 31.

The statement printed in the bills of lading "contents unknown," with the written statement following in one "thirty-five barrels beans," and in the other "thirty barrels beans," would not change the presumption that it was barrels of beans that had been received. If it did, it would require the court to presume fraud and dishonesty instead of good faith on the part of the shipper. Such is not the law.

Hatch v. *Bayley*, 12 Cush. 27; *Shaw* v. *Gardner*, 12 Gray, 488.

Nor does the case of *Miller* v. *Hannibal etc. R. R. Co.* 90 N. Y. 430, change this rule.

In that case the complaint did not charge that the defendant knew of the fraud or acted in bad faith, and proof was made of the deception practiced on the carrier by the shipper; and the court held that where those circumstances appeared, the carrier was not bound by the statement of contents.

Finch, *J.*, delivered the opinion of the court:

It is a settled doctrine of the law of agency in this State that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation and the principal is estopped from denying its truth to his prejudice. *North River Bank* v. *Aymar*, 3 Hill, 262; *Griswold* v. *Haven*, 25 N. Y. 601; *N. Y. etc. R. R. Co.* v. *Schuyler*, 34 N. Y. 30; *Armour* v. *Mich. Cent. R. R. Co.* 65 N. Y. 111.

A discussion of that doctrine is no longer needed or permissible in this court, since it has survived an inquiry of the most exhaustive character and an assault remarkable for its persistence and vigor. If there be any exception to the rule within our jurisdiction, it arises in the case of municipal corporations whose structure and functions are sometimes claimed to justify a more restricted liability. The application of this rule to the case at bar has determined it in favor of the plaintiff, and we approve of that conclusion.

One Weiss was the local freight agent of the defendant corporation at Batavia, whose duty and authority it was to receive and forward freight over the defendant's road, giving a bill of lading therefor and specifying the terms of the shipment, but having no right to issue such bills except upon the actual receipt of the property for transportation. He issued bills of lading for sixty-five barrels of beans to one Williams, describing them as received to be forwarded to one Comstock as consignee, but adding with reference to the packages that their contents were unknown. Williams drew a draft on the consignee and procured the money upon it of the plaintiff by transferring the bills of lading to secure its ultimate payment. It turned out that no barrels of beans were shipped by Williams or delivered to the defendant, and the bills of lading were the product of a conspiracy between him and Weiss to defraud the plaintiff or such others as could be induced to advance their money upon the faith of the false bills.

It is proper to consider only that part of the learned and very able argument of the appellant's counsel which questions the application of the doctrine above stated to the facts presented. So much of it as rests upon the ground that no privity existed between the defendant and the Bank may be dismissed with the observation that no privity is needed to make the estoppel available, other than that which flows from the wrongful act and the consequent injury. *N. Y. R. R. Co.* v. *Schuyler*, *supra.*

While bills of lading are not negotiable in the sense applicable to commercial paper, they are very commonly transferred as security for loans and discounts, and carry with them the ownership (either general or special) of the property which they describe. It is the natural and necessary expectation of the carrier issuing them that they will pass freely from one to another and advances be made upon their faith; and the carrier has no right to believe and never does believe that their office and effect is limited to the person to whom they are first and directly issued. On the contrary, he is bound by law to recognize the validity of transfers and to deliver the property only upon the production and cancellation of the bill of lading.

If he desires to limit his responsibility to a delivery to the named consignee alone, he must stamp his bills as "non-negotiable;" and where he does not do that he must be understood to intend a possible transfer of the bills and to affect the action of such transferees. In such a case the facts go far beyond the instances cited, in which an estoppel has been denied because the representations were not made to the party injured. *Mayenborg* v. *Haynes*, 50 N. Y. 675; *Maguire* v. *Selden*, 4 Cent. Rep. 379, 103 N. Y. 642.

Those were cases in which the representations made were not intended and could not be expected to influence the persons who relied upon them, and their knowledge of them was described as purely accidental and not anticipated. Here they were of a totally different character. The bills were made for the precise purpose, so far as the agent and Williams were concerned, of deceiving the Bank by their representations; and every bill issued not stamped was issued with the expectation of the principal that it would be transferred and used in the ordinary channels of business, and be relied upon as evidence of ownership or security for advances. Those thus trusting to it and affected by it are not accidently injured, but have done what they who issued the bill had every reason to expect. Considerations of this character provide the basis of an equitable estoppel, without reference to negotiability or directness of representation.

It is obvious also upon the case as presented that the fact or condition essential to the authority of the agent to issue the bills of lading was one unknown to the Bank and peculiarly within the knowledge of the agent and his principal. If the rule compelled the transferee to incur the peril of the existence or absence of the essential fact it would practically end the large volume of business founded upon transfers of bills of lading. Of whom shall the lender inquire? And how ascertain the fact? Naturally he would go to the freight agent, who had already falsely declared in writing that the property had been received. Is he any more authorized to make the verbal representation than the written one? Must the lender get permission to go through the freight house or examine the books? If the property is grain, it may not be easy to identify; and the books, if disclosed, are the work of the same freight agent.

It seems very clear that the vital fact of the shipment is one peculiarly within the knowledge of the carrier and his agent, and quite certain to be unknown to the transferee of the bill of lading, except as he relies upon the representation of the freight agent.

The recital in the bills that the contents of the packages were unknown would have left the defendant free from responsibility for a variance in the actual contents from those described in the bill, but is no defense where nothing is shipped and the bill is wholly false. The carrier cannot defend one wrong by presuming that if it had not occurred another might have taken its place. The presumption is the other way: that if an actual shipment had been made, the property really delivered would have corresponded with the description in the bills.

The facts of the case bring it, therefore, within the rule of estoppel as it is established in this court and justify the decision made.

The judgment should be affirmed, with costs.
All concur.

PENNSYLVANIA.

SUPREME COURT.

Margaret DISBROW, *Plff. in Err.*,
v.
Township of ULSTER.

In an **action to recover for a death caused by** the **negligence** of defendant, *held*, that **evidence** that the deceased, a short time before his death, said that he was tired of life and did not care nor want to live; that his life had been a failure, and evidence tending to show that he was a habitual drunkard, had such a **bearing on the value of** the **decedent's life to his family, and of his probable care** for its preservation, as to be **admissible,** and to be considered by the jury on the question of **damages.**

(Argued March 16, Decided March 28, 1887.)

JANUARY Term, 1887, No. 28, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Green, *JJ.*

Error to the Common Pleas of Bradford County, to review a judgment on a verdict for plaintiff for $100 damages in an action to recover for a death of plaintiff's husband alleged to be caused by the negligence of defendant. *Affirmed.*

The facts are stated in the charge to the jury given below.

At the trial the defendant offered to prove that deceased, a short time before his death, said in effect that he was tired of life and didn't care how soon nor how he would leave this life; that, on being reprimanded for careless driving, his reply was that he did not care nor want to live, or words to that effect; that his life had been a failure and his family was a failure. This offer was made for the purpose of showing recklessness and carelessness on his part. It was objected to by plaintiff, because not competent to prove such facts between parties to this action. Objection overruled. Offer admitted. Exception noted.

The court refused to admit evidence of previous accidents on the road in question similar to the one in which Disbrow met his death.

The court overruled objections by plaintiff, and admitted evidence tending to show that the deceased was a habitual drunkard, such evidence consisting of narrations of particular instances.

MORROW, *P. J.*, charged the jury, *inter alia*, as follows:

The undisputed evidence shows that O. H. P. Disbrow died on the night of the third of June, 1883, at the age of fifty years, leaving to survive him Margaret Disbrow, his widow, the present plaintiff, and two children, Theodore and Lois. His family had resided in this borough for many years, and he kept a hotel in the first ward, and for a year or more before his death had spent a considerable portion of his time on his farm in Ulster Township, frequently passing over the road in question, going to and returning from his farm. On the afternoon of Sunday, June 3, he came to Towanda and started back to Ulster in the evening, and some time after 11 o'clock that night his dead body was found lying in the ditch on the west side of the railroad by the track walker, Mr. Carroll. A dead horse and some fragments of a wagon were found lying near by.

It was subsequently ascertained, from an examination of the ground, that in going along the road called the Ulster Narrows he had gone off at a point indicated by the evidence, where the mountain is very steep and precipitous on the lower side of the road, the distance from the highway where he went off to the railroad where he was found being in the neighborhood of 300 feet or more. It is not disputed that Mr. Disbrow was killed by going off from the east side of the public highway and falling down this mountain side; and this action is brought by his widow, Margaret Disbrow, for the benefit of herself and the two children, against the Township of Ulster, to recover damages which she alleges the family has sustained by reason of the negligence of the township authorities in not maintaining sufficient guards or barriers along the road at the point where Mr. Disbrow went off, which negligence, it is alleged by the plaintiff, was the sole cause of her husband's death; and this negligence is the foundation of the plaintiff's right to recover.

If there was no negligence on the part of the defendant, the plaintiff cannot recover. And even if there was negligence upon the part of the township officers, and the jury should find that the road was insufficiently guarded and unsafe at the point where this accident occurred, still the plaintiff cannot recover if there was any negligence on the part of Mr. Disbrow which in any degree contributed to the accident. Therefore the plaintiff's right to recover depends upon two facts: first, the existence of negligence on the part of the township authorities, and second, the absence of negligence on the part of Mr. Disbrow.

It was the duty of the Township to keep the road in question in a safe condition for persons to pass over the same by night or by day, and to keep it, at all seasons, clear of all impediments for the easy and convenient passing of travelers. And, the road being along the face of a steep mountain, there should have been sufficient guards or barriers along the outside, to prevent travelers from driving or falling off. By reason of the proximity of this road to this precipice, it was the duty of the road commissioners to take extra precautions in order to secure the safety of the traveling public; and their omission to do so would constitute negligence on the part of the defendant.

The highway must be kept in such condition and repair that even skittish animals may be employed without risk or danger, and it is not enough that even by careful driving an accident may have been avoided. So that if the jury find that this road was not protected by a guard or barrier along the outside sufficient so that it was safe to be traveled at all times, then it was negligence on the part of the township officers and the plaintiff may recover, provided there was no negligence on the part of Mr. Disbrow himself which contributed to the accident resulting in the loss of his life.

On the part of the plaintiff they have called witnesses to show the condition of the road, and they claim that there were some stones thrown up as a guard or barrier on the outside, but that at the point where the horse went off the earth was merely raised a few inches and some loose stones piled on that little rise of ground on the outside.

On the part of the defense they have called witnesses to testify that at the point where the horse went over this wall was about two feet thick and one foot high, and that a horse to go over there at all must have been forced over, and they claim that this could not have occurred except through the act of Mr. Disbrow himself. The witnesses on the part of the plaintiff and the defendant agree substantially in this: that some ten or twelve rods south of where the horse went off he went close to the mountain side on the west side of the road, and that they could easily trace his tracks on that side close to the rocks, down to a point nearly opposite to where he went off, and that then the horse went nearly straight across the road and went off. The testimony of some of the witnesses on the part of the defense, who were there between 6 and 7 o'clock on the morning of the accident, would seem to show that the horse was going backwards at the time the accident occurred, and that the hind wheels of the wagon went over the bank first. Other witnesses are of a different opinion, and it is proper for you to consider all the evidence of the witnesses on both sides as bearing upon this question, so far as it may be important in the determination of this case. * * *

We have spoken to you in regard to the duties of the commissioners as to keeping this road in proper condition, and it was also the duty of Mr. Disbrow to exercise such care as a prudent man, having regard to all the surrounding circumstances, would take; that is, having regard to the character and condition of the road and the fact that it was known to him, as well as to the darkness of the night. If he failed to exercise such care and precaution it would be negligence on his part; and if such negligence contributed to the accident, then he cannot recover, even though you should find that the road was unsafe and dangerous and that the defendant was guilty of negligence.

If you find for the plaintiff, the measure of damages is the pecuniary loss suffered by the plaintiff and her children, without any *solacium*, that is, sorrow or distress of mind. That cannot enter in as an element of damage. Their loss is what the deceased would probably have earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for the benefit of his widow and children, taking into consideration his age, ability and disposition to labor, and his habits of living and expenditure. You will understand that in arriving at that amount, his personal expenses for the remainder of his life would have to be taken out of whatever sum he might have earned, as those would not have gone to his family.

The plaintiff's counsel have submitted certain points in writing, asking us to charge you as follows: * * *

"2. That a road 20½ to 22½ feet wide, along a steep and precipitous mountain side between 200 and 800 feet to the bottom of the mountain, the outer side of the road being only six inches higher than the road bed and having a wall of loose stones one foot high and two feet wide, is not a reasonably safe road for the traveling public."

Ans. The facts contained in this point have reference to the road in suit, and whether it was a reasonably safe road for the traveling public or not is a question for the jury, and it is submitted to you under the instructions contained in our general charge.

The jury returned a verdict for plaintiff for $100 damages, and plaintiff took this writ, assigning as error the admission and rejection of evidence as above noted and the refusal to affirm plaintiff's second point.

Messrs. **B. M. Peck** and **D'A. Overton,** for plaintiff in error:

Carelessness on several different occasions would not prove carelessness on the night when plaintiff's intestate was killed.

Frazier v. *Pa. R. R. Co.* 38 Pa. 104.

Compensation for loss of life is to be measured by the loss thereof to the parties entitled to compensation.

Pa. R. R. Co. v. *Keller*, 67 Pa. 300.

In estimating the value of life, that personal exertions may ever be required of its possessor or his possible want of capacity are not to be taken into account. *Id.*

Messrs. **Davies & Hall,** for defendant.

Per Curiam:

The verdict of the jury establishes the negligence of the defendant and the absence of contributory negligence of the plaintiff. The only substantial question remaining is the measure of damages. That was a question for the jury, to which it was correctly submitted. The evidence of the defendant, received under objections, had such a bearing on the value of the decedent's life to his family, and of his probable care for its preservation, as to be considered by the jury.

Judgment affirmed.

Borough of FREEMANSBURG, *Pff. in Err.*,
v.
Jeremiah RODGERS.

1. On **appeal** to the common pleas **from a report of viewers** assessing damages to plaintiff by reason of a change of grade in a street, *held*, that **testimony** of the viewers that they had heard the testimony of the witnesses before them as to the injury to the property, and the opinion of the viewers that the change of grade was a damage to the property, after having testified to an acquaintance with the value of such property and that they had viewed the premises, was **admissible.**
2. *Held also*, that the **cause of action accrued** at the time of the physical change of grade on the ground.

3. *Held also*, that the **measure of damages** is the difference in the market value of the property before the change of grade in the immediately adjoining property and the market value after the change of grade in front of the property, with interest on the principal sum to date.

4. *Held further*, that an **assent to** the **change of grade** by plaintiff at a time **when** he was **not** the **owner of** the **property** would **not bind** him after he became such owner, and that statements made in his hearing before he became the owner, or acquired any title in the property, to which he gave no dissent, were not evidence of any assent upon his part to the change in the grade.

(Argued March 9, Decided March 21, 1887.)

JULY Term, 1886, No. 210, E. D. All the Judges present.

Error to the Common Pleas of Northampton County, to review a judgment on a verdict for plaintiff on an appeal from a report of viewers assessing damages to plaintiff by reason of a change of grade in a street. *Affirmed.*

The facts are fully stated in the charge of the court below to the jury.

The witnesses at the trial, Theodore Fradeneck, Francis Held, A. J. Snyder and Christopher Gebhardt, were viewers appointed by the court on petition of Rodgers to assess damages to him caused by the change of grade in question.

Theodore Fradeneck, after having testified to his familiarity with the prices of property in the Borough, having bought and sold real estate there, and that he was a viewer in the proceedings to assess damages to Rodgers caused by the change of grade in question, being examined further on behalf of the plaintiff, testified as follows:

Q. Afterwards did you hear the testimony of the residents of the Borough who gave an opinion as to the injury which was sustained to the property by reason of that change of grade.

Objected to as incompetent and irrelevant. Objection overruled. Bill sealed.

A. There was testimony, yes, of a number of witnesses, but I do not recollect how many.

Q. State whether or not in your opinion such raising of the sidewalk was a damage to the property.

A. It was.

Q. Are you acquainted with the value of property in Bethlehem and around it?

Objected to as incompetent and irrelevant. Objection overruled. Bill sealed.

A. Well, to some extent, I am.

Q. State whether or not in your opinion such raising of the sidewalk was a damage to the property.

A. It was.

A. J. Snyder, examined on behalf of the plaintiff, testified as follows:

Q. After you had looked about the property did you hear the testimony of witnesses on the question of damages?

Objected to as incompetent and irrelevant. Objection overruled. Bill sealed.

A. Yes, but I cannot mention the number of witnesses we heard.

Q. State whether or not that change was a damage to the property.

A. Yes, I think it was.

Francis Held, examined on behalf of the plaintiff, testified as follows:

Q. After you had viewed the premises with the special end in view of ascertaining the damages sustained by Mr. Rodgers—

A. Yes.

Q. After you had viewed the premises did you hear the testimony of a number of witnesses from the residents of the Borough upon the subject.

Objected to as incompetent and irrelevant. Objection overruled. Bill sealed.

A. Yes.

Q. State whether the raising of that sidewalk was a damage to the property.

A. I think it was.

Christopher Gebhardt, examined on behalf of the plaintiff, testified as follows:

Q. Are you acquainted with the general market value of property in Easton?

Objected to as incompetent and irrelevant. Objection overruled. Bill sealed.

A. Yes.

Q. State whether or not in your opinion the raising of that sidewalk was a damage to Jeremiah Rodgers' property?

Objected to as incompetent and irrelevant. Objection overruled. Bill sealed.

Plaintiff, *inter alia*, presented the following points:

1. The cause of action accrued at the time of the physical change of grade on the ground.

Ans. This point we affirm.

2. The measure of damages in this case is the difference in the market value of the property before the change of grade, in the immediately adjoining property and the market value after the change of grade in front of the property, with interest on the principal sum to date.

Ans. This point we affirm.

Defendant, *inter alia*, presented the following points:

1. If the jury find that the grade of the several streets, including the pavements of the Borough of Freemansburg, was fixed in 1870 by the corporate authorities, and further find that work was done in raising Main Street in front of Joseph Lerch's property to the proper grade, and in raising the pavement on Main Street in front of said property to within five or more inches of the proper grade, either before or after 1870, and before October 26, 1878, when Jeremiah Rodgers, the plaintiff, purchased the property from the heirs of Joseph Lerch, deceased; and although the raising of the pavement to the proper grade was completed after the date of said purchase, this does not entitle Jeremiah Rodgers to any share of the damages, if any were sustained to the property by reason thereof, as he took the property by his purchase *cum onere*, and the verdict must be for the defendant.

Ans. If that point means that work was done in raising Main Street in front of Joseph Lerch's property by the Borough of Freemansburg, or in conformity to any action of the municipal authorities, then this point would be true. If it does not mean that, and it simply means the raising of the pavement by somebody else, other than the borough authorities, or without their assent, or not in conformity to any demand upon their part, then we negative this point.

2. If the jury find the facts set forth in the foregoing points as therein stated, and further find that at the time of the sale of the property it was stated by the heirs of Joseph Lerch, deceased, and others in the hearing and presence of Jeremiah Rogers that the purchaser of the property would be required to raise the pavement on Main Street in front of the property to the proper grade, then the legal effect of the matter set forth in this point is that Jeremiah Rodgers took the property by his purchase *cum onere*, and the verdict must be for the defendant.

Ans. If the jury find the facts of the first point as qualified by the court, and as we stated when we said if it were in that way we would affirm it, then we also affirm this point. If the jury do not so find, then we negative this point.

7. The Act of Assembly under which this claim is brought does not apply to or cover a case where no essential change of grade or alteration is made. Merely requiring the owner of a lot to raise his pavement three or four inches, to a level with the pavement of his neighbors, is not such essential change of grade or alteration.

Ans. This point we deny, as applicable to this case.

The court, REEDER, *J.*, charged the jury as follows:

In this action Jeremiah Rodgers, the plaintiff, seeks to recover from the Borough of Freemansburg damages which he alleges that he sustained by reason of a change of grade on Main Street, in the Borough of Freemansburg.

Prior to 1878, under the laws of Pennsylvania, persons who were damaged by reason of a change of grade of a street were not permitted to reecover any damages against the municipal corporation creating such damages. Since then, however, by reason of an Act of Assembly passed in that year, the Legislature directed that persons suffering damage by reason of the change of grade by a municipal corporation, should be compensated for the amount of the damage which they had suffered by reason of any change of grade.

[Under the provisions of that Act of Assembly, before the jury can render a verdict awarding damages to a plaintiff in any case, they must find: first, that a change of grade has been made; second, that the change of grade has depreciated the value of the property; third, that the change was made without the consent of the owner of the property. In considering this case which you have been sworn to try, I will direct your attention to these three propositions inversely; and you will therefore consider, before passing upon the evidence in determining your verdict, first, if there was any change, whether the change was made without the owner's consent.

It is a legal presumption that no man will consent to any injury affecting his person or property. This is a mere presumption, however, which can be overthrown by evidence to the contrary. Therefore, when the plaintiff has proven, if he has succeeded in convincing you that the injury has been done to the property of Jeremiah Rodgers, the burden of proof, by reason of this legal presumption, rests upon the defendant to convince you that it was done with his consent. In the absence of any such evidence the law presumes that the injury done to the property, if any was done, was done without his consent. The only evidence in the case was that which I admitted under the offer of the defendant in relation to the declarations which were made at the public sale by Joseph Lerch's heirs of this property and were testified to have been made by Peter A. Fritchman in the presence of Jeremiah Rodgers, but which was denied by Rodgers. Those declarations were that an obligation would rest upon the purchaser of the property to raise the sidewalk in front of the property on Main Street to the established grade.

I admitted the evidence as I said then, because it was some evidence of his assent, not knowing at the time how far the defendant's testimony would go in support of it. We say to you now, that you shall disregard that testimony in considering whether there was any evidence of assent upon the part of Jeremiah Rodgers, and even though Jeremiah Rodgers assented to them at the time, we do not think that that assent, made by him at a time when he was not the owner of the property, could bind him after he became the owner of the property. It is a doubtful question in my mind whether assent made in that way is the assent that is required by the Act of Assembly. It is a doubtful question whether the assent required by the Act of Assembly is not a formal assent by the party, indicated in some way to the municipal authorities, and even though he were the owner of the property at the time and had assented—not listened to without assenting, as the testimony is—but had assented to the proposition that it would be the duty of the purchaser of that property to raise the pavement, that any such assent upon his part would be a waiver of his legal right to recover any damage which he may have suffered by reason of any elevation of the pavement. But it is not necessary for me to decide that question. It does not arise here.

The proposition as submitted is that certain statements or declarations were made at that time in his hearing, before he became the purchaser or owner, or acquired any title in the property, to which he gave no dissent. This is not evidence of any assent upon his part at all, and, therefore, so far as that testimony bearing upon the question of his assent to the alteration of it or change in the grade of the pavement is concerned you will disregard it entirely in making up your verdict.] Therefore, the testimony leaves you without any evidence of his assent to this change of grade at all.

You will, therefore, consider the next proposition, whether there was a change of grade.

It does not affect the right of the party injured to recover damages whether the change of grade is from a grade previously established by the borough council or whether it was a change from the natural surface of the ground; that is to say, it does not matter whether the Borough has formally, by resolution, established a grade at that place and afterwards by resolution or ordinance changed it, or whether the natural grade of the surface of the ground at that place has been the grade at that point, and the Borough afterward changed it by fixing another grade to which it elevates the street. In either event the plaintiff would be entitled to recover if such change caused a depreciation of the market value of his property.

The natural grade is the grade of the street at which it has been maintained for the convenience of the public. The words, change of grade, are used by the courts interchangeably for two purposes: first, for the purpose of indicating the change of grade as fixed by ordinance and as indicated by the official map of the Borough; and second, the change of grade which is the physical, actual alteration of the ground so as to conform to the proper grade, or the grade established on the borough map. It is the latter, we say to you, and the latter only, for which persons injured are entitled to recover; that is to say, the right of action against the Borough for a change of grade in a street does not commence with the fixing of the grade upon the borough map. It is not the paper grade that gives parties owning property along a street a right of action. It is the actual, physical work done upon the street in order to make the surface of the street conform to the actual grade. So in this case.

No matter when the ordinance of council was adopted fixing the grade, if you find from the evidence that the first attempt of the Borough to make this street actually conform to the grade fixed by the resolution of 1870, adopting the map, in front of the plaintiff's property was when they raised the pavement, and that the raising of the pavement on Main Street was a damage to the market value of the property, then the plaintiff is entitled to recover; that is to say, that if you find as a fact that when the plaintiff's pavement on Main Street was first put down it conformed to the surface of the ground as it then was, that when the pavement was first laid in front of that property it was laid upon and in accordance with the surface of the ground as it was at that time, and that the first time that the Borough took any steps to elevate that street so as to conform to the grade fixed by it by the resolution of 1870 adopting the borough map, was at the time in 1881, which was testified to by plaintiff's witnesses, then we say to you that that was such a grade as would entitle the plaintiff to recover, if he had suffered any damage to his property in consequence of it.

[If you believe from the evidence that in 1858, or in any year prior to 1870, the borough authorities graded the street by filling up the hollows and digging down the hillocks that existed along that street without fixing a regular grade by ordinance or resolution, then the elevation and the position in which they left the street and pavement at that time was the grade of that street; and no matter whether the pavement was higher or lower than the street at that time, the condition in which they left it was the grade for the pavement as well as the condition in which they left the street was the grade of the street.]

[The Borough could, and if you find that it did not by any subsequent action, adopt and enforce a grade, and enforce the raising of the pavement so as to conform to the grade which it then adopted, until 1881, and that it then raised the pavement in front of Jeremiah Rodger's property on Main Street so as to conform to the grade of 1870; and if you believe, furthermore, that the grade of 1870 was a change from the grade of the ground or of the pavement as it left it when it elevated the street in 1858, and that the change of 1881 was a damage to that property, then we say to you that the plaintiff would be entitled to your verdict.]

If, however, you find that there was no change of grade, that the pavement as laid did not conform to the natural surface of the ground, and that after it was raised, then, for the first time, it conformed to the natural surface of the ground, or the condition in which the Borough left the street after its improvement upon the street in 1858, then the plaintiff would not be entitled to your verdict, and your verdict would have to be for the defendant.

[If you believe from the testimony that there was no physical conformation of this pavement to the grade established in 1870, and you believe that the grade of the pavement was in the same condition and at the same elevation that it was after the Borough had completed its work upon the street in 1858, and that the change in order to make the pavement conform to the grade of 1870 was not until Jeremiah Rodgers became the purchaser of this property in 1881, then he would be entitled to recover.]

I do not know whether or not I have made clear to your minds the position which I have been discussing; but I will restate the proposition as clearly as possible.

It was testified to by the defendant's witnesses that in 1858 changes were made in the elevation of this street, in the grade of Main Street. If you believe that to be true, and you believe that after it made the changes in that street there was no fixed elevation or grade of the street, and the testimony shows none, and you must therefore assume that there was none, then the condition in which it left the street was the grade for the street; and the position or elevation at which it left the pavement was the grade of the pavement.

[There is no contention that that grade so left by the Borough in 1858 was ever fixed by any subsequent ordinance or resolution of the Borough until 1870, when it adopted this official map, which is in evidence, and which fixed the grade of that street. When that map was adopted fixing the grade of Main Street in front of that property that fixed the grade of both the pavement and the street.

The testimony in the cause upon the part of the defendant was that that map made no change of grade in front of Rodgers' property, so far as the street was concerned, if it made a change in the grade so far as the sidewalk was concerned; and that afterwards the Borough, in 1881, elevated that sidewalk in order to make it conform to the grade established in 1870. If that elevation was a damage or an injury to the property, then the plaintiff would be entitled to recover in this action.] If it did not do so, or if it was no injury to the property, then the defendant would be entitled to your verdict.

You will next have to determine what, if any, is the amount of the damage to which the plaintiff is entitled by your verdict if you should find that he is entitled to any.

If this injury was a damage in the way in which I have already stated, if you find the facts which are essential to your verdict as I have already stated them in the first part of my charge to be, and you find that they caused any damage to the property of Jeremiah Rodgers, you will have to determine what the amount of that damage is. The testimony in relation to the damage that was caused to the property by reason of the elevation of the pavement on Main Street has already been alluded to. The claim of the plaintiff was that it was for the depression in the yard of the house, he being obliged to step down from the pavement upon the yard and again step up in order to go into the house, and that it was for the water being turned from the yard into his cellar—from the pavement into his cellar—and from the interference, by the elevation of the pavement, with the front gate, and the damming of the water running down Madison Street upon his pavement by the elevation of this pavement on Main Street and turning it into his property and thence into his cellar.

You have heard the testimony in regard to it and you will take the evidence into consideration upon all these questions, and determine whether they have caused him any dam age or not. I will only call your attention to the testimony in relation to the condition of the pavement on Madison Street, he claiming that the water running down Madison Street was turned, by reason of the elevated condition of the pavement on Main Street, into his property. The defendant claims that this was caused by his own negligence, he having had the established grade on Madison Street given to him by the borough surveyor, and he having refused to lay his pavement in conformity to it. If that is true, then you would have to eliminate from your consideration the turning of the water because of that condition of the pavement; because, if that allegation of some of the defendant's witnesses is true, then the plaintiff would not be entitled to recover because of that.

Jeremiah Rodgers, however, contends that he laid his pavement on Madison Street, in conformity with the grade given to him by the borough surveyor, and said something in connection with that about stakes being driven. If that is true, and you believe his testimony, and you believe that that pavement was laid in conformity with the grade given to him by the borough surveyor, then he would be entitled to recover for any damages sustained by reason of the elevation of the pavement on Main Street and the turning of the water into his property, if you believe that it was so turned in. So also with the condition of the fence; if you find that the raising of the pavement interfered with the opening of the gate, that would be an element which you would have a right to take into consideration in determining the amount of damages to which he was entitled.

The true measure of damages, however, is this: it is not the amount which it would cost him to place his property in the same condition that it was before, but it is the difference in the market value of the property before the change of grade and after the change.

It is contended by the plaintiff upon the one hand and disputed by the defendant upon the other, that the difference in the market value which is to be the measure of damages in this case must be found by the jury to be the difference between the property as it was originally left in 1858, and the condition in which it was after the pavement was elevated so as to grade with the pavement on either side. We say to you that that is correct, as a matter of law; that after the Borough had compelled the adjoining property owners to elevate there pavement so as to conform to the established grade, that if by that act the property of Jeremiah Rodgers was depreciated, you have no right to take such depreciation of value into consideration in order to arrive at the amount of appreciation of value after the pavement was elevated.

The true comparison is the condition in which the Borough left the pavement in 1858, after it had fixed and graded that street and left it until 1870, when it made the first change (if you believe that that is the fact, that the first change after 1858 was made in 1870) the condition in which it was at that time is the condition with which you must compare the property after it was elevated to the grade, and the difference between its value then, or in that condition and its value at the time it was up upon grade after the alteration is the true measure of damages which you must find in this case. You will understand very easily that if a Borough, or a municipal corporation direct a change of grade along a street, and the pavements are elevated upon either side of a property, that that depression in the pavement would of course be, under ordinary circumstances, a depreciation in the value of the property. But in order to arrive at the measure of damages which the owner of that property would sustain after his pavement had been elevated to grade, you would have no right to take into consideration the condition of his property when his property is depressed by reason of the change to grade of the adjoining property owners; but you would have to compare it with the market value of his property before the change of grade, if it was on a level with the pavement of the property owners adjoining, and its condition after it had been raised by the Borough; and the difference is the true measure of damages for your consideration.

I do not propose to comment upon the testimony in this case. A number of witnesses have been examined upon both sides who have testified as to their opinion in regard to the amount of damages. [If you believe from the evidence that his property is worth more to day than it was prior, or as much to-day as it was prior, to the elevation of the pavement, then your verdict will be for the defendant. If you believe it is worth less to-day than it was befor the elevation of the pavement, then your verdict will be for the plaintiff; and it will then be your duty to ascertain from all the evidence in the case how much less it is worth; and after having determined how much less this property is worth to-day than it was before the change of the grade, then you will allow that in your verdict with interest from the time of the injury.]

A verdict was returned in favor of plaintiff for $387.45 and a judgment entered thereon.

The assignments of error specified the action of the court in admitting the evidence above noted; the answers to the plaintiff's first and second points, defendant's first, second and seventh points, and the portions of the charge inclosed in brackets.

Messrs. **O. H. Meyers** and **W. E. Doster,** for plaintiff in error:

The questions asked the witnesses were incompetent and irrelevant. It enabled the witnesses to testify to the opinion of others, which the law does not tolerate; besides, the admission of this testimony was in violation of the plainest and most familiar rule of evidence, which forbids the introduction of hearsay testimony.

The rule laid down by the court as to the measure of damage is in clear contravention of the rule, repeatedly declared by our supreme court, that "The measure of damages is the difference between what the property would have sold for as affected by the injury, and what it would have brought, unaffected by such injury."

Schuylkill Nav. Co. v. *Thoburn*, 7 Serg. & R. 411; *Delaware etc. R. R. Co.* v. *Burson*, 61 Pa. 369; *Shenango etc. R. R. Co.* v. *Braham*, 79 Pa. 452.

In the latter case the court says that the rule as laid down in 7 Serg. & R. 411, has been followed in *Pa. R. R. Co.* v. *Heister*, 8 Pa. 450; *Searle* v. *Lackawanna etc. R. R. Co.* 33 Pa. 57, and in a number of other cases there cited.

The case of *Borough of Easton* v. *Walter*, 2 Cent. Rep. 589; *Seitzler* v. *Pa. Schuylkill Valley R. R. Co.* 2 Cent. Rep. 357, and *Pitts. Brad. & Buf. R. R. Co.* 16 W. N. C. 651, are to the same effect.

The error committed here is that the point of time when the jury are to determine the value of the property is to-day, that is at the time of the trial; and if it is worth less to-day than it was before the change of grade, then the difference is the amount which the plaintiff is entitled to recover. The alleged change of grade was done in June, 1881. The case was tried in 1886; and, for aught we know, the value of the property in 1886 may have depreciated in value from other causes since 1881.

Shimer v. *Jones*, 47 Pa. 276.

The court below erred in giving binding instructions to the jury to allow the plaintiff interest on the amount of damages found by them from the time of the injury to the date of the verdict.

Weir v. *Allegheny Co.* 95 Pa. 413; *Pass. R. R. Co.* v. *Philadelphia*, 51 Pa. 468; *Easton Bank* v. *Commonwealth*, 10 Pa. 453; *Getz* v. *P. & R. R. R. Co.* 15 W. N. C. 358.

Rodgers, the purchaser of the property, bought it *cum onere*, and is therefore not entitled to any damage by reason of the subsequent raising of the pavement. In other words, the law required him to regulate his bid on the property, so that he paid no more for the property than it was worth, as affected by the subsequent raising of the pavement.

Borough of New Brighton v. *Peirsol*, 107 Pa. 283; *Memmert* v. *McKeen*, 3 Cent. Rep. 383; *Patterson* v. *Arthurs*, 9 Watts, 152; *Wilson* v. *Cochran*, 48 Pa. 107.

Messrs. **William Mitchler** and **H. J. Steele,** for defendant in error:

The questions asked the witnesses were competent.

Beatty v. *Gilmore*, 16 Pa. 463; *Pa. etc. R. R. Co.* v. *Bunnell*, 81 Pa. 414; *Dickinson* v. *Inhabitants of Fitchburg*, 13 Gray, 546; *First Nat. Bank of Easton* v. *Wirebach*, 106 Pa. 37; *Minnequa Improvement Co.* v. *Coon*, 10 W. N. C. 502.

The rule as to the measure of damages given the jury by the court was correct.

Schuylkill Nav. Co. v. *Thoburn*, 7 Serg. & R. 411; *Phila.* v. *Linnard*, 97 Pa. 142; *Delaware etc. R. R. Co.* v. *Burson*, 61 Pa. 380.

A charge must be tested by its general effect on the minds of the jury, and not by the sentences culled here and there. If as a whole the charge was calculated to mislead the jury, there is error in the record; if not, there is none.

Reeves v. *Delaware etc. R. Co.* 30 Pa. 454; *Watts* v. *Cummins*, 59 Pa. 84; *Lehigh Valley R. Co.* v. *Brandtmaier*, 5 Cent. Rep. 144, 113 Pa. 610.

In *Little Schuylkill Nav. Co.* v. *French*, 2 W. N. C. 718, the jury were told they might measure the proportion of the injury done by the defendants, with a liberal hand, and it was held not to be error taking the charge as a whole.

See also *Carman* v. *Clarion River Nav. Co.* 2 W. N. C. 720; *Blair Iron & Coal Co.* v. *Lloyd*, 3 W. N. C. 103.

Directing the jury to allow interest on the amount of damages from the time of the injury was not error.

Where the property of a citizen is injured by a corporation, against or without his consent, under an authority coupled with the constitutional obligation to pay a just compensation, the duty of ascertaining the amount is an incident to the obligation to pay, and clearly falls upon the corporation.

Railroad v. *Gesner* 20 Pa. 240.

Under the Act of May 24, 1878, the liability of the Borough was fixed at the time of the physical change of grade, and the injured party had the right to expect his money at that time. Delay of payment beyond that time is consequently an injury for which the only compensation is interest.

Philadelphia v. *Dyer*, 41 Pa. 463; *Pa. R. Co.* v. *Cooper*, 8 Pa. 408; *Delaware etc. R. R. Co.* v. *Burson*, 61 Pa. 369; *Bare* v. *Hoffman*, 79 Pa. 71.

Per Curiam:

A careful examination of the questions relating to the admission of evidence discloses no substantial error. Some answers may have been irrelevant, but they did no harm. The evidence was fairly submitted. We see no error in the charge nor in the answers to the points.

Judgment affirmed.

Judith WEBER, *Plff. in Err.*,
v.
William F. DETWILLER.

Where the record of a former judgment

shows that the **justice** before whom the judgment was obtained **had jurisdiction** of the subject matter and of the parties, the question of the **liability of one of** the **defendants,** a married woman, for the debt upon which the judgment was entered, **cannot be retried on** a **scire facias** to revive the judgment.

(Argued March 9, Decided March 21, 1887.)

JULY Term, 1886, No. 133, E. D. All the Judges present.

Error to the Common Pleas of Northampton County, to review a judgment for plaintiff, for want of a sufficient affidavit of defense in an action of *sci. fa.* to revive a judgment. *Affirmed.*

At the trial in the court below, before SCHUYLER, *P. J.*, the following facts appeared:

This was a *sci. fa.* by William F. Detwiller, to revive a judgment against Samuel R. Weber and Judith his wife, for the alleged debt of the wife. The judgment was obtained originally before a justice of the peace, from whose docket the following transcript was filed in the court of common pleas August 30, 1877:

"'Served on oath by producing the original summons to the defendants and informing them of the contents thereof, Dec. 9. Now, Dec. 14, parties appear. Case continued to the 23d inst. at 4 o'clock P. M. Dec. 23, parties appear. Plaintiff claims $89.12 for medicine and medical attendance for the family. Defendant objects to $30, which amount was for his son's sickness, and a set-off for carpenter work done for plaintiff. Plaintiff admits there is an offset. Deft. is required to produce his book of original entries. Adjourned to Jan. 6, 1877, at 8 o'clock, A. M. Parties met again; defendant produced his book, set-off $18.18; found correct and corresponding with plaintiff's book up to a certain date and year, the balance of $60.81 for which amount there were no original entries and could not make affidavit to it. Plaintiff produced his book where original entries were kept. $36.44 were taken as correct. Defendant's offset, $54.62, in full, leaving a balance in favor of plff. of $4.50, and $30, with $12.60 interest, amount $47.10; this debt had been contracted by the deft., Judith Weber, for necessaries, to wit: medical attendance furnished by the plaintiff; to the use of the family of said Judith Weber. Jan. 13, judgment rendered in favor of plaintiff and against defendants for the sum of $47.10, with costs of suit. Execution issued Aug. 7, 1877. Returned 'No Goods.'"

Judith Weber filed the following affidavit of defense:

"Judith Weber, one of the defendants, being duly sworn according to law, says that she is one of the defendants in the above stated case, and that she at the hearing of the case was not indebted to the said plaintiff, in any manner whatever; that she never entered into a contract with the said plaintiff for medical attendance or family necessaries; that the plaintiff's book of original entries contains no charges against this deponent of any kind; that Jacob Nickum, the justice of the peace, called on this deponent and urged her to sign a revival of the said judgment, and that then for the first time she learned that there was a judgment against her; that at the time of the hearing of the case before *Justice* Nickum, the plaintiff's claim was outlawed, and that that plea was made to the justice by Samuel R. Weber, the husband of this defendant, but that the justice would not pay any attention to the said statement; that this deponent never was summoned to appear before *Justice* Nickum in the said case, and therefore had no hearing before the said justice; that this deponent never was nor is she now indebted to the said plaintiff; that she has a just and legal defense against the revival of the said judgment; all of which she is able to prove to the satisfaction of the court if she will be permitted to do so."

A supplemental affidavit was as follows:

"Judith Weber, one of the defendants above named, being duly sworn according to law, says that she has a just and valid defense to the whole of plaintiff's claim in the above entitled action of *scire facias*, and to the original action, by the plaintiff, William F. Detwiller, brought, the nature and character of which is as follows:

"That she did not employ the said plaintiff to attend the family of herself and her husband, and that he never rendered any medical services or furnished any medicine to her, or to her said family at her request and on the credit of her separate estate; but that the said services were rendered and medicine furnished to and on the credit of her husband Samuel R. Weber, with whom the said William F. Detwiller had mutual dealings and accounts, which were adjusted on the hearing before the said Jacob Nickum, the justice before whom the said original action was brought, as appears by the record and transcript thereof.

"That the said record and transcript thereof does not primarily set forth that the said services were rendered and medicine furnished to this deponent or her family at her request and on her credit, or that the same were charged to her; but only that the claim of the said plaintiff was 'for medicine and medical attendance for the family.'

"That the said record and transcript of the said alleged judgment are further void and of no effect because it does not therein and thereby affirmatively appear that an execution was issued against Samuel R. Weber, the husband of the deponent, and duly returned that no property of the said Samuel R. Weber could be found; or that thereupon an *alias* execution was issued against her to be levied out of her separate estate, as required by law.

"That the said transcript and the writ of *scire facias* thereon were prematurely and improperly proceeded upon in the court of common pleas of said county, the said entry of said transcript and the issuing of said writ of *scire facias*, being without warrant in law, and wholly and entirely illegal and void, *ab initio*, as by the said transcript and record appears.

"That the said transcript and record do not affirmatively show that the said action by the said William F. Detwiller was brought for the purpose of charging the separate estate of this deponent; or that she, this deponent, had notice or knowledge that she or her separate estate was so held and charged; or that the said

William F. Detwiller, plaintiff, was by said justice, at the hearing, duly sworn to prove his claim; or that any other legal and competent evidence thereof was produced and heard by said justice in said action, as against her, the said Judith Weber, and her separate estate; or that she, the said Judith, had ever acknowledged the said indebtedness or promised to pay the same; or that the said medicine and medical attendance were furnished for the support of the family of the said husband and wife, to wit: the said Samuel R. Weber and Judith Weber, his wife; or that any legal proof whatsoever was made to or heard by the said justice that the said William F. Detwiller had any legal claim against her, the said Judith Weber, for medical services rendered and medicine furnished to the family of the said Samuel R. Weber and Judith Weber, his wife, upon the credit of the said Judith Weber and at her request; all which she expects to prove upon the trial of this cause."

By consent of plaintiff's attorneys, the following depositions were taken:

Judith Weber, sworn:

"I am one of the defendants in the suit in which the original judgment was obtained. I knew the plaintiff Dr. Detwiller; I never entered into a contract with Dr. Detwiller for medical attendance on my family: I never made a contract with him; I don't owe a cent, nor was I in any manner (indebted) at the time of bringing this suit; I never contracted with him. No summons was ever served on me in this case. I was not present at the hearing. I never knew there was a judgment against me until Esquire Nickum called on me to sign a revival. I refused to sign a revival, because I was not indebted to him, and he had nothing to do with me."

Mr. Jones, for plaintiff, states that he has no questions on cross examination, but objects to the whole of the testimony, because incompetent and irrelevant for the reason the docket of the justice, Esquire Nickum, who gave judgment for the plaintiff in 1876 shows that defendants were summoned and that judgment was duly entered against the wife for necessaries according to the Act of Assembly, and makes the same objection to the testimony of the following witness:

Josephus Weber, sworn:

"I am a son of defendants and was present at the hearing. I saw Dr. Detwiller's books there. I looked at the entry of charge. I looked at the entry of my father's name Samuel R. Weber, nothing there besides that. The whole account (was) charged to him. Mother's name not there. Nothing said about the wife; only a single charge against Samuel R. Weber and nobody else. My father made objections on account of the bill and of it being over six years. My father mentioned it to the justice and I did to the esquire myself. My mother (was) not there. The bill (was) made on account of my sickness. I was a married man. I asked the doctor for the bill and he would not give to me."

Plaintiff entered a rule to show cause why judgment should not be taken for want of a sufficient affidavit of defense, which the court, after hearing, made absolute.

The assignments of error specified the action of the court in entering the judgment against Judith Weber for want of a sufficient affidavit of defense.

Mr. **Elisha Allis**, for plaintiff in error:

The judgment against Mrs. Weber was void as is shown by the transcript, which sets forth the mutual dealings between the plaintiff and Mr. Weber. It recites that on demand each had produced "his" book of original entries against the other; that plaintiff claimed for medicine and medical attendance for the family. Defendant objects to $30, which was for "his" son's sickness, and a set-off for carpenter work done by him for plaintiff. Plaintiff admits there is a set-off.

For such a claim there should have been no recovery against the wife.

Murray v. *Keyes*, 35 Pa. 384; *Parke* v. *Kleeber*, 37 Pa. 251; *Sawtelle's App.* 84 Pa. 310; *Hoff* v. *Koerper*, 103 Pa. 396; *Martin* v. *Renier*, 11 W. N. C. 370.

The wife must contract in her own behalf. The evidence must clearly prove, and the pleadings aver it.

Berger v. *Clark*, 79 Pa. 340, 345.

A joint purchase of necessaries is, in law, the contract of the husband alone.

Rigoney v. *Neiman*, 73 Pa. 330.

The very essence of her liability is that the necessaries sued for were furnished at her request and on her credit. If not so furnished, her separate estate cannot be made liable.

Sawtelle's App. 84 Pa. 306, 311; *Hecker* v. *Haak*, 88 Pa. 238, 242.

When, therefore, as appears by the transcript, the plaintiff admitted the set-off, in the husband's right, he destroyed his case, as against the wife.

Cummings v. *Miller*, 3 Grant, 146; *Wilson* v. *Renshaw*, 91 Pa. 224; *Hoff* v. *Koerper*, 103 Pa. 398; *Gould* v. *McFall*, 1 Cent. Rep. 853, 111 Pa. 66.

A wife cannot be concluded from denying her appearance before the justice, by the entry, "parties appear," for she is not named. The depositions of the wife and the son were admissible to explain and limit the word "parties;" for nothing is taken against her by intendment or enlarged by construction.

Bear v. *Bear*, 33 Pa. 527-529; *Cummings* v. *Miller*, 3 Grant, 146; *Parke* v. *Kleeber*, 37 Pa. 251; *Swayne* v. *Lyon*, 67 Pa. 441; *Gould* v. *McFall*, 1 Cent. Rep. 853, 111 Pa. 66.

The judgment being void, the transcript brought nothing into the court of common pleas, which gave it jurisdiction over the person or estate of Mrs. Weber, nothing on which it could act.

Hecker v. *Haak*, 88 Pa. 238; *Gould* v. *McFall*, 1 Cent. Rep. 858, 111 Pa. 68.

There could therefore be no valid judgment against the wife, upon *scire facias* to revive it.

Dorrance v. *Scott*, 3 Whart. 313, 314; *Caldwell* v. *Walters*, 18 Pa. 82; *Duff* v. *Wynkoop*, 74 Pa. 306.

A sale on such a judgment would not pass title.

Swayne v. *Lyon*, 67 Pa. 436, 441; *Hecker* v. *Haak*, 88 Pa. 242; *Hugus* v. *Ditchridge Glass Co.* 96 Pa. 160.

The court has power to strike off the judgment, as to Mrs. Weber.

Act June 24, 1885, P. L. 160; *Collins* v. *Brown*, County Rep. No. 14, 261.

A *scire facias* cannot be sustained upon a judgment obtained against a married woman and filed in the common pleas, unless it affirmatively appear that the debt was contracted by the wife, and for necessaries.

Swayne v. *Lyon*, 67 Pa. 441; *Glen* v. *Bracey*, 22 Pittsb. L. J. 183; *Hecker* v. *Haak*, 88 Pa. 242.

The plaintiff in error contends that the record of the justice shows that his judgment as to her was void; and being void, she can defend against it in whatever form it may present itself.

Caldwell v. *Walters*, 18 Pa. 79; *Swayne* v. *Lyon*, 67 Pa. 436, 441.

The same doctrine has been held in reference to mechanics' liens filed against the estates of married women.

Lloyd v. *Hibbs*, and *Shriffer* v. *Saum*, 81 Pa. 306, 385.

She therefore asks that the judgment of the court below be reversed as to her, and that she be allowed her costs.

Murray v. *Keyes*, 35 Pa. 382.

The case is rested upon the alleged fraud in obtaining the original judgment.

Hartman v. *Ogborn*, 54 Pa. 120.

We insist that enough appears upon the face of this proceeding to raise the inference of fraud and mistake.

Kane v. *Weigley*, 22 Pa. 179; *Hall* v. *Hamlin*, 2 Watts, 354; *Mitchell* v. *Kintzer*, 5 Pa. 217, 218.

A party cannot maintain inconsistent actions or claims for the same right.

Potts' App. 5 Pa. 500.

One cannot have mutual dealings with a husband, adjust accounts in a suit before a justice, and then take judgment for a balance claimed, against the wife.

Berger v. *Clark*, 79 Pa. 343, 345.

The admission of a set-off by the plaintiff below, as recited in the transcript, conceded a right of action in the husband; and as a set-off can only be had where such an action could be sustained, the allowance of the set-off was practically a judgment in favor of the wife.

2 Pars. Cont. 6th ed. p. 742, 905; *Naglee* v. *Ingersoll*, 7 Pa. 185.

Especially is this true since the Act of 1848.

Mellinger v. *Bausman*, 45 Pa. 528, 529.

If it was a void judgment, she could attack it collaterally.

Swayne v. *Lyon*, 67 Pa. 436–441.

Messrs. **R. I.** and **M. H. Jones,** for defendant in error:

The court was clearly right in entering judgment in favor of the plaintiff.

Lacock v. *White*, 19 Pa. 495; *Boyd* v. *Miller*, 52 Pa. 431.

In *sci. fa.* the defendant cannot go behind the original judgment.

Carr v. *Townsend*, 63 Pa. 202; *Pittsburg etc. R. Co.* v. *Marshall*, 85 Pa. 190; *Steinman* v. *Henderson*, 94 Pa. 315.

Per Curiam:

This was a *scire facias* on a judgment. All the facts averred in the affidavits of defense are insufficient to defeat the action. The record of the former judgment shows that the justice had jurisdiction of the subject matter and of the parties; and the matters now alleged cannot be retried on this *scire facias*.

Judgment affirmed.

Martin L. YOST, *Plff. in Err.*,
v.
Jacob L. GRIM.

1. In Pennsylvania a clear, distinct and unequivocal **acknowledgment of a debt** is sufficient to take a case out of the **Statute of Limitations.**
2. Such an acknowledgment being proved, the **law will imply** the **promise** without its having been actually made.
3. **Evidence** that the specific statement of the account, for the recovery of which the suit was brought, was exhibited by the plaintiff to the debtor and the items distinctly pointed out to him, and that he thereupon made a payment thereon, and made no objection to the existence and validity of any of the items thus designated, justifies the finding of the jury **that** he **admitted** the **bill to be right and acknowledged** his **liability** therefor.

(Argued March 11, Decided March 21, 1887.)

JANUARY Term, 1887, No. 266, E. D. All the Judges present.

Error to the Common Pleas of Northampton County, to review a judgment on a verdict for plaintiff in an action on an account. *Affirmed.*

This was an appeal to the common pleas by Martin L. Yost from a judgment of a justice of the peace, of $100, in favor of Jacob L. Grim, in an action for a balance due on a book account. Defendant pleaded *nil debet* and the Statute of Limitations.

At the trial before SCHUYLER, *P. J.*, the following facts appeared:

Grim, the plaintiff, was a miller and sold Yost, the defendant, flour and feed. The parties had a settlement in April, 1873, at which settlement (as sworn to by Grim) Yost informed Grim that he had gone into the lumber business with his brother-in-law, Moritz, under the name of Yost & Moritz, and asked Grim to get his lumber of the firm, saying that the firm would get its horse feed from Grim, who should charge the whole to the individual account of Yost, as formerly, but keep the items that went to the firm marked, so they could be identified.

This agreement was carried out. Grim bought some lumber of the firm, and Yost, as formerly, got his horse feed of Grim and it was charged to his individual account. The firm also got feed of Grim, which was charged on the day book to Yost & Moritz but was posted on the ledger to Yost's individual account. Yost denied ever making any such agreement with Grim.

May 22, 1878, Grim called on Yost for a settlement, taking with him a statement of the account, which showed charges for feed delivered between May 10, 1873, and April 9, 1877, and after deducting the price of certain lumber, purchased by Grim from Yost & Moritz, showed a balance due Grim, with interest, of $129.39. At this time Yost gave Grim a check for $54.93.

Grim, on direct examination, after testifying to the fact of presenting the bill to Yost and noting a small offset for lumber and adding interest to the accounts, testified as follows:

Q. What did he say then?

A. He did not say anything then; he wanted to know what goods he personally got for himself, and I told him I could not tell him exactly what, except these lower items for the seed wheat and for the seed rye, etc.; and then we looked over it awhile and I told him this bill is made out Jan. 1, 1877, until here, and then he figured out and then: "Well," says he "I and Mr. Moritz are two; we are not friends together; we don't speak together and I don't get along with Mr. Moritz, and now I'll give you a check and then you go to Mr. Moritz and get some out of Mr. Moritz;" and I told him I couldn't go to Mr. Moritz because I didn't have it charged to him in my ledger that way; that I had charged him, Dr. Yost, with it, and he said they were not on good terms and they would not speak, and I should go and see him and collect it out of him; and I told him I would do so provided I could; and the next time I saw Dr. Yost I told him that I couldn't collect anything and I wouldn't do it that way.

On cross examination he testified, *inter alia*, as follows:

Q. Why was it that the check was given for $54.92 and not for just $54?

A. Why, he wanted to know what he got individually and I told him I couldn't tell on this bill, that I hadn't the books with me, that if I had the books with me I could tell—but here is the marks yet that were made with my pencil, and I said "I know that this hundred you got out on the farm private where the pencil mark is," and then he figured up a little and says he: "I'll give you my check now for $54.92; I and Moritz are not on speaking terms, and you try and collect that from him."

Q. You say that after some figuring and talking to find out what Yost got himself you came to this amount of $54.92, and after that he gave you a check for that amount.

A. Yes, he figured out and told me that he would give me a check for that amount.

Q. Was that the amount you and he made out that he had got individually?

A. No, I told him I couldn't tell the amount he got.

Defendant presented the following point: 1. Under all the evidence the verdict must be for the defendant.

Ans. I cannot affirm this point.

The court charged the jury, *inter alia*, as follows:

"Now take the evidence as given by Jacob L. Grim himself and consider whether that, assuming it to be true, would justify you in finding that the defendant did acknowledge the existence of this debt. Mr. Grim testifies as follows (Reads from direct and cross examination of J. L. Grim.): Now this is the account given by the plaintiff himself, and is the only evidence, so far as I remember, bearing upon what took place at Dr. Yost's office at the time the check for $54.92 was given—the only evidence given by the plaintiff bearing upon what took place at that time. Throwing, for the present, out of the case all the other evidence, can you say from what Mr. Grim says that this giving of the check for $54.92 was such a clear and distinct acknowledgment on the part of the defendant that the whole bill that was presented at that time was his individual bill? Was his evidence upon that point so clear and distinct that you can say without hesitation that the defendant, by the payment of the $54.92, intended to acknowledge his liability for the full amount of the bill?"

"If you are satisfied that this was a firm debt to begin with, and that Dr. Yost agreed on May 22, 1878, that the bill was all right, acknowledged his liability for it, then your verdict would be in favor of the plaintiff, provided the evidence is such as satisfies you beyond hesitation that such was the fact."

Verdict and judgment for plaintiff.

The assignments of error specified the answer to defendant's point, and the portions of the charge given above.

Mr. **Robert L. Cope,** for plaintiff in error:

The claim of the plaintiff on its face was barred by the Statute of March 27, 1715. The supreme court, in construing this Act, has added to it a provision that if the defendant within six years acknowledges the claim in a clear, unequivocal, unambiguous and unqualified manner, so as to imply a new promise and be consistent with a promise to pay, such an acknowledgment shall avoid the statute.

Suter v. *Sheeler*, 22 Pa. 308; *Bolton* v. *King*, 14 W. N. C. 361.

A man cannot be said to waive or surrender a legal right unless his intention to do so clearly appears, either by his acts or words. It has therefore been held that "If there be circumstances accompanying an acknowledgment, which repel the presumption of a promise or intention to pay, or if the expression be equivocal, vague and indeterminate, leading to no certain conclusion but at best to possible inference which may affect different minds in different ways, they ought not to go to a jury as evidence of a new promise to revive the cause of action."

2 Greenl. Ev. §404; *Shafer* v. *Shafer*, 40 Pa. 51.

Does not the request to collect some from Moritz clearly repel the presumption of a present intent to pay the whole claim himself? Is it consistent with a promise to pay the whole balance?

Senseman v. *Hershman*, 82 Pa. 83.

The question as to the sufficiency of the evidence, assuming it to be true, is clearly for the court and not for the jury.

Shafer v. *Shafer*, 40 Pa. 51; *Senseman* v. *Hershman*, 82 Pa. 83; *Landis* v. *Roth*, 16 W. N. C. 309.

Mr. **W. E. Doster,** for defendant in error:

In *Palmer* v. *Gillespie*, 95 Pa. 344, the court says:

It is not essential that the promise be actual or express, provided the other necessary facts are shown. A clear, distinct and unequivocal acknowledgment of a debt is sufficient to take a case out of the operation of the statute. It must be an admission consistent with a promise to pay. If so, the law will imply the promise, without its having been actually or expressly made. There must not be any uncertainty as to the particular debt to which the admission applies. It must be so distinct and unambiguous as to remove hesitation in regard to the debtor's meaning.

Fries v. *Boisselet*, 9 Serg. & R. 128; *Bailey* v. *Bailey*, 14 Serg. & R. 195; *Allison* v. *James*, 9

Watts, 380; *Gilkyson* v. *Larue*, 6 Watts & S. 213; *Hazlebaker* v. *Reeves*, 12 Pa. 264; *Davis* v. *Steiner*, 14 Pa. 275; *Johns* v. *Lantz*, 63 Pa. 324.

Mr. Chief Justice **Mercur** delivered the opinion of the court:

It is settled law in Pennsylvania that a clear, distinct and unequivocal acknowledgment of a debt is sufficient to take a case out of the Statute of Limitations. Such an acknowledgment being proved, the law will imply the promise without its having been actually made. *Palmer* v. *Gillespie*, 95 Pa. 344.

In the present case the evidence was sufficient to justify the finding of the necessary facts. The plaintiff below testified that the specific statement of the account, for the recovery of which this suit was brought, was by him exhibited to the debtor, and the items got for the latter distinctly pointed out to him, that he thereupon made a payment thereon, and made no objection to the existence and validity of any of the items thus designated. This evidence justified the submission to the jury to find that he admitted the bill to be right and acknowledged his liability therefor.

Judgment affirmed.

Walter L. C. BIDDLE, *Plff. in Err.*,
v.
D. Dodge TOMLINSON *et al.*

1. The **purchaser of a judgment** is ordinarily charged with the inspection of the record of that judgment, and is in general **affected with notice** of any right which it plainly discloses. A like rule applies to purchases of land sold on execution to satisfy a judgment.
2. A **deed of land,** with all rents, issues and profits, and all the grantor's estate, right and interest, to the grantee, his heirs and assigns, vests in the grantee the legal title and equitable estate, including ground rent and life estate, of the grantor.
3. A **judgment** can **not** be **attacked collaterally,** save for collusion.
4. Where parties have contrived by judgment to defeat the rights of a third person, such **judgment** is **not a bar against** the claim of the **party sought to be defrauded.**

(Argued Jan. 26, Decided March 28, 1887.)

JANUARY Term, 1887, No. 80, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Green, *JJ.*

Error to the Common Pleas No. 1 of Philadelphia County, to review a judgment on a verdict directed for plaintiffs in an action of ejectment. *Affirmed.*

The action was brought by D. Dodge Tomlinson and Caroline B., his wife, John M. Armington, William Elliott and Sarah H. his wife, Charles Ganshine and Ann E. his wife, and Monterey Armington, plaintiffs, heirs at law and next of kin of Catharine Armington, deceased, against Christiana Horn, to recover possession of certain premises in the City of Philadelphia.

On rule to show cause, Walter L. C. Biddle, as landlord, was joined as codefendant, and admitted to defend and filed a plea of "not guilty."

At the trial in the court below the following facts appeared:

February 17, 1846, Charles H. Fisher and wife deeded to Henry Knight and Thomas Armington, in fee, the lot in question, reserving an annual ground rent of $46. In the same year, Henry Knight and Thomas Armington deeded the same lot to John F. Armington in fee, subject to the ground rent. In 1847 a judgment was entered against John F. Armington for $500, in favor of one Malin.

On December 17, 1851, John F. Armington and Catharine, his wife, conveyed the premises to Josiah Hibbard for the consideration of $1,000, subject to the ground rent, and December 20 thereafter, said Hibbard conveyed the premises to Catharine, wife of John F. Armington, for the same consideration, subject to the ground rent. All these deeds were duly executed and recorded.

On April 1, 1852, the judgment of April 2, 1847, was revived by an agreement filed on record and signed by said Armington but without notice to Catharine Armington, and a *fi. fa.* was issued thereon, under which the property in question was returned "levied and condemned."

A *venditioni exponas* was subsequently issued and the premises sold to John Wurfflein for $100; and December 30, 1856, the purchaser received a sheriff's deed for the same in fee, subject to the ground rent.

Wurfflein took possession of the premises and collected the rents until April 12, 1867, when he purchased the ground rent in fee from Rebecca Snowden, in whom the same was then vested, and a deed was made to him for the same.

Wurfflein continued in possession until May 1, 1869, when he conveyed the premises to Jacob Knoell for the consideration of $3,600. The deed recited that the premises were the same which the sheriff of the City and County of Philadelphia, by deed dated December 30, 1856, and recorded, etc., "granted and confirmed unto the said John Wurfflein in fee, subject to the payment of a certain yearly ground rent therein mentioned, of $42, which said yearly ground rent Rebecca C. Snowden by indenture dated the 12th of April, 1867, * * * granted and assigned unto the said John Wurfflein his heirs and assigns, whereby the same merged and became forever extinguished; together with all and singular the buildings and improvements, ways, waters, water courses, rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging or in anywise appertaining, and the reversions or remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, claim and demand whatsoever of them, the said John Wurfflein and Anna B., his wife, in law, equity or otherwise, howsoever, of, and to the same, and every part thereof, to have and to hold the said three story brick messuage or tenement and lot or piece of ground above described, hereditaments and premises, hereby granted and mentioned and intended so to be with the appurtenances unto the said Jacob Knoell his heirs and assigns, to and for the only proper use and behoof of the said Jacob Knoell, his heirs and assigns forever."

Knoell took possession of the property under this deed, occupied a portion of it, and received the rents up to the time of his decease in 1875, when his widow and children, devisees in his last will and testament, succeeded him in possession, receiving the rents until September, 1882.

Catharine Armington died March 5, 1856, leaving surviving her husband John F. and children, plaintiffs in this action. John F. Armington died in February, 1877; and in September of the same year the heirs of Catharine Armington, the plaintiffs in this suit, brought an action of ejectment for the lot in question, contending that their mother, Catharine Armington, died seised in fee of the property, and that upon her death their father, John F. Armington, became entitled to a life estate in the premises as tenant by the curtesy, with remainder to themselves, subject to the ground rent; that the Malin judgment revived without notice to the mother, and did not bind more than the life estate of John F. Armington; that the sheriff's sale passed only that life estate to Wurfflein; that upon the death of said John F. Armington they became entitled to possession of the premises, subject to the ground rent.

The devisees of Knoell defended that action. The case was tried in October, 1881, and a verdict rendered for the defendant and a judgment entered thereon. On error to the supreme court the judgment was reversed and a *venire de novo* ordered; the court, in an opinion delivered March 23, 1882, holding that the plaintiffs were entitled to recover on their title. See 100 Pa. 165.

April 1, 1882, a summons in covenant *sur* ground rent deed first recited, was issued in the name of John Wurfflein against Henry Knight and Thomas Armington, the original covenantors; and on May 17, 1882, judgment was obtained thereon without notice to the heirs of Catharine Armington, on two returns of *nihil habet*, for the arrears of ground rent from July 1, 1867, to January 1, 1882, $918.45, the *alias* summons being returned "Served on Christopher Knoell, tenant in possession."

June 20, 1882, a *venditioni exponas* was issued on this judgment and the property advertised for sale.

June 28, 1882, an affidavit was filed by Monterey Armington, one of the heirs of Catharine Armington, deceased, which set out that John Wurfflein, the nominal plaintiff in the action on the ground rent deed, had no interest or title in or to the ground rent, having conveyed all his interest to Jacob Knoell, and that the suit was the result of a fraudulent conspiracy between Wurfflein and Knoell to defraud the plaintiffs in ejectment out of the property to which they are entitled and the income thereof; that the summons was served upon Christopher Knoell, one of the heirs of Jacob Knoell; and that the deponent and his brothers and sisters had no knowledge of the suit until they saw the advertisement, June 27, 1882.

On this affidavit the court granted a rule to show cause why judgment should not be opened, *venditioni exponas* set aside and the terretenants admitted to make a defense. Proceedings to stay meanwhile.

July 1, 1882, the court entered an order as follows:

"Rule continued and sale to proceed, subject to the rule."

July 3, 1882, the property was sold by the sheriff to the defendant Biddle. No notice of the rule to open the judgment and set aside the *venditioni exponas* was given at the sheriff's sale; and it appears from the evidence that Biddle had no knowledge of the same but immediately after the sale was informed of the fact by the attorney who represented the Armington heirs at the sale.

On July 8, 1882, the rules to open the judgment and set aside the *venditioni exponas* were discharged. On July 15 Biddle paid the balance of the purchase money, $2,000 and received a sheriff's deed for such premises; and the proceeds of the sale were paid into court.

The ejectment suit of the Armington heirs against Rau and the Knoells was again tried in October, 1882, and verdict rendered for the plaintiffs, the jury assessing damages for mesne profits at $1,300, and judgment was entered thereon.

A *hab. fac.* was issued to which the sheriff returned that he found the premises in possession of a sheriff's vendee under a paramount title, and the court refused to grant an attachment against the sheriff; whereupon, on December 2, 1882, a bill in equity was filed by the Armington heirs, alleging that the suit for arrears of ground rent and the judgment and execution sale thereunder to Biddle were part of a fraudulent scheme conceived by Charles and Christopher Knoell for the purpose of defrauding the Armington heirs of their title to the premises.

The bill prayed a decree impounding the fund in court, and declaring the sale to Biddle fraudulent and void, and asking that an injunction issue. This bill was subsequently dismissed, without costs, on the ground that no fraud had been shown as to Biddle the purchaser, and without prejudice to the plaintiffs' legal rights, if any they had, to maintain the action of ejectment for the same premises.

See 6 Cent. Rep. 903.

At the trial of this action plaintiff read in evidence the depositions of Wurfflein and Charles and Christopher Knoell, children and devisees of Jacob Knoell, deceased, showing that the sale from Wurfflein to Jacob Knoell was of the whole property including the ground rent; and that Wurfflein asserted no claim for the ground rent or for arrears; that Wurfflein, after his purchase from the sheriff and up to his sale to Knoell, had possession of the premises and was in receipt of the rents therefor.

The court charged the jury as follows:

"Gentlemen of the jury: I shall not trouble you with any determination of this case upon the facts which have been submitted in evidence, further than to instruct you it is very much a question of law—what is involved in it. Under all the evidence I instruct you to find a verdict for the plaintiffs, reserving the question for the court in banc as to whether the plaintiff is entitled to recover, and reserving also the right to enter judgment for the defendant *non* *obstante veredicto*, as it is termed, if under all the evidence the court should be of opinion that the defendant is entitled to a verdict. Therefore you have nothing more to do than to find a verdict for the plaintiffs."

The assignments of error specified the action of the court in directing a verdict for plaintiffs.

Mr. **Charles Hart,** for plaintiff in error:

A purchaser at sheriff's sale need not regard a notice of defense contained in the record.

Taylor v. *Young*, 71 Pa. 81; *Farrington* v. *Woodward*, 82 Pa. 259.

It appears from the record in a suit that on May 17, 1882, judgment had been entered on two returns of *nihil*. On June 20, following, a *vend. ex.* was issued. Here, then, was a valid judgment by a court of competent jurisdiction, and a valid writ of sale.

If dissatisfied with the action of the court, in discharging the rule to show cause these plaintiffs might, before the sheriff's sale, have removed by writ of error the record of court, and thus have submitted for revision the action of that court in entering the judgment of May 17, 1882, for arrears of ground rent, as well as the order made on July 1, 1882, directing the sale to proceed.

Fraley v. *Steinmetz*, 22 Pa. 440.

Having failed to do this the terretenants (the plaintiffs below) acquiesced in the judgment against them, and cannot now be heard in prejudice of rights derived from such judgment.

Mr. **Joseph M. Pile,** for defendants in error:

The ground rent estate reserved from the lot, passed by the conveyance of the lot by Wurfflein.

Schollenberger v. *Filbert*, 44 Pa. 404; *Brown* v. *Brooks*, 25 Pa. 210; *Place* v. *Proctor*, 2 Pennyp. 264; *Gould* v. *Lee*, 55 Pa. 99; *Phila. Life Ins. Co.* v. *Am. Life etc. Ins. Co.* 23 Pa. 65.

None of the Armington heirs were present at the sale to Biddle. Their counsel was present, and was entitled to presume that anyone who was a possible bidder had knowledge of what the record clearly set out.

Mere silence will not estop a party having title; it will only postpone when silence is a fraud.

Robinson v. *Justice*, 2 Penr. & W. 19.

There can be no fraud in silence where the purchaser or other actor was or ought to have been acquainted with the subject of his action, or, having means of knowledge, neglected it.

Commonwealth v. *Moltz*, 10 Pa. 531; *Hepburn* v. *M'Dowell*, 17 Serg. & R. 383.

The affidavit and rule of record in the suit before the sale was notice to the purchaser of the facts in the affidavit.

Griffith v. *Sears*, 17 W. N. C. 468; *Beck* v. *Uhrich*, 13 Pa. 636; *Juvenal* v. *Jackson*, 14 Pa. 519; *Youst* v. *Martin*, 3 Serg. & R. 423.

The receipt of rents by Wurfflein and Knoell, while they held the ground rent, was a payment of the ground rent as it accrued.

Penhyn v. *Hughes*, 5 Vesey, 99; 4 Kent, Com. 74; 2 Cruise, Dig. 110; *Pennock* v. *Imbrie*, 3 Phila. 140; *McDonald* v. *Heylin*, 4 Phila. 73; *Jewell's Estate*, 1 W. N. C. 404; *Duval's App.* 38 Pa. 119; *Hitner* v. *Ege*, 23 Pa. 305.

Mr. Justice **Trunkey** delivered the opinion of the court:

The title to the lot, subject to the yearly ground rent of $42, was in Catharine Armington at the time of her decease. John F. Armington's life estate in the lot became vested in John Wurfflein, who afterwards purchased the ground rent. In 1869, Wurfflein conveyed the lot by deed, which on its face is for the fee, without reservation, to Jacob Knoell.

John F. Armington died in 1877, and soon after the heirs of Catharine Armington brought suit in ejectment for the lot. Before the termination of that suit an action was brought in covenant, in the name of Wurfflein as plaintiff, against Knight and Armington, grantees in the deed by Fisher, dated February 17, 1846, which created the ground rent. The *alias* summons was served on Christopher Knoell, tenant in possession, who is one of the devisees of Jacob Knoell, said devisees owned the ground rent and had possession of the ground. Not until the property was advertised to be sold by the sheriff did the plaintiffs learn of this action in covenant, and that judgment had been entered "for want of appearance on two returns of *nihil habet*," and "damages assessed at $918.45."

It scarcely needed the direct testimony of Wurfflein to show that he knew he had no interest in the ground rent, and that he permitted the use of his name in an action to recover arrears for the very purpose of preventing the heirs of Catharine Armington from getting possession of the property. Nor is the case made much plainer by the testimony of Christopher Knoell that his father bought the lot from Wurfflein, clear of all incumbrance, and that he did not know of any ground rent.

On the day that the plaintiffs learned that the lot was advertised for sale, they prayed the court to open the judgment, to the end that they might defend; the court granted a rule to show cause, but permitted sale by the sheriff, subject to the rule. Although the petition set out the facts and was supported by affidavit, the heirs of Catharine Armington were unable to convince the court that the judgment ought to be opened at their request, but they succeeded in getting enough upon the record to warn the purchaser at the sheriff's sale.

Moreover, the money is held in court that as little hardship may result as possible after adjudication of the validity of his title. He ought to have taken notice of the pending rule founded on affidavit, alleging conspiracy to defraud the Armington heirs, between Wurfflein and the tenants in possession of the lot. The deed by Wurfflein to Jacob Knoell was recorded. We think he stands in no better position as to title than would Wurfflein or Christopher Knoell, had either of them purchased the lot at the sale by the sheriff. The purchaser of a judgment is ordinarily charged with the inspection of the record of that judgment, and is, in general, affected with notice of any right which it plainly discloses.' *Griffiths* v. *Sears*, 3 Cent. Rep. 239, 112 Pa. 523.

As regards purchases of land sold on execution to satisfy a judgment a like rule applies.

The deed by Wurfflein to Knoell falsely recited that Wurfflein had title in fee to the lot, and that the ground rent had merged and become extinguished. His title to that rent is correctly stated, and the rent well described. The intent to convey the lot in fee, subject to no charge, is obvious; and the grant contains words to effectuate that intent. That the ground rent, whether merged or not, was intended to be included in the grant cannot be doubted. Although the parties may have been mistaken as to the merger, Wurfflein conveyed the lot, with all rents, issues and profits, and all his estate, right and interest, to Knoell, his heirs and assigns. Because Wurfflein did not own the fee, is the deed void as to the estate he did own? Wurfflein retained no legal title to anything so described as to be within the grant; the legal title, as well as the equitable, was vested in Knoell for the ground rent and life estate.

The question is not whether the judgment is too large, or whether the Knoells were entitled to recover the rent since the death of Catharine Armington. The plaintiff in error contends that Wurfflein was a naked trustee, and that the Knoells were the equitable owners of the rent. In that view the equitable owners had the *alias* summons served on one of themselves as tenants in possession, procured judgment in default, and this at the time when they were defendants in the pending ejectment at suit of the owners of the fee to recover possession.

But nothing on the record shows that Wurfflein sued as trustee, or for the use of anybody but himself. He had no title or interest; and those who held the title were in possession of the land. The owners of the rent, with notice of the action, permitted Wurfflein to recover judgment for the arrears. All parties to that action know that, as between themselves, the judgment is an adjudication that Wurfflein is entitled to the money. Yet none of them pretends that even now the judgment belongs to him.

A judgment cannot be attacked collaterally, save for collusion. Where parties have contrived by judgment to defeat the rights of a third person, such judgment is not a bar against the claim of the party sought to be defrauded. In this case the scheme is transparent, without aid of the oral testimony; and the specification of error cannot be sustained.

Judgment affirmed.

Mayberry S. REBER, *Plff. in Err.*,
v.
Peter HERRING.

1. In an **action against** a **physician for negligence** in the treatment of an ulcer, *held*, that the case should have been presented to the jury upon the question as to the cause of the ulcer and the character and effect of its treatment by defendant.
2. *Held, further*, that the jury should have been distinctly charged that if the plaintiff was himself guilty of **contributory negligence** in producing the ulcer, he could not recover.
3. **Doctors** are **not required to insure** the **recovery** of their patients, but only to treat them with adequate care and skill.
4. A **charge** which is not an adequate presentation of the case to the jury is erroneous.
5. Where the assumptions contained in a **hypothetical question** are not proved by any testimony either in words or in substance, the question is inadmissible.
6. A **charge** to the jury which is misleading is good ground for a reversal of the judgment.

(Argued Feb. 28, Decided March 28, 1887.)

JULY Term, 1885, No. 168, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey and Sterrett, *JJ.*

Error to the Common Pleas of Berks County, to review a judgment on a verdict for plaintiff in an action on the case for damages alleged to have been caused by the negligence and want of skill and care of defendant, a surgeon. *Reversed.*

The case is sufficiently stated in the opinion of the supreme court.

The court below, HAGENMAN, *J.*, charged the jury as follows:

This action is brought by Peter Herring against Dr. Mayberry S. Reber to recover damages for unskillful and careless treatment. The evidence discloses that on the 27th of May, 1882, the plaintiff was at Shoemakersville, and there, or near by, met with an accident in which his leg was badly broken between the knee and the ankle. He was taken to the house of his son, and was there treated by the defendant, Dr. Reber. The bones were properly set; and there is no allegation of want of skill or care in the setting and treating of the fractured bones.

After some considerable time, the heel seems to have become very sore. About six weeks after the accident the plaintiff was brought to Reading, where he was treated by Dr. Sterly, and after remaining here for about eleven weeks, he went to Lehigh County, where he at present lives. He still suffers, and, from the evidence, probably will suffer from the injury which his heel sustained, either from the treatment, or from the accident which happened to him at Shoemakersville.

There is no dispute in the testimony that the heel became exceedingly sore, and that there was considerable sloughing away of the heel. The question in dispute is whether the treatment which the doctor gave the patient was proper. Was it that skill which a physician should bring to the care of his patient, or was it not? If it was not, if the injury of which the plaintiff complains was caused by a want of skill, a want of care on the part of the physician, then the defendant would be liable to the plaintiff for such damages as the jury would find him, under the circumstances, entitled to. On the other hand, if proper care and proper skill was bestowed, such as a physician should bring to the treatment of such a case, then the plaintiff would not be entitled to recover.

There is no dispute between counsel as to what the law is in a case of this kind. There is an implied contract of a surgeon or a physician who attends a patient, that he will use all known and reasonable means to accomplish the object for which he is called in to treat the patient; and that he will attend his patient carefully and diligently. His relation to his patient implies that he possesses, and will employ in the treatment of the case, such reasonable skill and diligence as are ordinarily exercised in his profession by a thoroughly educated surgeon or physician. This is the rule of law. And the question arises: Did this defendant, when he was called in, use that skill and diligence which he was required to use? If he did, he is not responsible; if he did not, he is responsible.

The evidence of the plaintiff, who is an old gentleman, is that Dr. Reber was called in to attend him; that he fixed up his leg and put it in a box; that the doctor came nearly every day; he worked around it; was lying on my back and in a few days it began to burn; told the doctor, who then placed something under it, but think it was too late; was sore; he got salve and some wash; he never looked at it particularly; put salve on; it got very sore, had great pain; at times was not conscious; "I told him I had pain; he looked in, and rubbed salve on it; told him how painful it was, a week or longer before it opened; my daughter waited on me." The daughter he referred to more especially is Mrs. Eck. She came up to see her father after this accident occurred, and was there on Decoration Day, which was the following Tuesday after the accident happened.

Mrs. Eck says she lived in Reading, and on Decoration Day, the 30th of May (the accident happened on the 27th), they put his leg in a box, on cotton, and the foot of the leg; they cut off the foot of a stocking and then sewed it up; "I told the doctor that father wanted the box opened, he had so much pain;" this was subsequent to the time. But after the leg was dressed and put in the box, several of the witnesses have testified that there were supports from the ceiling down, holding the box up; and that there was an extension applied. In other words, to this stocking which was around the foot there were strips or bandages of some kind sewed fast, or were around the foot, and there was a suspension of some kind from the ceiling, to the end of which a box of sand was put.

Some of the witnesses speak of a tin can, containing about a quart, and that it was full of sand. Mrs. Eck then speaks of having gone up several times to see her father, and that while she was there, after this stocking was fitted to the foot, it was sewed up on both sides; and that this was never removed, as far as she knows, until some four weeks after the accident occurred. She says: "I told the doctor that father wanted the box opened, he had so much pain; Doctor said it was rheumatism at the time; the time he opened the box was four weeks after the accident; Father said: it was like crawling;" she used the German word which no one here seemed to be able to translate exactly, but the word crawling in English comes as nearly in meaning to the German word as I can now think of [and when we opened the box, the maggots began to roll out of the heel; it was all slimy at the heel; I said, "Is this the way my father is to be eaten up with worms?"] The doctor said he knew there was worms at it; two weeks after, he was brought to my house, Reading; he was there eleven weeks.

This testimony is offered on the part of the plaintiff to show that there was want of care,—want of that ordinary skill and care which the doctor should have brought to his patient. These witnesses, and one or two others, speak of the heel having rested on the bottom of the box, or upon some hard substance. [You have the testimony of the doctors who were examined on the part of the plaintiff that if this heel had rested upon a hard substance, such as these witnesses spoke of, that inflammation would set in, and sloughing would follow; and that this inflammation and sloughing followed in consequence of the want of proper care and skill upon the part of the doctor.]

[In the questions that were put to the physicians examined, both on the part of the plaintiff and the defendant, in the statement of the facts which were embraced within the questions, the doctors were asked whether that was evidence of want of care, or whether it was not evidence of negligence. The doctors said it was.]

It is for the jury to say whether the evidence submitted on the part of the plaintiff establishes the fact that there was want of care, a want of skill upon the part of the defendant in his treatment of this patient.

The defendant takes the stand himself, and you have heard what he says in regard to it; that he dressed the leg properly; that he removed the bandages every day, and washed the parts; that is, washed the leg, and washed it down over the heel. He does not remember whether there was a stocking or whether there were bandages around the foot. He says, however, whatever was there was removed by him, and that he washed the leg and the heel.

You have the testimony of Charles Herring, the son of the plaintiff, and at whose house the plaintiff was, and he gives us the same statement while he was there. He says that the heel as well as the leg rested upon a cushion of some soft substance.

Then Mrs. Herring is called, and she says much the same thing. She was there and helped to attend and nurse the old gentleman, and attended with the doctor to the dressing of the limb. She says that the box was opened every day and the bandages taken off; that the leg was washed and the heel was washed. Her attendance took in the first three weeks. During the fourth week it seems the daughters of the plaintiff were called together, they were probably nearly all there during that week, the old gentleman's condition being regarded as serious, and that he was likely to die. During that week, on the Saturday of which Mrs. Eck says she insisted on having the box opened, and that if the doctor would not open it himself she would, Mrs. Herring was herself indisposed. But on the day it was opened, although she was about, she says she only saw after it was opened that there were some maggots on the pillow.

Then Sallie Herring was examined. She is the daughter of Charles Herring, and was not at home much of the time, and did not see much; but what she saw is of the same character as was testified to by her father and mother.

After that testimony was in, there were certain inquiries made of the doctors, and certain statements of facts were embraced within the questions; and the doctors, one and all, said if such was the treatment it was done with skill and with care. It will be for the jury, therefore, to say whether the facts which were embraced in the questions submitted by the plaintiff or whether those embraced in the questions put to the doctors by the defendant are the true facts of the case. It is for the jury to say what the facts of the case are. It is for you to say whether from all this evidence there is want of proper care and skill upon the part of the physician. If there was, he would be liable.

We have been asked to say to the jury that even if there was not that proper care and skill upon the part of the doctor, if the plaintiff contributed to the injury which he complains of, he cannot recover. That is the law. Although one person may sustain an injury by the negligence of another, yet if he contributes to the injury which he receives, he is not entitled to damages.

When a physician or surgeon takes the charge of a patient, he assumes an implied obligation to treat the case with reasonable diligence, carefulness and skill. It is, however, the duty of the patient to submit to the treatment prescribed, and to follow the directions given, provided that they be such as a physician of ordinary skill would adopt or sanction; so that, when Dr. Reber attended to the patient, if his treatment was skillful, it was the duty of the patient to submit to his treatment; and although the doctor may have been negligent himself, if the plaintiff contributes to the injury which he complains of, he would not be entitled to recover.

The jury will, therefore, first of all inquire whether there was or was not that proper, ordinary diligence, care and skill exercised by Dr. Reber which he, as a physician, was required to bring to the care of his patient. If there was, then the plaintiff is not entitled to recover. But if the jury find, with the instructions I have given in regard to contributory negligence, that without any fault of the plaintiff himself he suffered this injury from a want of that care, that skill which the physician should have given to his patient, then he would be entitled to recover damages.

And then you will come to the question as to what are the damages he is entitled to recover. In estimating damages, the jury should allow not only for the direct expenses incurred by the plaintiff by reason of the injury, but also for the privation and inconvenience he is subjected to, and for the pain and suffering, bodily and mental, already experienced and likely to be experienced, as well as for the pecuniary loss he has sustained and is likely to sustain during the remainder of his life from the disabled condition of his heel. And in addition to what I have stated, the plaintiff would be entitled to such damages as would result from the loss of his earning power occasioned by the accident. In estimating the damages, the jury will take into account the age of the plaintiff. He is eighty odd years old. You will take everything into consideration which I have laid down to you, and which are embraced within the rules of law laid down to us, and you will return such a verdict as, in your judgment, the plaintiff is entitled to recover.

But, always, as I said before, if you find that he is entitled to recover; if you find that there was that proper skill and care exercised by Dr. Reber, and that this injury, although it came upon the plaintiff, did not result from the want of care and skill upon the part of the defendant, your verdict will be otherwise.

Verdict and judgment for plaintiff for $900 damages.

The first assignment of error appears from the opinion of the supreme court. *The fifth, second and third assignments of error* specify respectively those portions of the charge inclosed in brackets. *The fourth assignment of error* specified the action of the court in allowing the hypothetical case, assumed in the following question, to be submitted to the physicians called as experts in the case:

"By Mr. Reber: Q. If maggots form in the heel under such circumstances, does it not show that it is unskillful and improper treatment to permit them to remain and increase in number until a part of the heel, as large as a man's thumb, is destroyed by them?"

The sixth assignment of error specified the action of the court, after having been requested to say to the jury in the general charge, that if contributory negligence was shown, the plaintiff could not recover, in not referring to the evidence of contributory negligence, to wit: the application of wet cloths to the heel, in disobedience of the doctor's express orders, and the removal of the patient from the doctor's care against his protest, while the ulcer was apparently healing.

The seventh assignment of error specified the action of the court in presenting to the jury, in the charge, only so much of the testimony as assumed that the ulcer was caused by pressure on the heel during treatment, and in omitting all reference to the testimony of the physicians that such ulcers frequently occur in aged people without apparent cause or from the slightest scratch or abrasion of the skin.

Messrs. **Adam H. Schmehl** and **Richmond L. Jones,** for plaintiff in error.

Messrs. **Jeremiah K. Grant** and **Henry C. G. Reber,** for defendant in error.

Mr. Justice **Green** delivered the opinion of the court:

This was an action of case against a physician for negligence in the treatment of a fractured leg. The plaintiff, who was about eighty years of age, sustained a compound comminuted fracture of both bones of his leg between the ankle and knee. No complaint is made of the treatment of the fracture, as the plaintiff was entirely cured in that respect and in the usual time. The broken bones were reunited, the leg was straight and of the same length as the other one. It was admitted that the defendant treated the fracture with care, skill and entire success. This element of the treatment is therefore entirely out of the case.

The claim for damages is based only upon an allegation of negligence in the treatment of an ulcer which developed upon the plaintiff's heel and resulted in a sloughing of the flesh, which was not cured by the defendant and occasioned pain and suffering to the plaintiff. The plaintiff was taken away from the treatment of the defendant by his daughter, Mrs. Eck, about six weeks after the accident and was subsequently treated for about eleven weeks for the ulcer in the heel, apparently with indifferent success. Whether he would have recovered from the ulcer, if he had remained under the defendant's treatment, cannot be known because the ulcers only broke out in the third week and the plaintiff was taken from the defendant's care at the end of the sixth week. This, of course, produces an element of uncertainty in the plaintiff's case, since it becomes complicated with the question as to whose treatment, if any, was at fault for the nonrecovery of the ulcer in the heel.

It was entirely undisputed that several ulcers broke out on the leg and heel of the plaintiff, but those on the leg appear to have recovered under the treatment of Dr. Reber, the defendant, and the only one as to which complaint is made is the one on the heel. It was testified by all the physicians, including those called by the plaintiff, that ulcers are of common occurrence in persons of extreme old age, often without any apparent cause. Thus Dr. Loose, one of the plaintiff's medical witnesses testified:

"Ulcers are common occurrences in people of extreme old age, without apparent cause. The ulcers we find usually in aged people are caused by stagnation of the blood. In aged people the valves of the superficial veins are apt to give out, and the blood instead of going vigorously, stagnates and produces varicose veins, and these produce ulcerations. In a vitiated condition of the blood a scratch may make a very bad ulcer."

Dr Cleaver, another of plaintiff's experts, testified: "In extreme old age ulcers not unfrequently develop without any apparent cause. The cause may be in the blood itself, so that an ulcer may be developed without a bruise. If it is attributable to any particular cause, when you remove the cause the ulcer will heal."

Dr. Sterly, who treated the plaintiff next after the defendant, being called by the plaintiff, said: "Sometimes the least irritation or pressure upon certain parts, especially the lower limbs, will produce ulceration in aged people, and sometimes ulcers will form or develop themselves, you might say spontaneously, without any apparent cause, arising from mere poverty or depravity of the blood, not depravity so much as a want of vital power. And ulcers formed from such constitutional cause are likely to continue and to resist efforts to heal, and are described as indolent ulcers; you will find them frequently in aged people."

The defendant and all his medical witnesses testified to the cause and effect; and it was an entirely undisputed fact that in aged persons, ulcers are developed by very slight causes and, frequently, by no apparent cause, in which case they are attributable to low vitality and poverty of the blood.

In addition to this the defendant and his medical witnesses all testified that wet applications upon the parts affected would so soften and shrivel the skin as to produce ulcers; and it was also proved, both by the defendant and the persons attending the plaintiff, that wet applications were made to the plaintiff's heel repeatedly by the direct command of the plaintiff, and against the remonstrance of the defendant. The defendant alleged that in this respect the plaintiff was guilty of contributory negligence.

In this condition of the testimony it is evident that the case should have been presented to the jury upon the question as to the cause of the ulcer in the heel, and the character and effect of its treatment by the defendant. The jury should have been told by the court that under the testimony there were several different possible causes for the ulcer, to wit: 1, extreme old age and poverty of the blood; 2, irritation or pressure upon the heel; 3, wet applications upon the heel; 4, a low state of vitality in the patient.

For the first, third and fourth of these causes the defendant would not be responsible. For the second he would be responsible, if he negligently and improperly applied an undue pressure to the heel. This should have been carefully explained to the jury, and their attention should have been called to the evidence on both sides relating to this subject. Having read the whole of the testimony with the closest care I am constrained to say that the great preponderance of the evidence is to the effect that no such pressure was applied. Then the jury should have been distinctly charged that if the plaintiff was himself guilty of contributory negligence in producing the ulcer, he could not recover.

It was not enough merely to state this as a general proposition. The meaning of contributory negligence should have been explained to the jury as it related to this particular case; and they should have been told that the defendant alleged, and gave evidence to prove that the plaintiff had himself given directions to have wet applications made to his heel, and that if these produced, or tended to produce the ulcer, he was guilty of contributory negligence and could not recover.

As the testimony given by the defendant on this subject was not contradicted, but was strongly corroborated by the testimony of other witnesses, its force was greatly enhanced, and the attention of the jury should have been called to this aspect of the case. From whatever cause the ulcer was produced, the attention of the jury should have been directed to the treatment administered by the defendant. Was it proper and skillful, or improper and negligent, and if so, in what respect? The doctors do not seem to have differed as to what would be the correct treatment; and the question would be whether that kind of treatment was administered. For if it was, the defendant would not be responsible if the plaintiff did not recover. Doctors are not required to insure the recovery of their patients, but only to treat them with adequate care and skill.

These views indicate what, as it seems to us, was the proper manner of presenting this case to the jury.

An examination of the charge compels us to say that it was not so presented in any respect. On the subject of contributory negligence no explanation of its meaning was given, and not the slightest allusion was made to the large amount and uncontradicted character of the evidence tending to show such negligence. This was misleading and therefore error.

Nor was the precise question at issue at all explained to the jury. That question was: How was the ulcer on the heel produced? Was it by natural causes, such as the great age of the plaintiff, the stagnant or impoverished condition of his blood, or a low state of vitality pervading his system? Or was it the result of any possible bruise received at the time of the accident and not externally manifest? Or was it produced by an undue pressure upon the heel applied by the negligent conduct of the defendant? In this latter case only would the defendant be responsible for the fact of the ulcer, and the jury should have been so instructed, but were not. Then the character of the treatment administered should have been presented. Was it such as was usually given by physicians of competent skill and care? Or was it unskillful, inadequate and negligent? Attention should have been called to the evidence, not upon one side only, but upon both sides of this question. We think the charge is justly subject to unfavorable criticism upon all these points, so much so that we cannot regard it as an adequate presentation of the case to the jury, and must therefore treat it as erroneous.

On the trial, exception was taken to the allowance of a hypothetical question put to the physician by plaintiff's counsel, on the ground that it assumed a state of facts not proved in the testimony. The part of the question objected to is thus expressed: "And the entire leg in this condition resting mainly upon its heel for several weeks, without being changed or receiving any care or any other attention at the heel, what under such circumstances and conditions would likely be the effect upon the heel?"

A careful examination of the testimony compels us to say there is no evidence which supports this hypothesis. It includes the idea that for several weeks the heel received no care and attention, and to that no witness testifies. The plaintiff says that in a few days after the accident, the heel pained him, and he complained of it to the defendant who placed something under it and got some salve or wash which he applied.

Mrs. Eck did not see her father until the fourth day after the accident, and during the first four weeks, the period covered by the question, she was only at the house part of the time; and both her testimony and that of the other persons relied upon by plaintiff on this subject was merely negative, and goes for nothing against the positive testimony of the defendant and of the plaintiff's son, Charles Herring and his wife and daughter, who were present all the time and personally attended the plaintiff and testified to the constant treatment of the heel as well as the leg by the defendant. The question also assumes that the leg was "resting mainly upon its heel for several weeks, without being changed." This also is an unproved fact. The plaintiff did say that he laid on his back with the heel resting on the board pretty hard, and in a few days it began to burn, and hurt. But he also says he informed the doctor of it, and the doctor put something under it, and got some salve and rubbed the heel with it a number of times. He does not say the leg continued to rest on the heel for several weeks, and his own witnesses prove the contrary.

Mrs. Eck says: "The leg was resting in the box, but the whole heel you could see below the box, and the bottom of the foot." Dr. Sterly said that when he saw the plaintiff on May 31, "the fracture box did not reach the heel, and the heel was resting upon a pillow. The defendant and his witnesses all said the heel was resting on a pillow or on cotton. Mrs. Charles Herring, plaintiff's daughter-in-law, said the doctor put a cushion in the box, fixed it and put the leg in, but not so that the heel rested:" that the doctor "came every day, opened the leg every day, and looked after it and washed it, put a new bandage around it and put it in the box again. * * * He washed the leg from the fracture down to the heel and washed the heel also." She also said the heel did not rest on a board.

There was much other testimony to the same effect, which it is not necessary to repeat. But it is very clear that the assumption upon this subject, contained in the hypothetical questions we are considering are not proved by any testimony either in words or in substance, and this assignment of error is therefore sustained.

The language of the charge covered by the second assignment is still more objectionable. None of the doctors said that the inflammation and sloughing followed in consequence of the want of proper care and skill upon the part of the doctor. Yet the court distinctly charged the jury that they did so testify. In such circumstances such charging is the gravest error.

The language covered by the third assignment is ambiguous because it implies that the testimony of the *defendant's* physician, in answer to the defendant's hypothetical questions, proved that upon the facts there stated there was evidence of negligence and want of care. Of course this was not so, and the learned judge probably did not so intend; but the words he used are liable to that construction and are therefore misleading.

The hypothetical question complained of in the fourth assignment was a very exaggerated presentment of the testimony of one witness, Mrs. Eck, contradicted by every other witness in the case as to the number of maggots that were seen; yet as she did use language of such a character, we could hardly reverse on the ground that there was no supporting testimony at all. It was certainly not an impartial presentment of the testimony in relation to the maggots, to repeat to the jury the highly sensational exclamation of Mrs. Eck, in regard to her father being eaten up with worms, without also stating that the other witnesses testified to a far less number than she did; and in this respect the charge was misleading and the fifth assignment is sustained. The sixth and seventh assignments are both sustained for the reasons heretofore stated.

It was most clearly proved and not at all contradicted that the plaintiff insisted upon having wet applications made to his heel, and that it was done solely at his instance and against the positive instructions of the defendant. Yet no allusion was made to this testimony in the charge, nor was it in any manner explained to the jury that such conduct on the part af the plaintiff would, if believed by the jury, constitute or tend to prove contributory negligence. A mere statement of the general doctrine as to the effect of contributory negligence without any application of it to the facts of this case was of no moment at all, and might as well have been omitted entirely.

We are also of opinion that undue prominence was given to the subject of the maggots.

All the physicians concurred in saying that they were of very common occurence, that they were the result and not the cause of the ulcer, and that they are easily removed. The defendant and Mrs. Charles Herring said there were very few of them, and that they were removed at once. They also testified that when the plaintiff was taken away from Charles Herring's house the ulcer on the heel was already healing, and that the defendant protested against such removal, and declared that he would not be answerable for the consequences.

The attention of the jury should have been specifically called to this testimony, and to its effect upon the plaintiff's case, if believed. If it was true, it is diffcult to see how the plaintiff had any case. At his great age with so severe and complicated a fracture entirely cured, as is expressly admitted, with several ulcers, which the age, or the low vitality or the impoverished blood of the plaintiff might easily and naturally produce, all healed, and with only one remaining ulcer, and that fairly recovering, if the defendant's testimony is credited, there would seem to be no cause of action against the defendant. We are unable to discover any evidence in the record that the treatment actually administered by the defendant, either to the fracture or the ulcers, was negligent or unskillful, while on the contrary there is abundant and uncontradicted testimony that so far as the ulcer on the heel is concerned, the plaintiff was guilty of contributory negligence.

Judgment reversed.

Salathiel MEAD, *Plff. in Err.*,
v.
Peter WHITE.

1. **A witness may use a paper containing a list of items to refresh** his **memory,** when he knows the entries to have been correct when he made them, even though not admissible as entries made in the course of business in a book of original entries.
2. Where an alleged **settlement** is attacked, it is **admissible to prove** the several **items** which preceded it and were claimed to have been considered and included in the settlement.

(Argued March 17, Decided March 28, 1887.)

JANUARY Term, 1887, No. 268, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Green, *JJ.*

Error to the Common Pleas of Sullivan County, to review a judgment on a verdict for plaintiff in an action of assumpsit. *Affirmed.*

This action was brought by Peter White against Salathiel Mead to recover for a balance on a book account, and for labor done for defendant. Defendant pleaded the general issue and set-off. Plaintiff obtained a rule on defendant for a statement of the matters of set-off. .This was filed and consisted of items of book account, running back a number of years. On notice from defendant, plaintiff gave him a bill of particulars which also stated that plaintiff would claim a settlement February 22, 1882, when a balance of $14.41 was found due the plaintiff; and would also claim $101, for work done on the "Dutchman's Run Road," and, if the defendant denied the settlement of February 22, 1882, the plaintiff would claim for various items of book account, naming them, which entered into that settlement.

In the trial in the court below before Sittser, *P. J.*, the following facts appeared:

In the years 1880 and 1881 Mead, as supervisor of the Township of Laport, employed White to work upon the roads in said township. White received his pay for all work done upon said roads except $101, for work done upon the "Dutchman's Run Road." Upon this claim there was a controversy as to whether the same was due at the time the suit was brought.

It appeared that the claim of Mead against the township for such work, including the amount to be paid White for his labor was duly audited; but the report of the auditors was appealed from, and a trial had in court and an appeal taken to the supreme court where the matter was still pending. There was also between the parties a contract by White for the purchase of the land from Mead, on which land White was then residing; and it further appeared that in March, 1883, just previous to the commencement of this suit, the balance due on such contract was paid to the attorney in whose hands it had been left, by Mead, for collection.

At the trial the plaintiff first called the defendant for cross examination under the statute, who testified that he and the plaintiff had a settlement in September, 1880, of all their accounts except as to rent for the use of his house and the account between them in regard to exchanging work. Defendant denied having any settlement, February 22, of any account between himself and the plaintiff, except for work done upon the road.

Plaintiff was called as a witness for himself and testified to the circumstances relating to the alleged settlement of February 22, and that he wrote in his account book, which he had with him, according to the direction of the defendant who read to him, and that he wrote down just what had been told him; that the defendant told him the figures, and he put them down as told. Counsel for plaintiff offered the book in evidence.

This was objected to by defendant, because "It is not a book of original entry. It is not signed by anyone and is no evidence of anything whatever. It does not strengthen the case in any way. It is entirely irrelevant and immaterial. It is merely a memorandum the witness says he made at that time."

The counsel for plaintiff offered it in connection with the testimony of the witness.

The Court: As a paper in support of anything else of course it would not be evidence; but the witness swears that it was written at the dictation of the defendant in the case; in connecnection with his testimony it must go to the jury. Exception noted for defendant.

Counsel for plaintiff also asked witness the following questions;

Q. You can please go on and state what items of indebtedness you have against Salathiel Mead, prior to your settlement on the 22d day of February, 1882?

Counsel for defendant object to the question as irrelevant and immaterial.

The Court: We will allow you to show the account. The fact that the witness has testified there was a settlement, if it was an admitted fact in the case, you would be bound by it; but as long as the defendant disputes it we will allow you to introduce your account.

Now, go on, Mr. White, refresh your memory with your papers and books, and testify to what items of work you furnished to him, beginning at the first charge you have and work your way up.

(Counsel for defendant objected to the witness' reading from anything unless it was made at the time and by himself.)

Q. That account you have there upon your paper; where did you obtain that account?

A. Well it is a——I drawed it off from the other——

Q. Drew it off for your convenience to look at?

A. Yes, sir; one thing I would like to explain; this account is most of it, was in a pocket memorandum; I carried it around and it had been all settled, and they had been laid away. I had carried some of them until they had about worn out; the binding was worn off, and was settled up, and I supposed never would be called on; and I gave them up, and didn't give them any attention until I was called on, and had to hunt them up and get them the best I could.

Q. Will you swear that each one of these items that you are about to testify to are truthful items of indebtedness from Mr. Mead to you?

A. Yes, sir.

The Court: We will allow you to use the paper. Exception noted for defendant.

The defendant offered to prove by himself and four other witnesses that what took place between the parties at the time testified to by the plaintiff in his direct examination, when he said he demanded a settlement of defendant, and that defendant became enraged and threatened him with violence, etc., was not true and that no such scene occurred as he detailed. Objected to.

The Court: This will not increase the amount due the plaintiff from defendant. It is irrelevant. Offer overruled. Exception noted.

The court charged the jury *inter alia* as follows:

"It seems to be conceded by both parties in the case that this $101 was to be applied upon the contract for land. But Salathiel Mead has collected the contract for the land and put it out of his power to indorse it upon it, so that he must pay to Peter White the $101 in money, whenever it is due, and it is for you to say under the evidence, and under all the testimony in the case when that is due."

The jury returned a verdict for plaintiff for $142.87 and judgment was entered thereon.

The assignments of error specified the admission and rejection of the evidence as above noted, and the portion of the charge to the jury quoted.

Messrs. **Thomas J. Ingham** and **E. M. Dunham,** for plaintiff in error:

In order to make a writing evidence against a party, it must either be signed by him or by some one authorized by him, or must be in his writing, or else must be an entry made in the course of business in a book of original entry, that being the only exception to the general rule that it must be in the handwriting of the party against whom it is offered, or signed by him.

It was error to permit plaintiff to read, from loose sheets of paper, an account admitted by him to have been copied from memorandum books, since suit brought, where some of those books were yet in existence.

First Nat. Bank of DuBois v. *First Nat. Bank of Williamsport,* 5 Cent. Rep. 194; *Dodge* v. *Bache,* 57 Pa. 425.

Mr. **Ellery P. Ingham,** for defendant in error:

Permitting the plaintiff to testify to items of charge, using in aid of his memory a written memorandum, not original, was not error.

King v. *Faber,* 51 Pa. 393; *Ins. Co.* v. *Hanlon,* 31 Legal Int. 372; *Babb* v. *Clemson,* 12 Serg. & R. 329; *Heart* v. *Hummel,* 3 Pa. 415; *McCormick* v. *Pennsylvania Cent. R. R. Co.* 49 N. Y. 315: *Robertson* v. *Lynch,* 18 Johns. 451; *Ætna Ins. Co.* v. *Weide,* 9 Wall. 977 (77 U. S. bk. 19, L. ed. 810); *Ins. Cos.* v. *Weide,* 14 Wall. 375 (see note Bk. 20, L. ed. 894).

Per Curiam:

It may be conceded that the written memoranda were not admissible as entries made in the course of business in a book of original entries, yet it is well settled that a witness may use a paper containing a list of items to refresh his memory, when he knows the entry to have been correct when he made it. The alleged settlement having been attacked, it was clearly admissible to prove the several items which preceded it, and were claimed to have been considered and included in the settlement.

We see no error in the rulings relating to the admission of evidence, nor in the charge of the court.

Judgment affirmed.

John McCANN'S APPEAL.
Edwin S. GLANZ'S ESTATE.

1. **Claims against** the **estate of** a **decedent** may be proved by oral evidence of declarations or admissions, if they are so clear, positive and specific as to establish the validity of the claims.
2. In the absence of testimony showing that the **sum allowed** an **auditor** in a case was unreasonable this court will not assume it to be excessive.

(Argued March 7, Decided March 21, 1887.)

JANUARY Term, 1886, No. 424, E. D., before Mercur, *Ch. J.,* Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Appeal from a decree of the Orphans' Court of Northampton County, dismissing exceptions to the report of an auditor distributing the estate of decedent. *Affirmed.*

Edwin S. Glanz, a liquor dealer, died intestate, June 3, 1884, leaving to survive him a widow, Mary A. Glanz, one minor child, his mother Elizabeth Glanz and a sister, Mrs. Sarah Gernet.

Letters of administration were granted to his widow, whose account, showing receipts of $8,528.16, was duly filed and confirmed.

D. W. Nevin, Esq., was appointed auditor, to examine the account and make distribution of the balance in the hands of the administratrix. Such balance was not sufficient to pay all the claims presented against the estate, nor the amount of those found due and owing by the auditor; and he distributed the balance *pro rata* among the creditors, whose claims were allowed.

To the auditor's report John McCann, a creditor of the deceased, filed exceptions, *inter alia*, to the allowance of the claims of Mrs. Elizabeth Glanz and Robert Gerver; to the action of the auditor in refusing to surcharge the administratrix and in allowing the balance of the widow's exemption to Mary A. Glanz out of the balance for distribution, and also to the auditor's fee of $275, as exorbitant and excessive and not within the limits of the Act of Assembly regulating the compensation of auditors appointed by the orphans' court.

The facts in relation to these claims are as follows:

The claim of Elizabeth Glanz was made up of a note given by Edwin S. Glanz for $500, $90 for money loaned and a $1,000 4 per cent bond, of the value of $1,217.50. No objection was made to the claim on the note for $500. The auditor rejected the claim for $90, money loaned, not considering it sufficiently proven. In allowing the claim for the bond the auditor based his decision upon the following evidence:

Mrs Sarah Gernet testified as follows:

"I live with my mother on Ferry Street. Ed. came to my mother's house, and asked where mother was, and I said she was up stairs. He went upstairs, and I had occasion to go upstairs, and saw the bond on the bed. He came down shortly after, and I saw him have the bond in his hand. I saw him have the $1,000 bond. I just came up as she had gotten it out of the box and laid it on the bed. It was a $1,000 bond. He had it in his hand when he came downstairs, and came out in the kitchen where I was, and he said, 'this is a heavy load off my mind.' I said, 'Did mother give you the bond?' and he said, 'Yes.' I asked him if that would see him through, and he said it would, and he went out of the door."

The same witness on being recalled a few days later, testified as follows: "When he got the bond he said: 'Mother, I will pay you in small amounts every week;' and then he asked her if that would do, and she said yes; when he came he asked for the money as a loan."

On cross examination she testified: "This took place the same day that he got the bond; it was when I was upstairs, before she gave him the bond; it was when I saw the bond lying on the bed, I saw her give the bond to him, that is, I saw the bond in his hand when he came down stairs, and he said he would pay her so much every week; and he asked her if that would do, and he said he would pay it back as soon as possible."

Charles B. Hetrick, to prove the value of the bond, testified as follows: "On May 14, 1884, Edwin Glanz came to our office with a $1,000 4 per cent government coupon bond, and we bought it from him for 1.21¾ and gave him a check for $1,217.50."

A part of the claim of Robert Gerver consisted of a balance due on a book account, for liquor sold. Objection was made to the allowance of this claim, on the ground that Robert Gerver was a retail liquor dealer, and the charges being made of wholesale quantities it could not be recovered. The auditor refused to sustain this objection for the reason that if Gerver violated the law, he was subject to its penalties; but in no case did he forfeit his claim until a conviction should be had under the law.

Counsel for exceptant offered to prove before the auditor that subsequent to the confirmation of the account, evidence was discovered that the entire assets of the decedent's estate were not accounted for by the accountant, and asked to surcharge her with such property and moneys remaining in her hands unaccounted for. To this offer the administratrix objected.

The auditor sustained the objection for the reason that the account was confirmed absolutely; and the auditor having been appointed to distribute the balance in the account, could only inquire as to such matters as relate to distribution, and not to such matters as effect an account already confirmed, to which no exceptions were filed before the appointment of the auditor.

After hearing the exceptions to the report of the auditor, the following opinion of the court was delivered by SCHUYLER, *P. J.*:

To this report eleven exceptions were filed, but they were not all pressed at the argument. Those that were pressed may be disposed of with but brief comment without injustice to the exceptants. If the testimony of Mrs. Gernet is to be believed, there was no error in allowing the claim of Mrs. Elizabeth Glanz. It is true that Mrs. Gernet is the daughter of Mrs. Glanz. It is also true that she had to be called to the stand a second time, after an interval of several weeks, to supply defects in her first testimony. But these were circumstances that go exclusively to her credibility, which was for the auditor. Clearly, upon such grounds alone, we would have no right to say that this witness is unworthy of belief, when the auditor, with far better opportunities of judging, says to the contrary.

The claim of Robert Gerver is made up of a number of items which are objected to in a lump. The argument for exceptants, however, was chiefly directed against the allowance of the balance of $31.86 on book account for liquors sold. It seems that these liquors were sold in wholesale quantities, and that Mr. Gerver had no wholesale liquor license, he being at the time of the sale a hotel keeper. The allowance of this part of Mr. Gerver's claim is resisted, solely upon the ground that the liquor was sold in violation of a statute of the United States, R. S. § 3242, which provides that every person who carries on the business of wholesale liquor dealer without having paid a license shall be fined not less than $1,000, and imprisoned not less than six months.

It will be noticed that the penalty is annexed, not to the act of selling, but to the carrying on of the business of wholesale liquor selling. It is a sufficient answer to the position of the learned counsel for the appellants to say that there is no evidence that Mr. Gerver "carried on the business of wholesale liquor dealer." From all that appears these sales to Glanz were the only sales of this character ever made by Gerver; and if so, we think the Act of Congress has no application. See *Rahter* v. *First Nat. Bank of Lancaster*, 92 Pa. 393.

Whether or not the payments made to Gerver were sufficient to cancel the balance claimed by him is a question of fact. The fact has been found against the exceptant; and we have not been convinced that the auditor committed error in so doing.

The account having been confirmed absolutely, the auditor was appointed for the sole purpose of distribution. He therefore very properly refused to inquire into the question of surcharge. That was a matter over which he had no jurisdiction.

The last exception is to the auditor's compensation. This is an indirect way of "swearing at the judge,"—a not unusual practice when parties lose their cases. The excellent character of the learned auditor for integrity is of weight in the balance when weighing this question of the compensation charged by him. But, outside of this, we think this charge not unreasonable. In addition to the evidence furnished by the notes of audit and the report, it was stated at the argument, in the presence of the counsel for exceptants, and not denied, that in passing upon the numerous questions of fact it became necessary to make long and tedious examinations of books of account, which greatly added to the labors of the auditor.

And now, September 28, 1885, the exceptions are dismissed and the report confirmed.

The assignments of error specified the action of the court in dismissing the exceptions to the report of the auditor and confirming the same.

Mr. **William Gorman**, for appellant:

"It is a rule of reason and therefore of law that where a witness varies in her statement of the same transaction in material particulars at different periods the testimony is to be greatly doubted."

Commonwealth v. *Sallager*, 3 Clark, Pa. 127.

From the testimony given by the daughter on the first day this claim of the mother would be considered under the law either a gift out and out or an advancement; for the law recognizes the natural affection which prompts the parent to make voluntary provision for children by anticipating in their favor the distribution of the patrimonial estate before death.

Abbott, Trial Ev. p. 150, 151, and cases cited.

In the absence of qualifying and contrary evidence a delivery of personal property by a parent to a child will be regarded as a gift or advancement.

Whitfield v. *Whitfield*, 40 Miss. 352; *Young* v. *Glendenning*, 6 Watts, 509.

Sharswood, *J.*, in *Pollock* v. *Ray*, 6 W N. C. 60, says: "Claims against the estates of decedents resting in merely oral testimony or declarations or admissions are very dangerous, and ought certainly not to be favored by the courts."

See also *Graham* v. *Graham*, 34 Pa. 480.

The claim of Robert Gerver raises the question whether the court will help a retail liquor dealer to recover for goods sold by wholesale, such retailer having no license as a wholesaler.

The proof before the auditor was that Robert Gerver was a retail liquor dealer and that he sold liquor to decedent in barrels and quantities not authorized by his license.

The Revised Statutes, page 624, section 3232, provides: "No person shall be engaged in or carry on any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided."

Section 3242 provides: "Every person who carries on the business of rectifier, wholesale liquor dealer, retail liquor dealer or manufacturer of stills, without having paid the special tax as required by law, shall for every such offense be fined not less than $1,000 nor more than $5,000, and be imprisoned not less than six months nor more than two years; and all distilled spirits or wines and all apparatus fit or intended to be used for the distillation or rectification of spirits or the compounding of liquors owned by such persons wherever found, and all distilled spirits or wines and personal property found in the rectifying establishment, or in any building, room, yard or inclosure connected therewith and used with or constituting a part of the premises, shall be forfeited to the United States."

Section 3244 defines those who are retail and who are wholesale dealers, under which latter class it is conceded Gerver must bring himself, in order to sell in the quantities for which he makes his charges against the decedent.

Under the proof he is not a wholesale dealer, only having a retail dealer's license.

Under this law Gerver is prohibited: first, from carrying on business as a wholesale dealer; and second, a penalty is prescribed in case he does carry it on.

"If a statute inflict a penalty for doing an act, the penalty implies a prohibition; and the thing is unlawful though there be no prohibitory words in the statute."

Potter, Dwarr. Stat. p 161. See also *Mitchell* v. *Smith*, 1 Binn. 110; Pars. Cont. 458; 1 Story, 615, and *Roby* v. *West*, 4 N. H. 285; *S. C.* 17 Am. Dec. 423.

Every contract, says *Chief Justice* Holt, made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, although the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, although there are no prohibitory words in the statute.

See case *Mitchell* v. *Smith*, 1 Binney, 110, cited and approved 2 Serg. & R. 196; 4 Serg. & R. 159; 80 Pa. 28; *81 Pa. 127; 73 Pa. 201, and cases cited in 17 Am. Dec. 423.

The lower court was asked, having all the parties before it, to make such order in the premises as would do substantial justice to all the parties. It refused. We submit that this was error.

McGettrick's App. 98 Pa. 9.

Messrs. **B. F. Fackenthall, P. C. Evans** and **Aaron Goldsmith**, for appellees:

The finding of an auditor upon the facts which has been approved by the court below will not be disturbed upon appeal, except for flagrant error.

Burrough's App. 26 Pa. 264; *Loomis' App.* 22 Pa. 312; *Bull's App.* 24 Pa. 286; *Gilbert's App.* 78 Pa. 266, etc. etc.

Rahter v. *First Nat. Bank of Lancaster*, 92 Pa. 393, held that the United States Statutes did not prohibit the sale of whisky, but only imposed a penalty for their violations, and that therefore the sale was not void and the price could be recovered.

A person not licensed as a broker may, nevertheless, recover the compensation agreed to be paid for negotiating a sale, although he may have rendered himself liable to the penalty of $500 for acting without a license.

Shepler v. *Scott*, 85 Pa. 329; *Justice* v. *Roward*, 10 Phila. 623.

The neglect or refusal of a wholesale dealer to pay the internal revenue tax imposed by the United States Revised Statutes does not invalidate sales made by him during the period of his default, or prevent his recovery of the price of the goods sold.

Larned v. *Andrews*, 106 Mass. 435.

Per Curiam:

It is true that claims against the estate of a decedent proved by oral evidence of declarations or admissions should be carefully scanned; yet they may be so clear, positive and specific as to establish the validity of the claims. In this case the evidence was sufficient to satisfy the auditor and the court; and we discover no error in their conclusions.

The evidence furnished does not show us the extent of the services rendered by the auditor. In the absence of testimony showing that the sum allowed was unreasonable, we will not assume it to be excessive.

Decree affirmed and appeal dismissed, at the costs of the appellant.

Bernice W. JACKSON *et al.*, Exrs. of George D. Jackson, Deceased, *Appts.*,

v.

B. Rush JACKSON *et al.*, Exrs. of Josiah Jackson, Deceased, *et al.*

In a **suit** in equity **to establish** and enforce a **resulting trust in land,** *held* as follows:

1. A resulting trust in lands **may be proved by parol.**
2. Payment of the purchase money, possession and improvements, by the *cestui que trust*, and declarations of the alleged trustee are **evidence to prove the trust.**
3. The **Statute of Limitations** is no bar to the action where the *cestui que trust* continues in possession.
4. **Presumptions** are **in favor of** the **legal title** when neither party is in possession, but when the *cestui que trust* occupies the land, they are wholly against the trustee.
5. The **court of common pleas** of a county **may entertain a bill to establish a trust in lands** situate **in another county,** when the parties are within its jurisdiction.

(Argued March 15, Decided March 28, 1887.)

JANUARY Term, 1886, No. 381, E. D., all the Judges present.

Appeal from a decree of the Common Pleas of Bradford County, in favor of complainants in a bill in equity to establish and enforce a resulting trust in lands. *Affirmed.*

This was a bill in equity filed May 6, 1881, by B. Rush Jackson and James Thomson, surviving executors of the last will and testament of Josiah Jackson, and Emily L. Patrick, formerly Jackson, and H. W. Patrick her husband, in right of the said Emily L. Patrick against Bernice W. Jackson, executrix and George C. Jackson, executor of the last will and testament of George D. Jackson, deceased, to establish a resulting trust in two thirds of 102 acres, seventy perches, of coal land in Sullivan County, and to compel a conveyance thereof to complainants.

The complaint and its amendments set forth:

1. That Josiah Jackson, George D. Jackson (in their lifetime) and B. Rush Jackson were the owners of an undivided one half of 523 acres and 110 perches, situate in Cherry Township, Sullivan County, Pennsylvania.

2. That the parties named were partners in business under the name of Jackson & Sons, until the death of Josiah Jackson, after which the others continued business as Jackson Bros. That the title to the land mentioned was held, in trust, by George D. Jackson, for himself and the others named.

3. As shown by a written declaration of trust dated July 4, 1861 [setting it out in full].

4. That George D. Jackson in 1866 acquired an undivided three seventeenths interest in the same 523 acres, etc., by conveyance from Francis Jordan, Samuel H. Bibighaus, Thos. J. Woolf *et ux.* by deed dated September 20; and by a conveyance dated two days later, said George D. Jackson took from M. C. Mercur and Charles F. Welles, Jr., an undivided five and one half seventeenths parts of 102 acres and seventy perches, which were in turn a part of the original 523 acres, etc., before mentioned. That October 24, 1866, George D. Jackson and wife conveyed to the Sullivan & Erie Coal & Railroad Company eleven and one half seventeenths of 421 acres, forty perches, of the same land, leaving for himself the legal title to the exact land in controversy, to wit: 102 acres, seventy perches.

5. That the foregoing acquisitions, and the grant of George D. Jackson were in pursuance of an understanding between George D. Jackson, Josiah Jackson, B. Rush Jackson and the Sullivan & Erie Coal & Railroad Company, by which the company was to obtain full title to the 421 acres, forty perches, of the said 523 acres, 110 perches, and George D. Jackson full title to the remainder, to wit: 102 acres and 70 perches, the same being for himself, Josiah Jackson, and B. Rush Jackson equally, and that the conveyances made by Jordan, by Woolf, by Bibighaus, by Mercur and by Welles, were but the steps in carrying out this arrangement, and were in the interest of the company and of the Jacksons, to the extents set forth, the whole being paid for, under stipulation with the Jacksons, by the coal and railroad company, in the stock of the corporation.

6. That Josiah Jackson died April 9, 1867, testate and leaving heirs, six in number.

7. That the 102 acres, etc., is a valuable coal tract, and has been entered upon and in possession of Josiah Jackson, George D. Jackson and B. Rush Jackson, an opening made, and coal mined and sold for their joint account and interest, and books kept relating to the same, first in the name of Jackson & Sons, and after the death of the father, by the sons as Jackson Bros.

8. That George D. Jackson died November 23, 1879, and by his will appointed the defendants executrix and executor thereof, with power to sell and convey real estate as fully as the testator himself could have done.

9. That B. Rush Jackson has conveyed his interest in the land to Emily L. Patrick.

10. That Josiah Jackson was in his lifetime entitled to one undivided third of the 102 acres, and the same was by his will vested in Geo. D. Jackson, B. Rush Jackson and James Thomson as trustees, one sixth part for each of the following named children as *cestuis que trust:* George D. Jackson, B. Rush Jackson, Frances Ann Gottlieber, Elizabeth C. Thomson, Mary Webb Lippincott and Emily L. Patrick. That the remainder of the tract was vested, one third in George D. Jackson and one third in B. Rush Jackson.

11. That by the death of George D. Jackson the legal title to the land became vested in his executrix and executor, subject to the existing trusts.

12. That by the death of George D. Jackson, one of the executors and trustees under the will of Josiah Jackson, B. Rush Jackson and James Thomson became the surviving trustees and as such are entitled to a conveyance from the representatives of George D. Jackson for one third (six eighteenths) of the land in controversy, and Emily L. Patrick, as grantee of B. Rush Jackson, is entitled to one undivided third.

13. That the defendants claim to hold the land in fee and to the exclusion of the trusts mentioned, denying the interests of the plaintiffs.

The defendants demurred to the bill, on the ground that the lands were situate in Sullivan County and not within the jurisdiction of the court; that it appears from the face of the bill that the remedy is full and adequate at law; and that the bill does not set forth the residences of the parties. The court overruled the demurrer and ordered defendants to answer.

The defendants' answer admitted the substance of paragraphs 1, 2, 3 and amended paragraph 4, also paragraphs 6, 8 and 9.

It denied paragraph 5, as to each and every allegation, except that the considerations for the conveyances of Jordan, Woolf, Bibighaus Mercur and Welles, to George D. Jackson were paid in the stock of the Sullivan & Erie Coal & Railroad Co.

It admitted paragraph 7, to the extent that the land is a valuable coal tract, from which coal has been taken by Jackson & Sons and Jackson Bros. But defendants aver that they have no knowledge of the arrangement, if any, under which the coal was mined, and further, that whatever possession was exercised by these firms was by permission of George D. Jackson and under him.

It admitted paragraph 10, as to the recital of the trustees and *cestuis que trustent* under the will of Josiah Jackson, but any conclusions drawn therefrom are denied.

The answer denies generally the plaintiffs' ground of complaint and presents the corpus of the defense by averment—as follows: "We deny that the legal title to the said 102 acres and 70 perches of land became vested in us subject to the terms of any declaration of trust whatever, and we aver on information and belief that on or about the 22d day of September, 1866, all interest of Josiah Jackson and B. Rush Jackson in the said lands under the terms of the said declaration of trust of July 4, 1861, ceased and determined, and that the said declaration of trust was delivered up to the said George D. Jackson, under an arrangement with B. Rush Jackson and Josiah Jackson, pursuant to which George D. Jackson conveyed for their joint benefit on the 24th day of October, 1866, to the Sullivan & Erie Coal & Railroad Co., by deed printed as exhibit C, an interest in 421 acres and 40 perches of the said 523 acres and 110 perches of land in the said declaration of trust of July 4, 1861, mentioned, more than equal in value to the undivided one half of the said 523 acres and 110 perches, and equal to 285 acres in quantity."

In answer to paragraph 12 the position of B. Rush Jackson and James Thomson as surviving executors of Josiah Jackson, is admitted,—the rest denied.

The answer to paragraph 13 is an averment of ownership in the land, when the plaintiffs' bill was filed, and a denial that the plaintiffs had any interest therein.

James H. Codding, Esq., was appointed master, who reported, *inter alia*, as follows:

Our starting point is found in the conveyance produced in evidence, executed November 8, 1859, by Michael Meylert and wife, to George D. Jackson, for an undivided one half interest in 523 acres and 110 perches of land, being parts of six warrants in Sullivan County. It is the west end of this land which is now in question. July 4, 1861, is the date of the next paper, to which so much importance is attached. It is a declaration by George D. Jackson, that "Whereas, the said George D. Jackson and Josiah Jackson and B. Rush Jackson * * * at their joint and equal expense have purchased" the interest in the land, to wit: the 523 acres, etc., "and at the special instance and request of them, the said Josiah Jackson and B. Rush Jackson, he, George D. Jackson, obtained a conveyance from Michael Meylert, in his own name solely, for the whole of the land so purchased"—now he the declarant "doth testify, declare and acknowledge, that he stands seised, and doth covenant that he and his heirs shall and will at all times hereafter stand seised of one full, equal, and undivided third part of the undivided half part of the land," to the use of Josiah Jackson, his heirs and assigns, and one like third to the use of B. Rush Jackson, his heirs and assigns; and that upon any sale or division of the property, he will grant, convey or assure to the purchaser or to his *cestuis que* *trust*, their proper share of the land or interest in the proceeds.

This declaration is here claimed as the corner stone of the plaintiffs' case. Was it ever repealed, canceled or annulled by the parties, either by their concurrence or any implication from their actions? This is important, for there is no written evidence showing any change of title to the half of the land in controversy here, since the delivery of the above deed, affecting it in 1859, and the execution of this declaration July 4, 1861.

We may here, from all the evidence, generally review the status of the parties allied in this purchase, as disclosed by the declaration. Josiah Jackson was a well known and respected citizen—a physician, long resident in Sullivan County. The others were his sons, associated with him in mercantile pursuits, at Dushore, under the style of Jackson & Sons.

[This firm was from time to time interested in acquiring land, and the method used in the transaction just mentioned was no novelty to them; for in two instances, at least, in the evidence in this case, a similar course was held—in one, the title being taken by the father, in the other by B. Rush Jackson, and both were followed by declarations showing the common interest of all.]

Other deeds in evidence prove the peculiar changes of title which occurred in the fall of 1866, and are set forth in the plaintiffs' bill. The key to these movements is found in the fact that a railroad and coal company was being organized for operation, near or upon these very lands, and that the Jacksons were associating with others in taking a leading part.

[One thing, however, for a time, complicated the arrangement, and it is clearly in the evidence. George, with a sagacity which was prophetic, declined to embark all their coal interests in the new corporation, for coal was known to be upon this land, and insisting upon his views, so arranged with other corporators, who at first objected, that he was able to reach the end sought.]

By Meylert's deed, he then had legal title to one half the 523 acres, 110 perches—by deed from Jordan, Woolf, Bibighaus, he acquired three undivided seventeenths parts of the same land. The balance of the title was in Mercur and Welles, and from them he obtained five and one half seventeenths of the 102 acres, 70 perches, which he sought to obtain; he then conveyed to the new corporation, eleven and one half seventeenths of 421 acres, 40 perches (all his title therein), and so stood as the holder of the legal title to the now divided and separated 102 acres, 70 perches, which it was his object to procure. Was this transaction for himself or for his firm? Did any other cotemporary transactions with the coal company have any influence upon this? Who, then, owned the land? The answer is the solution to this suit.

If Dr. Josiah Jackson thought the matter needed any explanation, it was not long, for he died April 9, 1867; and the substance of his will, as creating parties to this suit, is admitted by the pleadings. The firm name of Jackson & Sons, became Jackson Brothers, and business went on as before.

[The plaintiffs have produced in support of their claim, outside the deeds and declaration, three independent lines of evidence, which are intended, of course, to be mutually corroborative, pointing toward a common central fact: first, the admissions and assertions of George D. Jackson himself, as to the real ownership of the 102 acre tract, commonly known as near the "Millheim" opening; second, the books of Jackson & Sons, and Jackson Brothers, showing entries, largely in the handwriting of George D. Jackson, and all under his supervision, respecting the mining and sale of coal from this tract, and treating these transactions as at the expense and for the benefit of the firm; third, a sort of mathematical demonstration, which influences the case, by showing an equality of the parties named, in their connection with the Sullivan & Erie Coal & Railroad Company, its organizers, and in the stock issued for their lands; in other words, that George D. Jackson gave no more for his interest in the disputed land than did his partners, or that the partners received nothing for an asserted concession of interest, which George retained.]

[In the first instance, sixteen witnesses have testified to statements, in conversation and otherwise, with George D. Jackson, indicating, not an individual ownership in this land, but a common one in the members of the firm of Jackson & Sons. In each case this land has been identified as the subject of the association; and all, with one exception, were made subsequent to the several transfers of 1866. These statements came mostly in shape of information from the speaker to his hearers, and differed among themselves greatly, in manner and form,—from mere reference to the land as "ours," to an unqualified assertion that it belonged to Jackson & Sons.]

The names of the witnesses are:

Theo. Ackley, Jasper Clark, Levi Hunsinger, J. K. Farrell, J. M. Heacock, J. B. Cox, P. Armstrong, J. W. Martin, H. Williams, Charles Kissner, Christian Millheim, H. P. Moore, Horace Arnout, B. M. Sylvara, William Stevenson, J. S. Andrews.

[The admissions and statements recited by these parties are not altogether casual, but come in such circumstances that it was reasonable to expect the truth.

The testimony of the following persons, considered in this last connection, may be important: of J. K. Farrell, who was assessor in Cherry Township as late as 1869; of Dr. J. M. Heacock, who was county treasurer in 1872. The conversations related by them are almost official. Also of H. P. Moore and William Stevenson, who enjoyed unusual and friendly acquaintance with George D. Jackson in his lifetime. If their evidence amounts to anything, it is that he made unequivocal statements that the coal lands, the land in question, belonged to Jackson & Sons.]

No less definite, in respect to individual ownership, is the deposition of J. S. Andrews, but to him Jackson Bros. were named as the owners. It was after the Doctor's death. * * *.

Upon the subject opened by the second branch of the evidence, several witnesses are called to prove that the possession of the land was in Jackson & Sons up to the Doctor's death and subsequently in Jackson Bros.: Millheim, who worked eleven years at the coal opening bearing his name, Jasper Clark, who gave orders for the coal, Charles Kissner, who was a carpenter doing work at the mine. These testified of the father and two brothers as possessing and operating the land and mine, and directing the work done there.

Copious extracts are given from the books of Jackson & Sons and Jackson Bros., cash books, coal books, day books, chiefly in the handwriting of George D. Jackson, and showing that he charged himself with coal from the mine; that all matters connected with the coal business were conducted by the two firms successively, and that they paid its expenses, taxes, etc., and put the receipts from it in the common till.

The defendants do not deny this, but say that this possession and use were by permission of George D. Jackson and under him. Of this, hereafter.

[Upon the third branch of the plaintiffs' evidence, that which endeavored to show the even relations of the parties in the conveyances to the Sullivan & Erie Coal & Railroad Company, and its issue of stock in return, no infallible conclusion can be reached. The figures admit of several combinations, and none of them are just right.]

It would seem that death has precluded full explanation. It is clear, however, that the three Jacksons conveyed to the company a large amount of land (more than 2,000 acres), and of this perhaps all was subject to trusts, among themselves or for others.

[George conveyed 645 acres, 46 perches, in Cherry and Colley Townships, which he had by some arrangement for or with Michael Meylert. Also eleven and one half seventeenths of 421 acres, etc., in warrant names of Norris and others. With the latter tract we are familiar. It is land conveyed by Meylert, November 8, 1859, and for which, with the 102 acres, etc., now in controversy, the declaration of the trust of July 4, 1861, was executed. These eleven and one half seventeenths are the original one half (8½ 17ths) conveyed by Meylert, and three seventeenths (3 17ths) conveyed to him by Francis Woolf, Thomas J. Woolf, Samuel H. Bibighaus. And here we find that George D. Jackson paid no consideration to these parties for the three seventeenths. He was but their agent, the bridge over which their title passed to their company as to 421 acres, etc., to himself as to the 102 acres and 70 perches.]

B. Rush Jackson conveyed to the company 1,088 acres, which appear to have been affected by a trust.

From Mr. Mercur's evidence as to the value given to land in forming the railroad and coal company, to wit: $200 per acre—4,274 shares of stock should have been issued to the Jacksons in return. The evidence discloses but 3,439 shares issued to them directly, and these were diminished by transfers: to M. C. Mercur, 425 shares; to Francis Jordan, 123 shares; to S. H. Bibighaus, 61 shares, and to Michael Meylert, 891 shares, until finally there remains: to George D. Jackson, 646 shares; to B. Rush Jackson, 646 shares, and to the estate of Josiah Jackson, 647 shares, practically an equality in result, too nearly so to be accidental.

The defendants' offer, by T. J. Vanderslice, J. G. Wright and F. F. Lyon, to procure declarations made by George D. Jackson, to the effect that the land in question was his, and his only. This is claimed to be rebuttal, but must probably weigh as other declarations, made in the interest of the declarant, and not in the presence of those affected by the claim. Mr. Mercur gives an interesting account of what was said to him by the brothers, a short time before George's death. It is certain from this that cordiality, if not friendship, had ceased between them; that George at that time claimed the land, while Rush, consistently with his present position, asserted that it "belonged to George, Rush and father's estate." These statements were not made, however, by the brothers in each other's presence.

The foregoing may show this much: that George's declarations were not invariably to the effect of a firm or common ownership; but if he considered the land his own, and his title beyond doubt, it is not easy to understand the anxiety he expressed to Vanderslice, and his wish to see Judge Elwell or Mr. Buckalew on the subject.

[Six receipts from the county treasurer, for taxes, were produced in evidence, the intent being to show that George D. Jackson supported a burden of ownership, not likely to be usurped by a disinterested party, and himself paid the taxes upon this property, as his own. Granting these their weight, they are silently disputed. The first one, dated June 6, 1868, for $12.75, for taxes upon the George Fox and Joseph P. Norris warrants, is undoubtedly the same item as the entry in coal book, page 54, "expenses," Jackson Bros., for date, amount and purpose coincide. The second and third receipts are for same tracts, *inter alia;* and here again, entries are found, on the coal expense book of the firm, pages 93, 94, showing payments for taxes on the same dates, the amounts being about one fourth less, as taxes upon other warrants were paid for at the same time.]

The fifth receipt is indorsed on its back "Paid by G. D. J." in George D. Jackson's handwriting. Why this, if paid by him upon his own land? * * *

[It is admitted, we believe, that all presumptions adverse to the declaration of trust must arise from the transactions of 1866, and in the failure of these it is entitled to its original vitality, so far as it affects the land in question. Upon the evidence, and from the views herein expressed, the Master finds that there are no such adverse presumptions; in fact, that there is no evidence of its cancellation or rescission. It is therefore still in force as to one half the land.]

As to the other moiety, we recapitulate: George D. Jackson did not complete his legal title by any arrangement with the Sullivan & Erie Company. This tract never was included in the proposed or established boundaries of that corporation. Three seventeenths came from Jordan, Woolf, Bibighaus, who conveyed that interest in the entire 523 acres, etc., considered their share equal to ninety-two acres.

[These were evidently considered as part of the 421 acres which went to the company, for the company paid them for just that amount. This course would depress the share of the Jacksons in the 421 acres just the three seventeenths of the 102 acres and no more. The real bargain which closed the gap in the title was with Mercur and Welles.]

Mr. Mercur tells of the accepted proposition, emanating from himself and Welles. "We will give you enough of our land outside the (S. & E.) line to make the 100 acres, receiving payment by stock from the company of an equal quantity of land you deed to them."

[Now, who paid the consideration? We quote Mr. Mercur again: "The stock was issued to Welles and myself for that quantity of land in excess of our deed to the company, and the stock to the Jacksons was that much less. * * * I mention the Jacksons, meaning the Doctor, George and Rush."]

[In deference to the defendants' position on this subject the Master has studied this part of the case with special care, and the foregoing foreshadows his conclusion. He is unable to find that George D. Jackson conveyed to the Sullivan & Erie Company, in individual right, any such excess of land, above that of his partners, as to extinguish their rights in the original trust, or acquire for himself the remainder of the title; nor is there a spark of evidence showing that any such arrangement was contemplated among them, and we think he was precluded from so doing without such understanding, by the fiduciary relation he then sustained. We believe further that the three Jacksons stood on terms of substantial and real equality as to this land from their first title in 1859, to and through all the transactions of 1866.]

[It is, therefore, found that the consideration which was paid at the time when George D. Jackson took the legal title to the second half of the 102 acres, proceeded equally from Josiah Jackson, George D. Jackson, and B. Rush Jackson, and was paid from lands held by them, which were conveyed to the Sullivan & Erie Co., Mercur, Welles and others taking the stock therefor, pursuant to their arrangement. Upon this, the conveyances of 1866 established a resulting trust]—82 Pa. 371; 86 Pa. 204; and the parol evidence which has been presented is entitled to its proper weight. 17 Pa. 220; 23 Pa. 268; 68 Pa. 38, 279.

This evidence is much strengthened by the fact of possession, which is undisputed. The trustee and *cestuis que trustent*, equal in interest, were not only mere possessors, but exercised and incurred notorious acts of ownership and obligation prior to Dr. Jackson's death; and since that time there has been no other possession than that of George and Rush, who were in unchanged relation to each other and were, both, executors of their deceased father's will, privies in blood and estate.

Said Black, *C. J.*, in *Lynch* v. *Cox*, 23 Pa. 268: "Where *cestui que trust* proves purchase money to have been his, he makes a strong case; it is much strengthened by showing that he went into possession immediately, without opposition from the holder of the legal title, and is rendered nearly irresistible by a continued and undisturbed occupancy, without payment of rent, or other acknowledgment of superior right, for a long time. * * * Presumptions are in favor of legal title when neither party is in possession, but when the *cestui que trust* occupies the land, they are wholly against the trustee."

[The defendants upon argument invoked the Act of April 22, 1856—limitations—as a bar to this suit, in part, at least. But here, again, the Master believes that the fact of possession is conclusive.] "A case is not within the words of the statute when the *cestui que trust* has possession and occupancy, when the statute is running. If the statute had begun to run, this would stop it. If possession preceded the trust relation, it would not begin to run."

52 Pa. 492; 56 Pa. 119.

[The Master is, therefore, of opinion that the surviving executors of Josiah Jackson are entitled to a conveyance of one undivided third, and Emily L. Patrick (now a widow, assignee of B. Rush Jackson) to one undivided third of the 102 acres 70 perches, as described in the original bill of complaint in this case.]

Numerous exceptions were filed to the Master's report, setting forth, *inter alia*, the portions of his report inclosed in brackets. On the hearing of such exceptions the following opinion and decree were delivered by MORROW, *P. J.:*

The undisputed evidence is that Josiah Jackson and his sons, George D. and B. Rush Jackson, did business for many years at Dushore, Sullivan County, in the firm name of "Jackson & Sons," and until the death of Josiah Jackson, April 9, 1867. His sons continued in business as "Jackson Brothers" until the death of George, November 23, 1879.

The land in suit—102 acres and 70 perches—is a part of a larger tract of 523 acres and 110 perches, in Cherry Township, Sullivan County—an undivided half part or moiety of which, Michael Meylert, in the year 1859, conveyed to George D. Jackson, and on the 6th day of July, 1861, George D. Jackson executed a writing, in which he declared that he held the undivided half as follows: one third for his father, one third for his brother and the remaining third for himself. This declaration of trust was found in the safe of Jackson Brothers after George's death, among his private papers.

Three and one half seventeenths of the same tract was conveyed to George D. Jackson, September 20, 1866, by Francis Jordan and others, and on the 22d of the same month, M. C. Mercur, and Charles F. Welles, Jr., conveyed to him 5½ seventeenths of the 102 acres and 70 perches—the land in question. On the 24th of the following October (1866) George D. Jackson conveyed the eleven and one half seventeenths of 421 acres and 40 perches—all of the tract of 523 acres and 110 perches, except the 102 acres and 70 perches just mentioned—to the Sullivan & Erie Coal & Railroad Company. This left the title to 102 acres and 70 perches in George D. Jackson. It is averred in the bill that he held this title in trust for the equal benefit of his father, brother and himself. The defendants claim that he owned the land absolutely, and free and discharged from all trust.

[From the testimony taken under these allegations, the master has substantially found as follows:

1. That the declaration of trust has neither been terminated nor surrendered.

2. That the consideration for the three and one half seventeenths of the entire tract, and also the consideration of the five and one half seventeenths of the 102 acres and 70 perches were paid from lands held by Jackson & Sons at the

time when George D. Jackson took the title to the second half of the 102 acres and 70 perches.

3. That Jackson & Sons and Jackson & Brothers were in joint possession of this land—opened a coal mine on it—mined and sold coal for their joint benefit.

4. That George D. Jackson admitted to different persons at or near the mine, and elsewhere, that the land belonged to Jackson & Sons, and that he entered on the books of both firms charges and accounts of coal taken and sold from this land.

The master found there was a resulting trust, and recommends a decree that one undivided third be conveyed to the executors of Josiah Jackson, and another third to Mrs. Patrick, assignee of B. Rush Jackson.

To this report the defendants have taken exceptions, and say the master erred in not finding that the declaration of trust had been terminated and surrendered. They also say that the evidence was not sufficient to warrant the master in finding that the consideration was paid by Jackson & Sons at the time the second half of the 102 acres was conveyed to George D. Jackson, and that all the evidence is not so clear, explicit and unequivocal as to establish a resulting trust.

I have examined the evidence with some care and think it fully warrants the findings.]

[There is no question but that a resulting trust may be proved by parol. It is true that the evidence must be clear, explicit and unequivocal. Is it not so here? "A fourfold cord is not easily broken;" payment of the purchase money by the *cestui que trust*, possession, improvements, declarations of the alleged trustee that he held the land for Jackson & Sons, and finally, all participating in the coal sold. Add to this the fact that he held one half of the land in trust, as by the declaration of trust, when he took the conveyance of the second half, and a resulting trust seems to be the inevitable conclusion.]

[The Statute of Limitations is no bar, for the *cestuis que trust* were in possession.]

Clark v. *Trindle*, 52 Pa. 492; *Williard* v. *Williard*, 56 Pa. 119.

We see no error, therefore, in the conclusion reached by the master. It is not necessary to notice the exceptions in detail. They are dismissed except so far as sustained here. Let the proper decree be prepared.

[And now, to wit: February 1, 1886, this cause came on to be heard upon the master's report and exceptions thereto, and was argued by counsel for the respective parties; and, therefore, upon consideration it is ordered, adjudged and decreed—

1. That Bernice W. Jackson and George C. Jackson, executrix and executor of George D. Jackson, deceased, convey by good and sufficient deed in fee simple to James Thomson and B. Rush Jackson, surviving executors of Josiah Jackson, deceased, an undivided one third interest in the 102 acres and 70 perches of land described in the plaintiffs' bill of complaint.

2. That the said Bernice W. Jackson and George C. Jackson, executrix and executor of George D. Jackson, deceased, convey by good and sufficient deed in fee simple to Emily L. Patrick, assignee of B. Rush Jackson, an undivided one third interest in the said 102 acres and 70 perches of land described in the plaintiffs' bill of complaint, and the said Bernice W. Jackson and the said George C. Jackson, executrix and executor as aforesaid, are hereby ordered and enjoined to execute and deliver to the said James Thomson and B. Rush Jackson, executors as aforesaid, and to the said Emily L. Patrick, assignee of B. Rush Jackson, respectively, good and sufficient deeds in fee simple as aforesaid for their respective and undivided one third interests in said land as aforesaid within ninety days from the date of this decree.]

[And it is further ordered, adjudged and decreed that the defendants in the said bill of complaint pay the costs, the master's fees and expenses to be paid in the first instance by the plaintiffs in the bill, with recourse over against the defendants upon the determination of this cause.]

This appeal was taken by defendants. *The assignments of error, inter alia,* specified the action of the court in dismissing the exceptions to those portions of the master's report inclosed in brackets; the portion of the opinion of the court inclosed in brackets; the action of the court in overruling the demurrer to the bill and in entering the decree.

Messrs. **Edward Overton, Jr., John F. Sanderson** and **Rodney A. Mercur,** for appellants:

This is an equitable bill, and should be dismissed as such, the resulting trust thereby sought to be enforced being the proper subject only of an ejectment. The court will not entertain a mere ejectment bill.

Kennedy's App. 81* Pa. 163; *Messimer's App.* and *Long's App.* 92 Pa. 168, 171; *Barclay's App.* 93 Pa. 50; *Richard's App.* 100 Pa. 51; *Phipps* v. *Kent* and *Boyd* v. *Reid*, 1 Ches. Co. Rep. 158, 191.

In this State the resulting trust must be enforced by ejectment.

Lynch v. *Cox*, 23 Pa. 265.

Resulting trust enforced by ejectment.

Hall v. *Vanness*, 49 Pa. 457; *Harrold* v. *Lane*, 53 Pa. 269; *Williard* v. *Williard*, 56 Pa. 119; *Best* v. *Campbell*, 62 Pa. 477; *McGinity* v. *McGinity*, 63 Pa. 38; *Farrell* v. *Lloyd* and *Cook* v. *Cook*, 69 Pa. 239, 443; *McLaughlin* v. *Fulton*, 104 Pa. 161.

Where rights which are legal are asserted on one side, and denied on the other, the remedies are at law. They cannot be settled under equity forms.

In actions respecting real property, therefore, if there be equitable ground of relief involved, the rights of the parties must be determined at law.

Washburn's App. 105 Pa. 482.

This is because the right of trial by jury ought not to be taken away when the injury complained of could be redressed by it.

Clark's App. 62 Pa. 447; *Norris' App.* 64 Pa. 275; *Tillmes* v. *Marsh*, 67 Pa. 507; *Haines' App.* 73 Pa. 169.

The growing disposition of the Bar and the lower courts to bring and entertain cases on the equity side which are properly sustainable at law, is met by a firm holding by the supreme court to the true jurisdiction, as that court, in view of its constitution and the pressure of business upon it, must avoid questions of fact and confine itself as far as possible to revision of errors of law.

Frisbee's App. 88 Pa. 146; *Christie's App.* 85 Pa. 463; *Grubbs' App.* 90 Pa. 228; *Long's App.* 92 Pa. 171; *Richards' App.* 100 Pa. 51.

The Court of Common Pleas of Bradford County ought not to entertain a bill the sole purpose of which is to try the title to lands situate in another county.

Morris v. *Remington,* 1 Parsons, 387; *Thompson* v. *Noble,* 3 Pittsb. 201.

A trust must result if at all at the instant the deed is taken, and when the legal title vests in the grantee. No oral agreements and no payments before or after the title is taken will create a resulting trust.

1 Perry, Trusts, § 133; *Barnet* v. *Dougherty,* 32 Pa. 371; *Nixon's App.* 63 Pa. 279; *Bickel's App.* 86 Pa. 204; *Stafford* v. *Wheeler,* 93 Pa. 462; *Cross' App.* 97 Pa. 471; *Salter* v. *Bird,* 103 Pa. 447; *McLaughlin* v. *Fulton,* 104 Pa. 170; *Fricke* v. *Magee,* 10 W. N. C. 50.

If two agree to purchase and one furnishes all the money and takes the title to himself, no trust results to the other.

1 Perry, Trusts, § 133; *Edwards* v. *Edwards.* 39 Pa. 369.

A person claiming a resulting trust must show that he paid some specific sum for some distinct interest in, or aliquot part of the estate, as for a specific share, as one half, or one quarter, or other particular fraction of the whole.

1 Perry, Trusts, § 132.

One who undertakes to establish a resulting trust by parol evidence takes the burden of proof on himself.

Strimpfler v. *Roberts,* 18 Pa. 298.

A resulting trust must be proved with great clearness and certainty.

1 Perry, Trusts, § 137.

A resulting trust may be proved by oral testimony; but the evidence ought to be clear, explicit and unequivocal.

Earnest's App. 106 Pa. 319; *Kistler's App.* 73 Pa. 400; *McGinity* v. *McGinity,* 63 Pa. 38.

Evidence must be clear and unequivocal.

Nixon's App. 63 Pa. 279.

It must be clear and satisfactory.

Lingenfelter v. *Richey,* 62 Pa. 123.

It must be clear and explicit.

Cowden v. *Oyster,* 50 Pa. 373.

It must be clearly proved.

Bennett v. *Fulmer,* 49 Pa. 163.

It should be full, clear and convincing.

Buchanan v. *Streeper,* 11 W. N. C. 435.

It must be full, clear and satisfactory.

Capehart v. *Capehart,* 2 Phila. 134.

Mr. **W. H. Jessup** and *Messrs.* **William Foyle, Rush J. Thompson** and **Davies & Hall,** for appellees:

The fact that the land which may be affected by the decree lies in another county is no valid objection to the jurisdiction.

Bisph. Eq. 65; *Wilcocks* v. *Wilcocks,* 2 Vern. 558; 2 L. Cas. Eq. 345; *Penn* v. *Baltimore,* 1 Ves. Sr. 444.

So a trustee residing in one State may be compelled to make a conveyance of real estate situated in another.

Vaughan v. *Barclay,* 6 Whart. 392; *Massie* v. *Watts,* 6 Cranch, 148 (10 U. S. bk. 3, L. ed. 182); *Arglasse* v. *Muschamp,* 1 Vern. 75; *Toller* v. *Carteret,* 2 Vern. 494; *Morris* v. *Remington,* 1 Pars. 387; *Derby* v. *Athol,* 1 Ves. Sr. 202; Story, Eq. § 1296: *Muller* v. *Dows,* 94 U. S. 444 (Bk. 24, L. ed. 207).

Ejectment is a possessory action. One in possession cannot bring ejectment.

Lynch v. *Cox,* 23 Pa. 268; *Edwards* v. *Edwards,* 39 Pa. 369; *Long* v. *Perdue,* 83 Pa. 214; *Washburn's App.* 105 Pa. 482.

If as to part of the property ejectment might afford an adequate remedy, still the appellees could not be compelled to split up their claim.

Socher's App. 14 W. N. C. 383.

So also when equity takes cognizance of a litigation, it will dispose of every subject embraced within the circle of contest, whether the question be of remedy or of distinct yet connected topics of dispute.

McGowin v. *Remington,* 12 Pa. 63; *Allison's App.* 77 Pa. 221; *Souder's App.* 57 Pa. 498; *Wilhelm's App.* 79 Pa. 120; *McElrath* v. *Pittsburg etc. R. R. Co.* 68 Pa. 37.

There was no evidence which proved any surrender of the declaration of trust, nor any declarations of the parties that it had been so surrendered. The master has found as a fact that this declaration of trust was never surrendered or annulled.

"The finding of facts by a master sustained by the approval of the court below will not be set aside, except for plain error."

Kisor's App. 62 Pa. 435; *Thompson's App.* 41 Legal Int. 24.

Per Curiam:

An examination of all the numerous assignments discloses no error which demands a reversal of this decree. The demurrer was properly overruled. The jurisdiction of the court cannot be successfully questioned. As to an undivided one half of the land, the trust was proved by the written instrument. The trust as to the other half was proved by oral testimony, but by evidence so clear, explicit and unequivocal as to justify the master and the court in finding that a resulting trust was established.

Decree affirmed and appeal dismissed, at the costs of the appellants.

Max M. BETZ *et al., Plffs. in Err.,*
v.
Hetty GREENWALDT, Exrx.

In an **action on an insolvent's bond an affidavit of defense** is sufficient if it alleges that the bond was not forfeited on the day the insolvent's petition was dismissed, that the hearing was fixed not for that day but for a subsequent one and had been continued by a rule, not yet disposed of, to show cause why the order dismissing the petition should not be rescinded, and that on the day the petition was dismissed the insolvent surrendered himself to the keeper of the county prison.

(Argued March 29, Decided April 11, 1887.)

JANUARY Term, 1887, No. 140, E. D., before Mercur, *Ch. J.*, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to Common Pleas No. 3 of Philadelphia County, to review a judgment in favor of the plaintiff for want of a sufficient affidavit of defense in an action of debt. *Reversed.*

This was an action by Hetty Greenwaldt, executrix of Louis Greenwaldt, deceased, against Max M. Betz and Constantine Krause on the following bond executed by them, a copy of which was duly filed:

"*Know all Men by these Presents*, That we, Constantine Krause and Max Betz, are held and firmly bound unto Louis Greenwaldt in the sum of $8,000 lawful money of the United States of America to be paid to the said Louis Greenwaldt, executors and administrators; to which payment, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated the — day of August, 1886. *Whereas*, the above bounden Constantine Krause has been arrested or detained in the County of Philadelphia, by virtue of a *capias ad satisfaciendum* at the suit of the said Louis Greenwaldt for the sum of $4,000 and costs; and the said Constantine Krause having made application to the Judges of the Court of Common Pleas of the County of Philadelphia, in compliance with the provisions of the Act of General Assembly of the Commonwealth of Pennsylvania, passed the 16th day of June, 1836, entitled 'An Act Relating to Insolvent Debtors,' to give bond to the said Louis Greenwaldt with such security as should be required and approved by the said court; and the said court, upon the said application, having required security in the sum of $8,000, and having approved of the said Max Betz as security for the said Constantine Krause, *now*, the condition of this obligation is such that if the said Constantine Krause shall appear at the next term of the court of common pleas of said county, and then and there present his petition, for the benefit of the insolvent laws of this Commonwealth, and comply with all the requisites of the said law, and abide all the orders of the said court in that behalf; or in default thereof, and if he fail in obtaining his discharge as an insolvent debtor, that he shall surrender himself to the jail of the said county, then this obligation to be void; otherwise to be and remain in full force and virtue."

With the copy was filed an averment "that said bond became forfeited by reason of the noncompliance with its terms; that the alleged insolvent did not appear at the next term of the said court; whereupon, his petition was discharged, and the insolvency proceedings quashed."

The defendant Krause filed an affidavit of defense, to the following effect:

"The bond sued on was not forfeited on October 16, 1886, when the petition of the deponent in insolvency was dismissed. The hearing of said matter was fixed for October 23, 1886, and has since been continued by the court under a rule to rescind said order dismissing the petition. Deponent, on October 16, 1886, surrendered himself to the keeper of the Philadelphia County prison, who received him as a prisoner, in accordance with the terms of said bond, and no breach of the conditions of said bond have ever occurred. All of which facts defendant expects to be able to prove upon a trial of the said cause."

The following affidavit of defense was filed by the defendant Betz:

"Max M. Betz, being duly sworn, deposes and says that he is one of the defendants in the above case and is the surety on the bond given in this suit by Constantine Krause to take the benefit of the insolvent laws of this Commonwealth.

"This affiant says that the said insolvent, Constantine Krause, has surrendered himself to the jail of Philadelphia County as provided in said bond, in case the said insolvent failed to obtain his discharge as an insolvent debtor. And this affiant further says that he is advised by his counsel that this bond is one which does not entitle the plaintiff to judgment for want of an affidavit of defense."

The plaintiff took a rule for judgment for want of a sufficient affidavit of defense, which the court made absolute.

The assignments of error specified the action of the court: 1, in entering judgment for want of a sufficient affidavit of defense; 2, "Because it appears by the affidavit of Constantine Krause, the insolvent, that he surrendered himself on October 16 to the keeper of the Philadelphia County prison, who received him as a prisoner, in accordance with the terms of said bond; and that no breach of the conditions of said bond has ever occurred. And also it appears by the affidavit of Max M. Betz, who is the surety on the bond, that the said Constantine Krause, the said insolvent, did surrender himself to the jail of Philadelphia County as provided in said bond;" 3, "Because the affidavits of defense distinctly raise the question of fact, whether or not the said Constantine Krause did surrender himself to the jail of Philadelphia County as provided in said bond;" 4, "Because the copy of the bond filed is not such an instrument as comes within the Affidavit of Defense Law, entitling the plaintiff in this action to judgment for want of a sufficient affidavit of defense;" 5, "Because it appears by the record that the suit upon the bond was premature, as it appears by the affidavit of defense that the hearing of said matter in insolvency was fixed for October 23, 1886, and has since been continued under a rule to rescind said order, dismissing the petition, and suit was commenced upon this bond on October 18, as appears by the docket entries;" and 6, because the affidavits were sufficient to prevent judgment.

Messrs. **Lewin W. Barringer, John H. Fow, E. A. Anderson, Thomas R. Elcock** and **F. Carroll Brewster,** for plaintiffs in error:

The copy of the bond filed is not an instrument within the Affidavit of Defense Law.

A bail piece is not within the law.

Commonwealth v. *Steelman*, 2 Miles, 405.

Nor a sheriff's recognizance.

Commonwealth v. *Hoffman*, 74 Pa. 105.

It is admitted as a matter of original practice in these cases that averments may be made that the conditions of certain bonds have been broken; but where, as in this case, these averments are distinctly denied by affidavit of the defendant, the averment amounts to nothing against the oath of the defendant. The averment and the oath of the defendant, taken together, raise a distinct question of fact for a jury to pass upon.

Borlin v. *Commonwealth*, 99 Pa. 42; *Dauphin Coal Co.* v. *Dasher*, 1 Pearson, 148; *Strock* v. *Commonwealth*, 90 Pa. 272.

The suit upon the bond was premature. This affidavit says that no right of action had accrued upon the bond because the insolvent had not had a hearing in the insolvency case; that the hearing was fixed for October 23, 1886. Suit was brought on this bond October 18, 1886, although no cause of action could arise upon it until after October 23. Besides, rules were pending to show cause why the order of court should not be rescinded.

McGovern v. *Hoesback*, 53 Pa. 176.

That there was a full compliance with the spirit as well as with the letter of the bond can be seen by referring to the language of this court in the case of *Mullen* v. *Wallace*, 2 Grant, 389. See also *Gallagher* v. *Kenedy*, 2 Rawle, 166; *Potts* v. *Fitch*, 2 Pa. 173.

Messrs. **Bradbury Bedell** and **Frederick B. Vogel**, for defendant in error:

The averment of the breach of the condition of the bond was that the alleged insolvent did not appear at the next term of the said court; whereupon, his petition was discharged and the insolvency proceedings quashed.

The next court of common pleas is the first period of time succeeding the day of giving the bond, fixed by the court for hearing insolvent debtors, provided fifteen days' notice can be given by the debtor of his application; *i.e.*, of having filed his petition.

Ingraham, Insolvency, p. 28.

In cases where the petition is dismissed because the party does not attend when his case is called up, the practice is for the crier to call upon him to come forth and support his petition, or it will be dismissed. *Id.*

The order of the court declares that the debtor did not appear at the day fixed for his hearing; whereupon, the petition was dismissed and the insolvency proceedings quashed. This order made by a court of competent jurisdiction is conclusive as to the fact that the debtor did not comply with all things required by law to entitle him to a discharge; and cannot be the subject of inquiry in a collateral suit. Being a decree of a court having jurisdiction, it is immaterial what may have induced the decision; it is not subject to review in this court in a case growing out of it, and the making of this order has never been excepted to; and no assignment of error has been based upon it.

Sheets v. *Hawk*, 14 Serg. & R. 173; *Heilner* v. *Bast*, 1 Penr. & W. 267.

A surrender to jail before the day of hearing does not save a forfeiture of the bond.

Kelly v. *Stepney*, 4 Watts, 69.

A surrender to jail on the day of hearing and after an appearance, the petition not being in accordance with the Act of Assembly, does not save a forfeiture of the bond.

Detwiler v. *Casselberry*, 5 Watts & S. 179.

A surrender to jail on the day of hearing, the insolvent being present in court house, but not having personally appeared in court, does not save a forfeiture of the bond.

Wolfram v. *Strickhouser*, 1 Watts & S. 379.

The cases cited by plaintiff in error as to the insufficiency of the copy filed were brought to recover an uncertain sum of money upon bonds for the performance of collateral conditions. In the present case the bond is for a fixed sum: and the damages under it according to the law are the debt, interest and costs in the suit in which it was filed.

Rush v. *Clifford*, 10 W. N. C. 238.

But no decision is needed in this case, for the Act of March 12, 1842, § 2, P. L. p. 67, expressly brings bonds given by debtors and their sureties with the conditions prescribed in the sixth section of the Act of the 16th of June, 1836, entitled, "An Act Relating to Insolvent Debtors," within the provisions of the Affidavit of Defense Law in Philadelphia County.

As to the averment and the oath of the defendant, raising a distinct question of fact for a jury to pass upon, it is sufficient to say that the averment sets forth what the record itself showed, that the insolvent did not appear; the affidavit evades this averment, which could not be contradicted without contradicting the record, sets forth that there was no forfeiture or surrender to jail, "and that no breach of the conditions of the bond has ever occurred."

This is simply a general denial without any statement of facts, and a mere averment of a conclusion of law which is insufficient.

Marsh v. *Marshall*, 53 Pa. 396; *Bardsley* v. *Delp*, 88 Pa. 420; *Stitt* v. *Garrett*, 3 Whart. 281; *Dewey* v. *Dupuy*, 2 Watts & S. 553.

Every fact must be averred, and nothing left to inference.

Peck v. *Jones*, 70 Pa. 83.

It is claimed by the fifth assignment of error that the action was prematurely brought, because the affidavit of defense says that the record of the court below in this very case is untrue; in other words, the lower court erred because it would not receive parol evidence to contradict its own record; and that, too, as to matters especially within the knowledge and conscience of the court. That this cannot be done is so clear that it is unnecessary to cite other authorities than *Sheets* v. *Hawk*, 14 Serg. & R. 173; *Hoffman* v. *Coster*, 2 Whart. 453; and *Graham* v. *Smith*, 25 Pa. 323.

The bail can only be exonerated by a surrender upon the day the petition is dismissed, in cases where the dismissal of the petition is based upon the insolvent's nonresidence for the required time within the State; or where his insolvency arose from gambling, or purchase of lottery tickets, or where he has been guilty of embezzlement or fraud; in all of which cases he is prevented from complying with the condition of the bond by operation of law, at the instance of the creditor or the court, and not by any default in himself in complying with the provisions of the Insolvent Act. In these cases the surrender furnishes the body to answer the criminal offense, for which the surety did not undertake to answer.

Wolfram v. *Strickhouser*, 1 Watts & S. 379; *Kelly* v. *Stepney*, 4 Watts, 69; *Detwiler* v. *Casselberry*, 5 Watts & S. 179.

Although the failure of the debtor to conform with the requirement of the Act arises from ignorance or an honest mistake, it is no excuse, and the bond becomes forfeited.

Detwiler v. *Casselberry*, *supra*.

Per Curiam:

The facts averred in the affidavit of defense are sufficient, if proved, to carry the case to a jury. *Saunders* v. *Quigg*, 8 Cent. Rep. 917, 18 W. N. C. 81, 112 Pa. 546.

Judgment reversed and a procedendo *awarded.*

Thomas JONES *et al.*, *Plffs. in Err.*,
v.
Jennie BLAND *et al.*

1. A **motion for a compulsory nonsuit** is substantially a demurrer to evidence; and it is the duty of the court to assume the truth of the plaintiff's evidence and deduce therefrom every reasonable inference of fact in his favor.
2. It is not always necessary for a plaintiff in **ejectment,** first to show title out of the Commonwealth and then to trace each successive transfer down to himself.
3. **Where both plaintiff and defendant in ejectment claim under** the **same party,** there is an implied admission of title in him; and it is sufficient for the plaintiff to prove in the first instance, if he claims by devise, the seisin of the devisor and the will.
4. **Seisin of a devisor** may be **proved,** *prima facie*, by showing that he was in actual possession or in receipt of the rents as landlord at the time of his death.
5. Proof that **land conveyed to a married woman was bought with** her **husband's money** raises a presumption that the land was intended as a gift to her.

(Argued April 6, Decided April 25, 1887.)

JANUARY Term, 1887, No. 252, E. D., before Mercur, *Ch. J.*, Gordon, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to Common Pleas No. 3 of Philadelphia County, to review a judgment of compulsory nonsuit in an action of ejectment. *Reversed.*

Reported below, 2 Pa. C. C. R. 565.

This was an action by Thomas Jones and Catharine Jones, his wife, late Kate Williams, in the right of his wife; Owen Owens and Grace Owens, his wife, late Grace Williams, in right of the wife; David Williams, by Thomas R. Hughes, his guardian, against Jennie Bland, Willis O. Smith, Jennie Smith, and Margaret Brown.

The facts, as they appeared from the plaintiffs' testimony at the trial, are stated in the opinion of the supreme court.

On motion of the defendants, the court below entered a compulsory nonsuit. Upon overruling a motion to take off the nonsuit, REED, *J.*, delivered the following opinion:

This case, which has already been passed upon more than once, comes now before the court in a shape which differs essentially from any in which it has before been presented.

The plaintiffs show that Grace Bland, under whose will they claim, was the grantee of the premises in dispute in a deed made by one Ford in the year 1865, and that she went into possession, occupying the whole or a portion of the property with her husband, Aneurin Bland. No purchase money was paid by her, as far as the evidence showed, and no title or any act indicative of a claim of title was shown on the part of her grantor, Ford. The evidence also showed that the defendants, Jennie Smith, and Willis O. Smith, were respectively the second wife of Aneurin Bland, whom he married after the death of Grace Bland, and the second husband of Aneurin Bland's widow, Jennie. But there was no evidence that the defendants claimed either under Grace Bland or Aneurin Bland.

For all, therefore, that appears in this stage of the controversy, the suit may be merely a struggle for the possession of land between persons who are alike intruders upon it; and to settle such disputes courts of justice do not sit.

The case of *Jones* v. *Bland*, 2 Cent. Rep. 326, 112 Pa. 181, proceeded upon a dissimilar state of facts. There was there some proof of the payment of purchase money by Grace Bland, and the issue below had been made to turn exclusively upon a single question, namely: that of Ford's possession, which was at best but one element in the case.

The motion, therefore, to take off the nonsuit is refused.

The assignment of error specified the action of the court in entering the nonsuit and refusing to take it off.

Messrs. **Thomas R. Hughes** and **David C. Harrington,** for plaintiffs in error:

Every possession where there is title is presumed to be in subordination to it; hence, the possession of Grace Bland must be presumed, in absence of testimony, to be under her deeds; and the husband is also presumed to be in under the title of his wife, and after her death as tenant for life under her will.

Clark v. *Trindle*, 52 Pa. 492; *Jones* v. *Bland*, 2 Cent. Rep. 326, 112 Pa. 176.

The second wife of Aneurin Bland, upon his death, became a tenant by sufferance, is an intruder, and cannot dispute the title of the plaintiffs.

Asher v. *Whitelock*, L. R. 1 Q. B. 1.

The widow of a tenant for life, who continues in possession without any contract between herself and the owner of the land, holds in subordination to his title, and not adversely; she is at best a tenant by sufferance.

The subsequent marriage of such widow does not change the character of her possession; the second husband occupies the premises in right of his wife, and his possession, during her life, is in privity with the owner's title, and not adverse to it.

Bannon v. *Brandon*, 34 Pa. 263.

In *Bowser* v. *Bowser*, 2 W. N. C. 624, the husband bought property, and it was sold at sheriff's sale, where his wife became the purchaser. She was without means, but borrowed part of the money and obtained credit for the balance, which her husband paid. Upon her death her husband remained in possession, remarried and left his widow in possession. The daughter of the first wife brought ejectment and recovered on the ground that the title was in the heir of the deceased wife, and that her husband had no title.

A case was decided in the same way by *Judge* Hare, in *Caffrey* v. *McFarland*, 1 Phila. 555, where the facts were exactly like the present.

That plaintiff in ejectment need not go further back in deducing title in the first instance than the will under which he claims, of one who died seised of the land. The law presumes a fee simple in the devisor, unless the contrary is shown.

M'Henry v. *M'Call*, 10 Watts, 470; *Miller* v. *Wilson*, 2 Yeates, 294.

In ejectment by the heirs of one who died seised, against the widow and her second husband, it is not necessary for the plaintiff to show title in the ancestor.

Cook v. *Nicholas*, 2 Watts & S. 27; *Mobley* v. *Bruner*, 59 Pa. 481.

The proposition which used to be a maxim, that the possession of the wife is the possession of the husband, is no longer any truer than its converse.

Hoar v. *Axe*, 22 Pa. 384.

A conveyance to a wife vests the title in her, even as against the husband and his heirs, as was decided in *Earnest's App.* 106 Pa. 310; *Bowser* v. *Bowser*, 2 W. N. C. 624, and *Emery* v. *Marshall*, Legal Int. 1885, p. 395.

Where a defendant moves for a nonsuit, the plaintiff's evidence must be taken to be true; and every reasonable inference of fact which a jury might draw from it in favor of the plaintiff must be drawn by the judge.

McGrann v. *Pittsburgh etc. R. R. Co.* (Pa.) 2 Cent. Rep. 565; *Miller* v. *Bealler*, 100 Pa. 583; *Maynes* v. *Atwater*, 88 Pa. 496; *Schuchardt* v. *Allen*, 1 Wall. 359 (68 U. S. bk. 17, L. ed. 642); *Greany* v. *Long Island R. R. Co.* (N.Y.) 2 Cent. Rep. 452.

If there was any doubt as to the meaning of the witness, it was for the jury to solve.

Devine v. *Miller*, 37 Legal Int. 436.

Where there is any evidence which would justify an inference of the disputed fact it must go to the jury.

Maynes v. *Atwater*, 88 Pa. 496; *Howard Express Co.* v. *Wile*, 64 Pa. 201; *R. R. Co.* v. *Heil*, 5 W. N. C. 91.

This case has already been decided by this court and is reported in 2 Cent. Rep. 326, 112 Pa. 176.

Messrs. **A. A. Hirst** and **Crawford & Dallas,** for defendants in error:

In the present case the plaintiffs not having proved the material facts of Grace Bland's payment of the purchase money and possession at the time of her deed under it, which facts were the basis of the decision in 2 Cent. Rep. 326, 112 Pa. 176, and it appearing that colored people had possession of the principal part of the house, covering the period of her alleged possession, which was to whatever extent it existed, but jointly with her husband, the rule that even as against an intruder, the plaintiffs must show a title from a prior and exclusive, not a mixed or concurrent possession, precludes the plaintiffs' recovery.

7 Alb. L. J. 402 and cases cited; Tyler, Eject. pp. 72, 73, 105, 204, 685.

In *Clark* v. *Trindle*, 52 Pa. 497, both sides gave testimony and claimed under the same title, one as legal owner, and the other as *cestui que trust;* but the court held that a joint occupancy, or a possession not exclusive, will not amount to entry under color of title, as a starting point for the running of the Statute of Limitations, or making title against the joint possessor.

Mr. Justice **Sterrett** delivered the opinion of the court:

In considering the validity of a compulsory nonsuit it is the duty of the court to assume the truth of plaintiff's evidence and deduce therefrom every reasonable inference of fact, in his favor, that might be drawn by a jury. In that respect it is substantially the same as a judgment for defendant on demurrer to evidence.

If this case had been submitted to the jury, as it should have been, they doubtless would have found substantially the following facts, viz.: that in August, 1865, Ford and wife sold and conveyed the premises in controversy to Grace Bland, who afterwards went into possession of the same with her husband and died seised thereof in 1872, having first, by her will, duly probated, devised the same to her husband, Aneurin Bland, for life, and remainder in fee to the plaintiffs; that, after the decease of testatrix, Aneurin Bland the tenant for life married Jennie Bland, one of the defendants, and they continued in possession until his death in 1878. His widow, continuing to occupy the premises, afterwards married Willis O. Smith, another of defendants in possession. The remaining defendant occupied part of the premises as tenant of the widow, Jennie Bland. These are the controlling facts which the jury would have been clearly warranted in finding from the evidence, and upon them, without more, the plaintiffs had a *prima facie* case, entitling them to a verdict. The intervening life estate of Aneurin Bland having terminated by his death in 1878, the plaintiffs (as devisees in fee of the remainder) were entitled to possession as against his widow and all other mere intruders.

As we said before, it is not always necessary for a plaintiff in ejectment to first show title out of the Commonwealth, and then trace each successive transfer down to himself. If, for example, both parties claim under the same person, there is an implied admission of title in him. In like manner, the fact that defendant acquired possession as tenant of plaintiff warrants a presumption of title in the latter. If plaintiff claims by descent, it is sufficient for him, in the first instance, to prove his heirship and that the ancestor from whom he derives title was the person last seised of the premises. If he claims as devisee, he must, in like manner, prove the will and seisin of his devisor. The latter may be done by showing that he was in actual possession or in receipt of the rents as landlord at the time of his death; because possession is presumptive evidence of seisin in fee until the contrary is shown. *Jones* v. *Bland*, 2 Cent. Rep. 326, 112 Pa. 176.

As against the defendants, who are strangers, in blood as well as title, to Grace Bland, the devisor of plaintiffs, the latter were *prima facie* entitled to recover upon showing that she died in possession of the premises, and that the intervening life estate, created by her, had terminated. Those who continued to hold possession after the death of Aneurin Bland, the life tenant, were *prima facie* intruders.

The learned judge was mistaken in saying the former case, or rather the former trial of this case, proceeded upon a dissimilar state of facts. There was some evidence of additional facts, but they were not essential. The controlling facts deducible from the evidence are substantially the same. In the absence of any controversy between the devisees of Grace Bland and creditors of her husband, the conveyance by Ford and wife vested the title in her.

The recital and receipt in the deed were *prima facie* evidence of payment of the consideration money by her. If it were even shown that her husband paid the purchase money, it would not affect her title. The presumption would be that it was intended as a gift from him to her.

It is unnecessary to pursue the subject further, or to repeat what was said when the case was here before. The assignment of error is sustained.

Judgment reversed, and procedendo *awarded.*

Samuel THOMPSON, *Plff. in Err.*,
v.
COMMONWEALTH of Pennsylvania.

1. Public policy requires that **indictments for forcible entry and detainer** should be discouraged unless there is evident force against the person in actual possession.

2. **Entering a house** under claim of right and in the absence of the occupant, and substituting a new lock for the occupant's, does **not** without more **amount to forcible entry** and detainer.

(Argued Jan. 31, Decided April 25, 1887.)

JULY Term, 1886, No. 186, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, and Green, *JJ.*

Error to the Quarter Sessions of Fayette County, to review a judgment on a verdict of guilty on an indictment for forcible entry and detainer. *Reversed.*

The indictment was as follows:

The grand inquest of the Commonwealth of Pennsylvania, now inquiring in and for the body of the County of Fayette, upon their oaths and solemn affirmations, respectively, do present, that Samuel Thompson, late of said county, yeoman, and Robert Thompson, late of the county aforesaid, yeoman, on the second day of March in the year of our Lord, 1885, in the county aforesaid, and within the jurisdiction of this court, with force and arms, with violence and a strong hand, unlawfully did enter into a certain store room situate in the Borough of Brownsville, Fayette County, Pennsylvania, fronting on Main Street in said borough, then and there in the peaceable possession of one John Dutton; and they, the said Samuel Thompson and Robert Thompson, then and there, with force of arms and with a strong hand, by force and threats and menacing conduct, unlawfully did expel, remove and turn out the said John Dutton from the possession of the said premises with the appurtenances, and the said John Dutton so as aforesaid expelled, removed and turned out from the possession of the same by force and with a strong hand, and by menaces and threats did then and there unlawfully hold and keep out, and other wrongs to the said John Dutton then and there did, to the great damage of the said John Dutton, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

The facts, as they appeared at the trial, are stated in the opinion of the supreme court.

INGRAHAM, *P. J.*, charged the jury as follows:

"As you have already heard, this is an action or prosecution in the name of the Commonwealth against Samuel and Robert Thompson, for forcible entry and detainer. It is claimed by the Commonwealth that in the month of November, 1884, the prosecutrix, Mrs. Ada O. Krepps, was in the possession of a frame building in Brownsville in this county—in the 'Neck' I believe, and that while so in the possession of that property, the defendant took possession of it by force and is still in the possession of it. No, I believe the prosecutrix resumed possession of the property; and if you are satisfied from the evidence of these facts, counsel have agreed that you may return a verdict of guilty of forcible entry, as charged in the indictment. So, if you are satisfied of the fact of the defendant's guilt beyond a reasonable doubt, you can convict him. But if you have a reasonable doubt as to his guilt, he is entitled to the benefit of that doubt, and you can acquit him."

Verdict: guilty.

The assignments of error specified the charge and the subsequent action of the court below in overruling a motion in arrest of judgment.

Mr. **Edward Campbell,** for plaintiff in error:

The indictment is for the forcible entry of a store room in Brownsville in said (Fayette) County; to this the bill adds, "fronting on Main Street in said Borough."

This description is not sufficient to sustain an indictment.

1 Wharton, Precedents, 460, note b; *Vanpool* v. *Commonwealth*, 13 Pa. 390; *M'Nair* v. *Rempublicam*, 4 Yeates, 326; Adams, Eject. p. 27; 2 Troubat & H. Pr. 309-316.

If adjoiners were given, that alone would not suffice.

Hunt v. *McFarland*, 38 Pa. 69.

Judgment cannot be entered if the title of the prosecutor is not set out in the bill, for the prosecutor may have been tenant at will and liable to be turned out.

Vanpool v. *Commonwealth*, 13 Pa. 390; *Respublica* v. *Campbell*, 1 Dall. 354 (1 U. S. bk. 1, L. ed. 178); *Leinbach* v. *Kaufman*, 1 Cent. Rep. 420; *McDermott* v. *McIlwain*, 75 Pa. 341; *Trimbath* v. *Patterson*, 76 Pa. 277.

The information alleges Dutton to have been a "tenant," but no allegation anywhere appears as to whose tenant he was; this cannot be inferred.

The information also alleges that the title was in the husband of the prosecutrix. She therefore could not have been entitled to possession. The verdict in this case is guilty of forcible entry, only. The bill charges forcible entry and detainer. There can be no judgment because the court cannot separate the single count of which the bill consists.

Commonwealth v. *Toram,* 3 Clark, 288.

Nothing is alleged anywhere to show any right of Ada O. Krepps, the prosecutrix, to the possession of the premises; and it is not pretended that she was in possession. The prosecutor must aver a freehold, and prove at least an occupation or reception of the profits.

2 Whart. Am. Cr. Law, § 2042.

In this case the bill alleges an occupation by Dutton, who is a stranger, or for all that appears may have been defendant's tenant.

Possession or seisin of the prosecutor must be alleged in the bill.

2 Whart. Cr. Law, 8th ed. § 1108; *Pennsylvania* v. *Waddele,* Addison, 41; *Pa.* v. *Lemmon,* Add. 315; *Pa.* v. *Leach,* Add. 352.

One who breaks open the door of his own house, which is forcibly detained from him by one who claims the bare custody of it, cannot be guilty of forcible entry.

Commonwealth v. *Keeper of Prison,* 1 Ashm. 146; Jackson & G. Land. & T. p. 154, pl. 244, p. 338, pl. 623; *Overdeer* v. *Lewis,* 1 Watts & S. 91; *Kellam* v. *Janson,* 17 Pa. 469; *Brown* v. *Brightly,* 14 W. N. C. 497; *Commonwealth* v. *M'Neile,* 8 Phila. 438; *Commonwealth* v. *Haxton,* Lewis, Cr. L. 282.

Mr. Justice **Gordon** delivered the opinion of the court:

An examination of the evidence in this case develops the following facts: John Dutton, the alleged tenant of the prosecutrix, left his shop at about 5 o'clock on the evening of the 4th of November, 1884, and when he returned the next morning, he found as he says, that the lock had been taken off the door and two new ones put on, the one on the inside and the other on the outside. He discovered no other marks of violence than what is here stated, except that a piece had been cut out of the door. His possession does not seem to have been disturbed, nor was there the slightest interference with him personally; and if his occupancy was at all interrupted he does not so state. Indeed, there could not have been an interruption thereof for a longer period than it took to remove the locks, since they alone interfered with his immediate entrance upon the premises. There was neither violence nor threats of violence; nothing which was calculated to alarm the most timid.

The explanation of the matter seems to be that some time during the night Samuel Thompson and his son Robert had visited the premises, and quietly, under a claim of right, had substituted their own locks for that of Dutton. This evidence does not bring the case within the Act of March 31, 1860, since no entry was made with violence and a strong hand or other circumstances of terror, and the court below ought so to have instructed the jury. An insignificant trespass, such as that above described, which had no public significance, cannot be made the subject of a criminal prosecution. As was said in *Respublica* v. *Devore,* 1 Yeates, 501, indictments for forcible entry and detainer ought to be discouraged unless there is evident force against the person in actual possession.

The judgment is reversed, and it is ordered that the record be remitted to the Court below.

Henry MILES, *Plff. in Err.,*
v.
Benjamin LEWIS *et al.*

1. A **vendee of land,** in possession under a contract of sale on which a balance of purchase money was unpaid, **confessed judgment in amicable ejectment, to** the **vendor,** to be released on payment of the balance of the purchase money, in ten days; the money not being paid, judgment was entered twelve days thereafter, and a writ of *hab. fa.* issued; thereupon the vendee took a written lease of the premises from the vendor, at a small sum per month, and the sheriff returned the writ executed. The **vendee** was, at the time, **indebted by judgment, in favor of a third party.** Thereafter the **property** was **sold under a fi. fa.** issued on said last mentioned judgment against the vendee, to the present plaintiff, who now brings ejectment therefor against the vendor and vendee. The vendee testified that he told the vendor that said judgment creditor was about to push his judgment to collection; that the amicable action and confession of judgment in ejectment were for the very purpose of hindering such judgment creditor from reaching the property; and that the nominal payments of rent provided for in the lease were to apply on the purchase money. *Held,* that there was such **evidence of** fraud and collusion in the transaction between the vendor and vendee, with the **intent to delay** said **judgment creditor** in the collection of his judgment, as should have been submitted to the jury, and which, if found to exist, would **render** the **transaction void** as to the judgment creditor sought to be **defrauded,** and the purchaser under him—the present plaintiff.
2. If the plaintiff in the present action is entitled to recover, it is because the amicable action in ejectment, with judgment confessed, was collusive and fraudulent as to the said judgment creditor; and the **plaintiff** is **not bound to tender** or pay any **money to** the **vendor.**
3. The **testimony of** the **vendee** as to the intent of the transaction between him and the vendor was **not incompetent** under the rule which applies where one party to an instrument seeks to set it aside by oral testimony—for he would still be bound by the judgment in ejectment and lease, and the judgment would be valid as to all persons except the creditor sought to be defrauded.

(Argued Feb. 24, Decided March 21, 1887.)

JANUARY Term, 1887, No. 286, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Lackawanna County, to review a judgment on a verdict for defendants in an action of ejectment. *Reversed.*

This action was brought by Henry Miles against Thomas Barrowman and Benjaman Lewis to recover possession of premises in the City of Scranton. The following facts appeared on the trial before HAND, *P. J.:*

April 25, 1870, Alexander and Thomas Barrowman contracted to sell the lot in question to W. S. Griffiths. November 7, 1870, Griffiths sold the lot to Benjamin Lewis in consideration of $670. April 12, 1871, Griffiths assigned the contract to Alexander and Thomas Barrowman and on May 22, 1874, Alexander Barrowman assigned his interest in the contract to Thomas Barrowman, the present defendant.

Lewis, for the purpose of building on the lot, borrowed $1,000 of the Miners & Laborers Building Association, and gave his judgment note therefor, upon which note judgment was entered May 15, 1872, and the same was duly revived by *sci. fa.* On *fi. fa.* issued on this judgment, the property was sold on October 11, 1879, to Henry Miles, and a sheriff's deed delivered to him; and he brought this action of ejectment, claiming under such title.

Defendant Barrowman showed title as follows:

May 12, 1877, nearly four years after the payments of purchase money on the contract were due from Lewis, Barrowman and Lewis entered into an agreement whereby Lewis confessed judgment in ejectment to Barrowman, conditioned upon the payment in ten days of the amount of $344.58, the balance due on such contract.

The money not having been paid, twelve days thereafter, and on May 24, 1877, judgment was entered upon such agreement and the next day a writ of *hab. fa.* was issued and executed, and the possession of the tract of land delivered to Barrowman. A lease was then executed between Barrowman and Lewis for the land and house, at a rental of $5 a month, under which Lewis continued in possession of the premises up to November, 1882.

On behalf of plaintiff, Lewis testified that the arrangement between himself and Barrowman was entered into for the purpose of preventing the Building & Loan Association from pushing its judgment and obtaining possession of the property, and that the agreement was that the sum paid by Lewis as rent should be applied in extinguishment of the balance due on the contract, and that upon paying such amount in full he was to have a deed of the premises.

These statements were denied by Barrowman.

Plaintiff, *inter alia*, presented the following points:

1. If there is evidence in this case tending to show that the amicable action entered into between Barrowman and Lewis was entered into for the purpose of hindering or delaying the Miners & Laborers Building Association in the collection of its judgment, or for the purpose of defeating the claim of said association, then it is such evidence of fraud and collusion as ought to be submitted to the jury.

Ans. "If there was evidence in the case, we would affirm this principle. We affirm it as a principle of law, but we answer it in the negative on the facts of this case." *Second assignment of error.*

2. If the jury believe from the evidence in this case that Thomas Barrowman and B. Lewis effected the conveyance of the land described in the writ to Thomas Barrowman (through the amicable action of ejectment) for the purpose of defrauding the Miners & Laborers Building Association, such conveyance is fraudulent as against the Miners & Laborers Building Association, and for all purposes of appropriating the property of B. Lewis to the satisfaction of the loan of the Miners & Laborers Building Association the equitable title to the property at the time of the sheriff's sale to Miles was deemed to be still vested in B. Lewis.

Ans. "We negative this point, upon the facts of this case." *Third assignment of error.*

3. If the jury believe from the evidence that the amicable action of ejectment and confession of judgment in the same by B. Lewis to Barrowman was entered into by B. Lewis and Barrowman for the purpose of defrauding the plaintiff in the judgment and execution on which the land was sold, and was purchased by the plaintiff here, and that the land was that of B. Lewis at the time of the sheriff's sale of the interest of B. Lewis in the same to the plaintiff here, to be reconveyed to B. Lewis, or to anyone whom he might name, upon payment of the purchase money due Barrowman on said land, the plaintiff is entitled to recover and the verdict must be for the plaintiff for the land described in the writ, conditioned on his paying Barrowman, the defendant, the amount due him by B. Lewis.

Ans. "We answer this in the negative, upon the facts in this case. Miles should have tendered the purchase money, if he wished to stand upon Lewis' equities." *Fourth assignment of error.*

4. Under all the evidence in this case in any event the verdict must be against Benjamin Lewis for the land described in the writ.

Ans. "We answer that in the negative." *Fifth assignment of error.*

5. That if the jury believe that Barrowman and Lewis, by means of an amicable action of ejectment, perpetrated a fraud upon the Building Association, a lien creditor of Lewis, the purchaser at sheriff's sale, the plaintiff in this case, is entitled to recover without making a tender of the unpaid purchase money to the holder of the legal title prior to his bringing his action of ejectment.

Ans. "We answer that in this case there appears be no fraud against the Building Association. If there is an equity outside of the question alleged, of fraud *ex maleficio*, of fraud on the ground that Barrowman is a trustee *ex maleficio*, that equity can be secured by a conditional decree by the court on its equity side, Barrowman would not be made a trustee *ex maleficio*, except by refusing to convey on offer of payment. Under the principles and the facts in this case, your verdict will have to be for the defendant." *Sixth assignment of error.*

The court charged the jury, *inter alia*, as follows:

"It is further alleged and sworn to by Benjamin Lewis that when Thomas Barrowman took this tract of land back, under these proceedings in ejectment, he gave Lewis a lease (which is true) for the premises, and that at the same time he agreed with Lewis that if he, Lewis, would pay him the amount that was due him, or when he did pay him the amount that was due him, he would reconvey, or convey rather, the land to him."

"Mr. Barrowman is not in the position of having received a conveyance from Benjamin Lewis; he is simply in the position of having enforced his own purchase money against the tract of land.

"Now, this evidence is in the case only testified to by Benjamin Lewis, and alters or contradicts the written agreements of the parties, to wit: the agreement for the amicable ejectment and the lease in the case. But giving to this agreement the full force that the words sworn to can imply (and I should state here, however, before I say that, that there is but one witness who testifies to this arrangement, and that is Benjamin Lewis, who in his testimony admits that he had an interest in this case, and that it is against Thomas Barrowman), but as I say, admitting the whole force that can be given to these words that are sworn to as having been uttered by Thomas Barrowman, and the agreement that is set up, it amounted to an agreement by the holder of the legal title, which he had acquired again against the equitable title, that if he received the amount that was due him, he would make a conveyance.

"Assuming that the lease, at the rate of $5 per month, which, as the evidence shows is not a high rate of rental, but on the contrary rather a low rate, assuming that the rental was to be applied to the purchase money that was due Thomas Barrowman, it would require a longer time than elapsed before this action was brought to raise any equity that would entitle Benjamin Lewis, or anyone holding under him, to bring his action and compel a conveyance on the part of Mr. Barrowman.

"Mr. Lewis was obligated, if no time was fixed to pay that purchase money, to pay it within a reasonable time. The evidence is that he even failed to pay the rent; and the evidence is that he remained in possession of that land from 1877 down to the time when this suit was brought, during which he had the full opportunity, if that agreement was good, to make payment to Thomas Barrowman for the amount that was due him.

"The evidence further discloses that he remained in possession until 1882. Now, there is no equity that this court will enforce on its chancery side, to compel a conveyance to Benjamin Lewis, or anyone claiming under him, without the payment of the money to Thomas Barrowman. If this case is eventually to be decided wholly upon the equity that is set up by this plaintiff, that equity can be reached without a verdict here, because it is a fixed equity, the amount can be easily calculated and a decree could be made upon the payment of the money. But we hold in this case that this action being brought by Henry Miles, without any offer to pay Thomas Barrowman the amount that was due him, or before the arrangement was completed that is set up by Benjamin Lewis, if he stands upon that, his action was premature, brought too soon; and at all events the court, under the circumstances of this case, would not, at this late day, allow a verdict to go in favor of the plaintiff against Thomas Barrowman, except there was evidence that a tender of the amount due Thomas Barrowman was made before the action was brought, because upon these equities Henry Miles is seeking, as a vendee, to enforce the specific articles of agreement, and has shown no disposition on his part, as far as the evidence is concerned, to satisfy the just and equitable claim of Thomas Barrowman against this tract of land.

"Upon all the facts of the case, therefore, and upon the equitable principles that control us, we say there is no fraud in this case against Benjamin Lewis, for he has not complied with his agreement with Thomas Barrowman, or attempted to comply with it; there is no fraud against Henry Miles, for he stands in no better position than Benjamin Lewis, and had not offered to comply before the suit was brought.

"There is no fraud against the building association, for it had its lien upon the equitable title in 1872, and rested quietly on it until in 1879. Knowing that Mr. Barrowman had the legal title, and that it was liable at any time to be excluded from any interest in the equitable title, whenever he saw fit to enforce his payment for purchase money, the association laid by for seven years. If it had desired to enforce its right to have a legal title, it was its duty to have sold the land upon its judgment, becoming a vendee, then tender Thomas Barrowman the purchase money and ask for a deed. This it did not do. We hold that Henry Miles stands in no better position than it does."

The jury returned a verdict for defendant as directed by the court in its answer to defendant's fifth point, and judgment was entered thereon.

The first assignment of error specified the action of the court in directing a verdict for defendant. The other assignments of error are noted above.

Messrs. **Lemuel Amerman, H. M. Edwards** and **C. Comegys,** for plaintiff in error:

Under the Statute of Fraudulent Conveyances, 13 Eliz. chap. 5, §§ 1, 2, Rob. *Dig.* 295, a fraudulent conveyance may be effected through an action of ejectment.

Forrester v. *Hanaway*, 82 Pa. 218; *Sweetzer's App.* 71 Pa. 264.

A fraudulent conveyance or what is the same thing a fraudulent suit, judgment and execution, is void as against the person intended to be defrauded by it, and for all purposes of appropriating the property to the satisfaction of his claim, the property is to be deemed still vested in the debtor.

Kimble v. *Smith*, 9 W. N. C. 357; *Harlan* v. *Maglaughlin*, 90 Pa. 293; *Monroe* v. *Smith*, 79 Pa. 459; *Snyder* v. *Christ*, 39 Pa. 499; *Byrod's App.* 31 Pa. 241; *Phipps* v. *Boyd*, 54 Pa. 342; *Heath* v. *Page*, 63 Pa. 123; *Haymaker's App.* 53 Pa. 306; *McKee* v. *Gilchrist*, 3 Watts, 280; *Rhoad's App.* 11 W. N. C. 276.

If the intention and effect of the amicable action of ejectment was to hinder, delay or defraud the Miners & Laborers Building Association in the collection of its judgment, it is absolutely void.

Bunn v. *Ahl*, 29 Pa. 387; *Passmore* v. *Eldridge*, 12 Serg. & R. 198; *Stahle* v. *Spohn*, 8 S. & R. 317; *Forrester* v. *Hanaway*, 82 Pa. 224.

Whether or not the amicable action of ejectment, confession of judgment and execution thereon, was to the end, purpose and intent to delay, hinder or defraud the Miners & Laborers Building Association was a question of fact that should have been submitted to the jury under all the evidence in this case.

McGrann v. *Pittsburg etc. R. R. Co.* 2 Cent. Rep. 565, 111 Pa. 171; *Kaine* v. *Weigley*. 22 Pa. 183; *Rogers* v. *Hall*, 4 Watts, 359; *McKibbin* v. *Martin*, 64 Pa. 352.

If possession has been obtained by Barrowman, the holder of the legal title under circumstances which is a fraud on the lien creditor, the Miners & Laborers Building Association, it follows that Miles, the purchaser at sheriff's sale, is entitled to recover that possession from Barrowman without making a tender prior to bringing ejectment, even if there were purchase money due.

Forrester v. *Hanaway*, 82 Pa. 225; *Harris* v. *Bell*, 10 Serg. & R. 89; *Gregg* v. *Patterson*, 9 Watts & S. 208; *Heft* v. *McGill*, 3 Pa. 256; *Ives* v. *Cress*, 5 Pa. 121; *D'Arras* v. *Keyser*, 26 Pa. 249.

Messrs. **E. Merrifield** and **S. B. Price,** for defendants in error:

As to Barrowman's right to enter judgment in the amicable ejectment suit, see *Damon* v. *Bache*, 55 Pa. 67.

Where parties without any fraud or mistake have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement.

Martin v. *Berens*, 67 Pa. 459. See also *Thorne* v. *Warfflein*, 100 Pa. 519; *Stine* v. *Sherk*, 1 Watts & S. 195; *Morton* v. *Weaver*, 99 Pa. 47; *Cummins* v. *Hurlbutt*, 92 Pa. 165.

A judgment by confession has all the qualities of a verdict.

St. Bartholomew's Church v. *Wood*, 61 Pa. 96.

The case of *Forrester* v. *Hanaway*, 82 Pa. 224, has not a single element in common with this case. It was distinguished in *Price's Appeal.* The purchase money was not all due. It was on the eve of a sheriff's sale of the vendee's interest. An absolute judgment in ejectment was confessed on one day, and the next the property delivered on a *habere facias.* The vendor knew of the executions, and that the property was to be sold by the sheriff. The court held this a constructive fraud.

Mr. Justice **Trunkey** delivered the opinion of the court:

In *Damon* v. *Bache*, 55 Pa. 67, it was said that no wrong can be committed in the pursuit of legal rights by lawful means. Therefore a vendor of land, upon request of the vendee because of his indebtedness to others, may bring an action of ejectment, take a confession of judgment to be released on payment of the sum due and owing by the vendee at a stipulated time, and on failure of the vendee to perform the condition, issue execution and recover possession of the land.

It matters not that the vendee suggested the action and had some expectation in favor of his father and mother, for the vendor did nothing wrong in vigilantly enforcing legal rights, and where there is no wrong there can be no fraud. The evidence in that case was insufficient to warrant the inference of an intent on the part of the plaintiff in the action in ejectment, to hinder or delay a creditor of the vendee.

Where the owner of the equitable title, being indebted to divers persons, confesses judgment to the vendor in ejectment, conditional for payment of the purchase money, the judgment will not be set aside in favor of the vendee's other creditors, if there is no evidence of fraudulent intent. Judgment creditors of the vendee must take care of themselves; and in case there is no actual fraud, they cannot complain that the plaintiff in the amicable action and confession of judgment in ejectment, allowed the time given for payment of the money to expire before filing the confession of judgment in court; for that fact of itself does not show fraudulent collusion to hinder creditors. *Price's App.* 2 Com. Pleas Rep. 79.

But it was remarked by *Justice* Gordon: "Had other circumstances indicated a collusion between the parties for the purpose of defrauding the appellant, this relation of the confession until the last day of grace would undoubtedly have been evidence bearing upon the fraudulent intention."

Land was sold by articles of agreement, and nearly $700 of purchase money remained unpaid, a portion thereof not due. The vendee had made improvements, and his equitable interest was worth $2,000; judgments were entered against him exceeding $3,000, and on one of the judgments execution had been issued and the property advertised for sale. On the day before the date fixed for the sheriff's sale, the vendee confessed judgment in ejectment, without stay, in favor of the vendor, who immediately issued execution and recovered possession. There was no direct evidence of an agreement or promise by the vendor in favor of the vendee or his family; nor was there evidence that the vendee had an expectancy in favor of his parents. The unusual haste, the agreement making all the purchase money due, with the other facts, were sufficient, as remarked by the present chief justice, to "naturally lead the mind to the conclusion that the primary object of the arrangement was to remove the estate of McNamara out of the reach of his creditors." And as to them the judgment in ejectment was void. *Forrester* v. *Hanaway*, 82 Pa. 218.

In this case the amicable confession of judgment in ejectment, to be released on payment of $344.53 purchase money in ten days, was signed May 12, 1877, and filed in court twelve days thereafter. Execution was issued on the day the judgment was filed, and on the next day the plaintiff and sheriff went to the premises; whereupon, the defendant took a written lease for the same, and the sheriff returned his writ showing he had delivered possession as commanded. At the time of this transaction, the vendee was indebted by judgment in favor of the Miners & Laborers Building & Loan

Association, $1,000. There is evidence tending to show that the vendee's interest in the land was worth the amount of that judgment.

Had the jury believed the testimony of Benjamin Lewis, they would have been warranted in finding that he told Thomas Barrowman that said association was about to push its judgment to collection, and that Lewis and Barrowman agreed to enter the amicable action and confession of judgment in ejectment for the very purpose of hindering said association from reaching the property. He says that it was understood between them that he paid no rent, that the payments of nominal rents were to apply on the purchase money. His testimony ought to be considered in connection with the short time given in the confession of judgment for payment of the money, the filing of that judgment and the issuing of execution at the same time, and the contemporaneous service of the writ by the sheriff and the execution of the previously prepared lease.

Barrowman contradicts Lewis, and his testimony is not without some corroboration. But the disputed questions of fact were for the jury, not the court. The assignments of error, except the fourth and fifth, are sustained. The fourth is not sustained, for the reason that if the plaintiff is entitled to recover, it is because the amicable action in ejectment, with judgment confessed, was collusive and fraudulent as to the judgment creditor named; and the plaintiff is not bonnd to tender or pay any money to the vendor.

The defendants contend that this case is within the principle ruled in *Martin* v. *Berens*, 67 Pa. 459; and *Thorn* v. *Warfflein*, 100 Pa. 519, which applies where one party to an instrument seeks to vary, reform or set it aside by oral testimony. But here the parties to the judgment in ejectment are bound by what they did; they are competent witnesses—and should Barrowman admit that Lewis tells the truth, Lewis is bound by the judgment and lease. He would not be heard were he to set up the collusion to hinder his creditor for the purpose of defeating the result of the judgment as to himself. As to all persons, except the creditor sought to be defrauded, the judgment in ejectment is valid.

A creditor who seeks to avoid that judgment must satisfy the jury of collusion between the parties thereto to defraud him. The purchaser at sheriff's sale, or person holding under him, attacks not the existence or validity of a writing or judgment, but he charges that the judgment was collusively confessed and entered for the purpose of hindering or delaying the creditor on whose judgment the property was sold. The burden is on him to make out his case under the rules of evidence applicable in actions at law; not under the rule in equity that the equivalent of the testimony of two witnesses is necessary to overcome the responsive answer to a fact averred in the bill. The plaintiff alleges and must prove that the parties in the judgment, execution and lease, though unassailable as to themselves, intended thereby to defraud the creditor.

Judgment reversed and venire facias de novo *awarded.*

Zeno COPE, *Plff. in Err.*,
v.
Albert N. KIDNEY.

1. When on the trial of an action of ejectment the only controverted **question** of fact is **whether** the **grantor** of the defendant **conveyed** the land **to defendant with intent to defraud** plaintiff, a creditor of the grantor, it is **competent** for plaintiff **to prove declarations** of both grantor and defendant tending to establish such purpose.
2. An **objection** to plaintiff's title which was **not suggested at the trial** cannot be raised in the supreme court.
3. The amount of the debt of the alleged fraudulent grantor, to plaintiff, was $1,435.79. The **jury in** the **ejectment** suit **rendered a "verdict for** plaintiff, **$1,435.79."** There was no claim for mesne profits. The **court ordered judgment to be entered** "in favor of the plaintiff **for the land** described in the writ of ejectment and without prejudice to the right of the plaintiff to bring suit for mesne profits." *Held*, **not error.**

(Argued Jan. 19, Decided March 28, 1887.)

JULY Term, 1886, No. 200, E.D., before Mercur, *Ch. J.*, Gordon Paxson, Trunkey, Sterrett and Green, *JJ.*

Error to the Common Pleas No. 1 of Philadelphia County, to review a judgment on a verdict for plaintiff in an action of ejectment. *Affirmed.*

This action was brought by Albert N. Kidney to recover possession of a lot of ground and five houses in the City of Philadelphia. The writ was issued against the tenants in possession, but before trial Zeno Cope was admitted to defend as landlord and owner. Both parties claimed under Eliza Cope; the plaintiff under a purchase by him at a sheriff's sale in February, 1882, under a judgment obtained by Albert N. Kidney against said Eliza Cope on September 6, 1880, for $1,435.79, upon thirteen promissory notes given by her. The defendant claimed title under deed to him made by Eliza Cope, December 13, 1879.

At the trial in the court below, before BIDDLE, *J.*, it appeared that the property was formerly owned by Thomas Cope who devised it to Eliza Cope, his widow, during life or widowhood, remainder to his children. At the date of the deed to her son Zeno Cope, said Eliza Cope was seventy-two years old. The consideration paid by him was $800, part of which included a judgment against Mrs. Cope which was paid therefrom. The land was subject to a ground rent of $37.50.

It was admitted that Thomas Cope died in possession of the premises. The plaintiff, without objection from defendant, gave in evidence the will of Thomas Cope, the record of the action by himself against Eliza Cope, the judgment, etc., and the sale by the sheriff and deed to himself, and rested his case. The defendant gave in evidence a prior deed of the same premises from Eliza Cope to himself, dated December 13, 1879, and recorded December 15,

1879. The plaintiff alleging that the deed to Zeno Cope was made by Eliza Cope for the purpose of hindering, delaying, and defrauding the plaintiff in the collection of his debt, offered, in rebuttal, evidence tending to prove such allegations. All the testimony on the part of both parties was directed to this point.

The jury returned a "Verdict for plaintiff, $1,435.79."

On discharging a rule for a new trial the court entered the following order:

"June 28, 1886. The rule for a new trial is discharged, and it is ordered that upon payment of the jury fee, judgment be entered in the above case on the verdict in favor of the plaintiff, for the land described in the writ of ejectment, and without prejudice to the right of the plaintiff to bring suit for mesne profits."

The assignments of error were as follows:

1. The plaintiff's evidence disclosing no title in him, the learned judge erred in the following ruling as quoted from the bill of exceptions. Plaintiff offered to show: "That before the deed from Eliza Cope to her son Zeno Cope had been delivered, the grantor was indebted on thirteen promissory notes aggregating $1,400; that said notes had been placed in the hands of a collection agency for collection, and Mrs. Cope had been notified."

Objected to. Objection overruled. Exception for defendant.

2. The learned judge erred in the following ruling as quoted from the bill of exceptions: "Plaintiff offered to show that the plaintiff went to see Mrs. Cope with reference to the notes, when she said she would convey away the property—before any deed was made."

Objected to. Objection overruled. Exception for defendant.

3. The jury having given a verdict for plaintiff for $1,435.79, the learned court erred in making the following order: (quoting the order of June 28, 1886.)

4. The record under which alone the plaintiff below claimed title, showed a sale of a life estate without the preliminary order required by law; the whole proceeding was therefore a nullity, and the judgment should have been for the defendant.

Messrs. **Henry Budd, Robert Ingram,** and **F. Carroll Brewster,** for plaintiff in error.

Mr. **Charles F. Corson,** for defendant in error.

Mr. Justice **Trunkey** delivered the opinion of the court:

The first and second assignments of error are not well taken. As the cause was tried the only controverted question of fact was whether Eliza Cope conveyed the land to Zeno Cope with intent to defraud the plaintiff, who was her creditor. It was competent to prove the declarations of both of them tending to establish such purpose; and if the jury believed the testimony, they could hardly have avoided finding that the deed was executed for that purpose.

The defendant did not deny the validity of the plaintiff's title on any other ground than that his deed was prior to the judgment which was the foundation of the sheriff's sale. He did not attempt to defeat recovery for any cause, save that his deed was older than the judgment, and that he was a *bona fide* purchaser. If he believed that the plaintiff's title was fatally defective, he should have objected to its admission in evidence, or prayed instruction that the plaintiff's evidence did not entitle him to recover. Had he done so, and there was a defect, the plaintiff might have adduced other evidence. But be that as it may, he cannot object to a title here which he did not controvert in the court below, and the fourth assignment will not be considered.

The plaintiff's recovery depended on his satisfying the jury that the defendant's deed was void as against the purchase at sheriff's sale. It is obvious that the jury heard little, if anything, besides the dispute about the alleged scheme to prevent collection of the plaintiff's debt owing by Mrs. Cope, which amounted to $1,435.79. They rendered "Verdict for plaintiff, $1,435.79." Nothing but nominal damages was warranted by any claim or testimony in the cause. That the verdict is good for the land described in the writ or declaration is clear. Had there been claim and proof of mesne profits, judgment could have been entered on the verdict as rendered. We are of opinion that the court properly entered judgment for the land, which implies amendment of the verdict by striking off "$1,435.79," as surplusage. The words "without prejudice to the right of the plaintiff to bring suit for mesne profits" are not prejudicial to the defendant's rights, for it does not appear that mesne profits were claimed, proved or recovered in the trial of the ejectment.

Judgment affirmed.

APPEAL of Mary SCHULTZ *et al.*

RUFFING'S ESTATE

Upon appeal from a decree of the orphans' court, the record must be so **shown in the appellant's paper book** as to give the supreme court intelligent information of the facts on which the court below acted, or the decree will be affirmed and the appeal dismissed.

(Decided May 2, 1887.)

APPEAL from a decree of the Orphans' Court of Schuylkill County, confirming the appraisement of a decedent's real estate and setting aside the said real estate to his widow. *Affirmed.*

The paper book for the appellants contained the names of the parties and nature of the proceedings; a history of the case; the decree made; the assignments of error; and an argument for appellants, but not the record.

The history of the case was as follows:

John Ruffing was a resident of Tamaqua, Schuylkill County; he owned a house and lot of ground in Tamaqua, but no personal property, at the time of his death. He died March 28, 1875, intestate, leaving two children Mary Schultz and Eve Close, and Mary his widow, the appellee.

The appellee was married in December, 1877, to one John Homan, her present husband, with whom she is still living. During her widowhood she did not take out letters of administration nor claim the benefits of the exemption. On March 6, 1885, the appellee took out letters of administration on the estate of her late husband; and appraisers were appointed by herself to value and appraise said real estate which she selected under a claim of exemption. On June 1, 1885, the appraisers filed what purported to be their report appraising said real estate at the sum of $200. On June 22, 1885, exceptions were filed on behalf of the heirs, Mary Schultz and Eve Close, to the confirmation of this report. On November 23, 1885, the court overruled the exceptions and confirmed the appraisement absolutely, from which ruling Mary Schultz and Eve Close, the exceptants, appeal from said decree.

This appellee has laid by from the time of Ruffing's death, March 28, 1875, until May 23, 1885, making upwards of ten years' time, without administering on this estate or taking any steps towards claiming exemption.

On June 1, 1885, a paper purporting to be an appraisement and an election by her to take this house and lot under the Act of 1851, as widow of John Ruffing, deceased, in the name of Mary Homan, was filed, and her claim was not presented to court until June 1, 1885, which was confirmed and made absolute November 23, 1885.

We have no rule of court regulating proceedings under either the Act of April 9, 1849, or the Act of April 14, 1851; these Acts are *in pari materia*. The practice is generally, under the Act of 1851, that notice of the claim must be given to the executor or administrator to have property appraised to the value of $300.

This appellee says she was married in December, 1877, to Jacob Homan, her present husband; she never took out letters of administration until May 6, 1885; neither Mary Schultz nor Eve Close had notice of the time and place of appraisment; it was a secret matter to them, and the property was appraised to her at a price greatly below its value, to wit: $200.

These appellants claim that they were entitled to notice of the time and place of holding the appraisement, and in this respect the appraisement was invalid and void. The appellants claim that the appraisement was not made according to law and that they are not bound by it. These appellants claim that the appellee, having remarried before she made her claim, waived all right to exemption, if she had any; that she was bound to make her claim in a reasonable time, which she has not done; that upon her remarrying she ceased to be Ruffing's widow, and not entitled to exemption as the widow of Ruffing; that there was such laches on her part, from the time of death of Ruffing, her first husband, until she took out letters, as forfeits her claim to exemption, if there was nothing else, and the confirmation by the court could not aid such void act, and this court should set it aside.

The decree and the assignments of error sufficiently appear from this history of the case.

Per Curiam:

This record, as shown in the paper book submitted, gives us no intelligible information of the facts on which the court acted. There is nothing shown to convict the court of any error in making the decree; therefore,

Decree affirmed and appeal dismissed, at the costs of the appellants.

Catharine KELLEY, *Plff. in Err.*,
v.
PENNSYLVANIA R. R. Co.

One who attempts to cross a railroad track in plain sight of a near approaching engine is guilty of contributory negligence.

(Decided April 11, 1887.)

JANUARY Term, 1887, No. 163, E. D., before Mercur, *Ch. J.*, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas No. 1 of Philadelphia County, to review a judgment of nonsuit in an action of trespass on the case for negligence. *Affirmed.*

The evidence tended to establish the following facts:

The defendant operated a railroad in Philadelphia, along Lehigh Avenue, which is about 150 feet wide, crossing Cedar Street, a much frequented thoroughfare, on which is a line of street cars, at right angles. After dark on the night of February 20, 1886, Patrick Kelley was walking north on Cedar Street and started to cross Lancaster Avenue. In crossing the railroad track he was struck by the north part of an engine backing eastward along Lancaster Avenue, was thrown to the side of the track and killed. This suit was brought by his widow.

The engine was going faster than a horse trots, and was not checked at the crossing. There was no gate or stationary flagman at this crossing. Upon the engine were two flagmen for flagging crossings, one up and the other down the track, but they did not get off to signal the crossing as they had done before on special occasions. The engine bell was rung for two squares before reaching Cedar Street, and a head light in front and lights on the rear of the engine were burning. The whistle was not blown until Kelley started to cross.

A witness called by the plaintiff testified that he was going along the west side of Cedar Street in the same direction as Kelley, saw the light on the engine, heard the bell and waited for the engine to pass.

The engine was fourteen or fifteen yards away when Kelley attempted to cross the street. There was nothing to prevent him from seeing the locomotive, which was plainly visible from the sidewalk for the distance of a square. Another witness who was on Lehigh Avenue one square west of Cedar Street, heard the bell and saw the light as the locomotive approached.

The court entered a compulsory nonsuit and afterwards dismissed a motion to take it off, which was *assigned as error.*

Messrs. **Crawford & Dallas,** for plaintiff in error:

What signals, whether a whistle or flagman, are necessary is a question of fact for the jury. *Pa. R. R. Co.* v. *Coon*, 2 Cent. Rep. 323, 111 Pa. 430.

If a flagman were not necessary, yet if one be employed or used there before, and there be none at the time, the defendant is liable.

St. Louis etc. R. R. Co. v. *Dunn*, 78 Ill. 197, 199.

If a flagman would have prevented the injury and one be not there, although other less efficient signals, as the ringing of a bell, were used, the defendant is liable.

Kinney v. *Crocker*, 18 Wis. 81, 82; *Kissenger* v. *New York etc. R. R. Co.* 56 N. Y. 543.

Backing an engine requires great care.

Phila. etc. R. R. Co. v. *Anderson*, 94 Pa. 351.

The absence of signals before used imparts a sense of security and relieves what would otherwise be contributory negligence.

Pa. R. R. Co. v. *Ogier*, 35 Pa. 72.

The decedent is presumed to have used due care, and the question is for the jury.

Schum v. *Pa. R. R. Co.* 107 Pa. 11, 14; *Detroit etc. R. R. Co.* v. *Van Steinburg*, 17 Mich. 118–124; *Pa. R. R. Co.* v. *Coon*, 2 Cent. Rep. 323, 111 Pa. 431–439.

Mr. **George Tucker Bispham,** for defendant in error:

The case is wholly different from *Pa. R. R. Co.* v. *Ogier*, 35 Pa. 72. In that case Ogier was placed, by the failure to blow the whistle, in a position of peril where he was suddenly called upon to decide what course should be pursued. The court below said: "From the position in which he was placed, when he first could have seen the approach of the train, it is a reasonable conclusion to draw that he was in peril and must have acted upon impulse rather than from judgment."

It is vain for the plaintiff to rely upon the presumption of law that the decedent did his duty, when the evidence of the plaintiff shows that the decedent, in spite of what his eyes and ears told him, walked directly in front of a moving locomotive.

Carroll v. *P. R. R.* 12 W. N. C. 348.

It is the imperative duty of the traveler to stop, look and listen for approaching trains before attempting to pass over; if he neglects this legal duty, or knowingly attempts to cross in front of a rapidly moving train, he takes his life in his own hands and assumes the risk of personal injury.

Lehigh Valley R. R. Co. v. *Brandtmaier*, 5 Cent. Rep. 144, 113 Pa. 616.

Per Curiam:

The evidence of the plaintiff showed so clearly that her husband was guilty of contributory negligence, in attempting to cross the track in plain sight of the moving engine, that the court committed no error in not submitting the case to the jury.

Judgment affirmed.

John A. CODDING, *Plff. in Err.*,
v.
BRADFORD COUNTY.

1. Under the Act of March 31, 1860, and the local Act of May 1, 1861, **a county** to which the latter Act applies is **liable** to a justice of the peace **for** all the **costs,** except those of prosecutor and defendant, **of** a criminal **proceeding against** a defendant who pleads guilty **before** the **justice** to a felony, is sentenced by him and is discharged without payment of costs.
2. The Act of 1861 provides that the sentence by the justice shall have the **full force and effect of a sentence** pronounced **by the court of quarter sessions.** Unless the county is liable for the costs when the conviction is before a justice, the sentence in one form has not the same force and effect as in the other.

(Argued March 16. Decided April 11, 1887.)

JANUARY Term, 1887, No. 337, E.D., before Mercur, *Ch. J.*, Gordon, Paxon, Trunkey, Sterrett and Green, *JJ.*

Error to the Common Pleas of Bradford County, to review a judgment in favor of defendant in a case stated. *Reversed.*

The facts as set forth in the case stated were these:

The plaintiff was a justice of the peace in, and for Bradford County, Pennsylvania, residing at Towanda Borough in said County, duly commissioned and qualified.

On January 6, 1886, he presented to the commissioners of said County a transcript of a criminal proceeding had before him (attached to and made a part of the case stated) showing a bill of costs, itemized as follows, viz.:

Docket empty,	$ 20
Complaint,	40
Warrant,	40
Commitment,	40
Subpenas,	60
Hearing,	40
Recognizances,	1 00
Continuance,	10
Conviction,	50
Discharge,	25
Transcript,	40

making a total, justice's costs,........$4 65

—and showing a bill of constable's costs as follows, viz.:

Const. Dimock,........................$2 48

The charge for "subpenas 60," was for one subpena on the part of the Commonwealth, 30 cents, and one subpena on the part of the defendant, 30 cents.

These costs were demanded of the said commissioners on the 6th day of January, 1886, and Matt Merritt, the defendant in the criminal proceeding, was discharged from the county jail on December 26, 1885, by direction of the plaintiff to the jailer of the county.

If in the opinion of the court the County of Bradford was liable for the costs of the justice under the foregoing facts, or for any of the items of the said costs, and not liable for other items, then judgment was to be entered for the whole amount of said costs, or for such part thereof as in the opinion of the court the said county was liable for, with costs.

If in the opinion of the court there was no liability on the part of the defendant for all or any portion of the said costs, then judgment was to be entered for the defendant.

Either party was to have the right of appeal, or writ of error to the supreme court.

The transcript to which reference was made in the case stated was as follows, excluding the above bill of costs which was on the margin of the transcript:

"*Commonwealth of Pennsylvania—Bradford County, ss.*

Commonwealth }
vs. }
Matt Merritt. }

Warrant issued November 21, 1885, to Dimock, Police, on complaint upon oath of F. F. Lyon, that on the 21st day of November, 1885, and at other times within two years, at the County of Bradford and State of Pennsylvania, one Matt Merritt did feloniously steal, take and carry away 400 lbs. of coal, of the value of $1, the property of the Towanda Coal Company. November 23, 1885, defendent brought up, and the complaint being read aloud in his hearing he pleaded "Guilty." Hearing continued to November 25, 1885. And now, November 25, 1885, parties appear and said Matt Merritt is convicted of larceny as set forth in said complaint; whereupon, he is sentenced to pay a fine of $1 and costs of prosecution, to restore the goods stolen, or the value thereof to the owner, if not already done, and to undergo an imprisonment in the county jail thirty days, and to stand committed until this sentence is complied with."

The transcript was duly certified by the justice of the peace.

The court below gave judgment for the defendant, and this was *assigned as error.*

Messrs. **James H. Codding** and **John W. Codding**, for plaintiff in error:

The proceedings before the justice were under the Act of May 1, 1862, P. L. 682, and its Supplements of April 5, 1862, P. L. 274 and February 14, 1867, P. L. 197. The claim is based on the second section of the first mentioned Act, and also the Act of May 11, 1874, P. L. 132.

The said second section recites that the justice shall proceed to pass sentence upon the defendant, "Which sentence shall have the full force and effect of a sentence pronounced by the court of quarter sessions, in like cases."

This force and effect as to costs had its entire interpretation in the sixty-fourth section of the Criminal Procedure Act, March 31, 1860, until the passage of the Act of May 11, 1874. This provides, P. L. 132, "And in all cases of conviction of any felony, all costs shall be paid forthwith by the county, unless the party convicted shall pay the same."

The Act of 1861 creates a new jurisdiction, intended to relieve the work of the courts of quarter sessions, and by its phraseology of "full force and effect," affords a reasonable deduction as to payment of costs. Its juries, when summoned, are to have the same jurisdiction and control over the payment of costs as in the trial of the same offenses in the court of quarter sessions.

Sec. 7.

And the proviso, excluding the County's liability for either the prosecutor's or the defendant's bill of costs, operates to confirm it as to the costs of the justice and constable.

Mr. **John N. Califf**, for defendant in error:

The plaintiff in error rests his claim upon section 2 of the special Act of May 1, 1861, P. L. 682, and its Supplement of April 5, 1862, P. L. 274, extended to Bradford County by the Act of February 14, 1867, P. L. 197; and upon the general Act of May 11, 1874, P. L. 132.

The charge against the defendant in the proceedings before the justice was a felony. The defendant pleaded "Guilty," and the justice proceeded to pass sentence; "Which sentence shall have the full force and effect of a sentence pronounced by the court of quarter sessions in like cases." Since the passage of the general Act of May 11, 1874, such a sentence has no effect whatsoever so far as regards the liability of the county for costs. The liability of the County in cases of felony, under the Act of 1874, is forthwith upon conviction, unless the party convicted shall pay the same.

The full force and effect given to the sentence of the justice by the Act of 1861, evidently relates to the validity of such sentence as against the defendant, making its enforcement lawful and his confinement under it a legal and not a false imprisonment.

The Act contains no express provision as to costs in proceedings under section 2, and it is only by inference that it is sought to extend it to the payment of costs. The court will not impute to the Legislature an intent to make the county liable for costs where it is not so expressed in the Act.

County of York v. *Crafton*, 100 Pa. 619.

Liability for costs on the part of the county must rest upon a statute obliging the county to pay; a mere deduction from its phraseology will not support an action against a county.

Crawford Co. v. *Barr*, 92 Pa. 359.

The construction of section 7 of the Act of 1861 is not involved in this case, as the proceedings before the justice were under section 2. But under section 7 the County can only become liable for the costs of the officer and the pay of the jurors when upon acquittal in cases of misdemeanor the jury so imposes the costs. The Act of May 11, 1874, was plainly intended not to create a new liability on the part of the county, but to alter the time when the county should pay in cases of felony where by the Act of March 31, 1860, the county was previously liable.

County of York v. *Crafton*, 100 Pa. 619.

The Act of 1860 relates only to costs accruing on bills of indictment in the court of oyer and terminer and quarter sessions, and does not include cases of convictions before justices.

Crawford Co. v. *Barr*, 92 Pa. 359.

The Act of 1874 is a general law; that of 1861 and its supplements are special Acts. Later statutes which are general do not repeal an earlier one which is particular.

Bounty Accounts, 70 Pa. 96.

Rarely, if ever, does a case arise where it can justly be held that a general statute repeals a local statute by mere implication.

Malloy v. *Reinhard*, 6 Cent. Rep. 126.

The attempt by the plaintiff in error to engraft, by an unwarranted implication, part of a general Act upon one that is purely local cannot be successful.

Kilgore v. *Commonwealth*, 94 Pa. 495.

Unless, therefore, the claim of the plaintiff in error can be sustained under the special Act of 1861, he cannot successfully invoke the aid of the general Act of 1874 to help it out. At any rate the County is not liable for the cost of the defendant's subpena, thirty cents.

Commonwealth v. *Evans*, 1 Kulp, 426; *Wayne Co.* v. *Waller*, 90 Pa. 99.

Mr. Justice **Trunkey** delivered the opinion of the court:

It has long been the policy of the Commonwealth not to discourage good faith criminal prosecutions, nor to oppress innocent persons accused of crime, nor to make it the pecuniary advantage of magistrates to hold an accused person for trial. The Act of 1791 provides that when a person charged with crime is brought before a magistrate, and it appears that the charge is unfounded, upon his discharge the costs shall be paid by the city or county.

The provisions of the Act of 1860, so far as they relate to costs, are mainly re-enactments of prior statutes. Full power is given to the jury, to determine by their verdict in all misdemeanors, in case of acquittal, whether the prosecutor or defendant or county shall pay the costs, or whether the prosecutor and defendant shall pay the costs in certain proportions; "And in all cases of conviction of any crime, all costs shall be paid by the party convicted, but where such party shall have been discharged according to law, without payment of costs, the costs of prosecution shall be paid by the county." In all these cases the direction as to costs relate to convictions on bills of indictment.

By the local Act of 1861, in force in many counties, jurisdiction is conferred upon justices of the peace, if the accused person shall plead guilty or demand trial before the justice, for determination of certain indictable offenses defined in the Act of 1860. When the accused person denies the charge and demands jury trial, such trial is conducted on similar principles as trials in the court of quarter sessions; "and the jury shall have the same jurisdiction and control over the payment of costs; *Provided*, That the county shall in no case be liable for either the prosecutor's or the defendant's bill of costs." With a single exception, the jury in one court have the same power as the jury in the other.

When the accused person pleads guilty, or the jury find him guilty, the justice shall pass sentence upon him, which shall have the full force and effect of a sentence pronounced in the court of quarter sessions, in like cases, except that imprisonment shall only be in the jail of the proper county. The result of the sentence is the same when pronounced on a plea of guilty, as when on a verdict of guilty, except that in one case certain costs have no existence which are made in the other.

All the cases within the Act of 1861, are triable on indictment in the court of quarter sessions under the Act of 1860. Upon conviction of a person, of felony, in that court, if he fail to pay the costs, the county is liable therefor; and unless the county is so liable when such conviction is before a justice, the sentence in one forum has not the same force and effect as in the other. In a trial before the justice of the peace, the exception, that in no case shall the county pay the prosecutor's or defendant's bill, evidences an intendment that other costs shall be paid as if the trial were in any other court having jurisdiction.

In no case is the county liable for costs, unless made so by statute. *Crawford Co.* v. *Barr*, 92 Pa. 359.

That decision is cited by the defendant as applicable to the pending question. But there the claim was by a justice of the peace for his costs accrued in a summary conviction, under the Act of March 24, 1878, P. L. 125.

An offense under that statute is not indictable, and it is not a crime within the meaning of the word as used in the Act of 1860; nor is it within the operation of any statute which imposes payment of costs upon the county. All the offenses triable under the Act of 1861 are indictable; and when such offenses are tried on indictment, in case of conviction of the defendant and his legal discharge without payment of costs, the county shall pay the costs of prosecution. The offenses remain the same, the result of conviction is the same, except the statutory limit as to place of imprisonment, and the exemption of the county from payment of the bills of costs, when the conviction is before a justice of the peace. A change of tribunal, and a lawful conviction without the formality of indictment, the sentence to have like force and effect as if the proceeding were in the court of quarter sessions, do not relieve the county from liability for costs imposed where a convicted party shall have been discharged according to law, without payment of costs. The statute making the county liable is not repealed by implication. Although conviction may be without indictment, the statute in so providing makes no change in the law relating to the offenses and procedure, other than is expressed.

The defendant's bill is not payable by the County, and the fees for his subpena are included in his bill. This is recognized in section 63 of the Act of 1860, relating to criminal procedure, and in section 1 of the Act of 1873. The defendant insists that it is not liable for the cost of subpena, thirty cents, which was given to the party who was charged with the larceny; and that sum must be deducted from the claim.

Judgment reversed; and judgment is now entered for the plaintiff for $4.35, with costs, on the case stated.

William J. BARTON, *Pltf. in Err.*,
v.
Jonathan R. JONES *et al.*

Plaintiff, an **employee** of the contractors for putting up the iron work in the construction of a building, in the performance of his duties rode on a bundle of the iron beams as they were carried up the outside of the wall by an engine at the top, for the time under the control of his employers, and having been carried over the top of the wall, was **injured** while being lowered by the engine to the floor of an upper story. Plaintiff thereupon **sued** his **employers for damages**, alleging that the engine was at the time, to the knowledge of his employers, operated by a new, inexperienced, and incompetent engineer without notice to or knowledge of plaintiff, and that the injury resulted from the negligence of such engineer. *Held*, on the evidence, that plaintiff was **properly nonsuited.**

(Decided April 4, 1887.)

JULY Term, 1886, No. 187, E. D.

Error to the Common Pleas, No. 4 of Philadelphia County, to review a judgment of compulsory nonsuit in an action to recover damages for injuries to the person, alleged to have been caused by negligence. *Affirmed.*

This action was brought by William J. Barton, against Jonathan R. Jones and Samuel T. Benner, trading as Jones & Benner, to recover damages for injuries received by a fall, alleged to have been caused by the negligence of defendants and their servants.

The following facts appeared before the court at the trial:

Jones & Benner were contractors for putting up the iron structure of the public buildings in Philadelphia. Barton was in their employ, as a laborer whose duty required him to prepare large iron beams, from twenty to twenty-five feet long, for hoisting, by piling them together and fastening them by a chain, so that a wire and hook, dropped from an overhead engine called a traveler, which ran on a tramway located above the building, at a height of 150 feet from the ground, could be thereto attached. When the pile had been attached to the traveler, he would stand on the edge of the pile while it was being raised, so that he could push it away from the marble face of the building, could signal the engineer as to the direction in, and the place to which, the pile was to be carried, and could, when it reached its destination, detach it from the wire.

Barton had been engaged in this work at the public buildings for several years. The traveler was inclosed so that a man on the ground could not know who was in it. The engineer was guided in his movements by signals (wavings of the hand) given by the man who stood on the iron which was hoisted.

These travelers were constructed differently from an ordinary yard, stationary or locomotive engine, having much additional and complicated machinery. They required special experience on the part of those who ran them. There were three of them at the building, two being at the height of 150 feet from the ground, one on the west, and the other on the east side of the building. These two were in constant use at the time of Barton's accident, and were run by engineers who had had charge of them for several years, and who were well known to Barton and to the other employees who had worked with them for a considerable time.

There was a third traveler on the north side, which was only occasionally used, and never, so far as the testimony shows, in hoisting anything but stone. It was at a comparatively low elevation, being about ninety feet from the ground. Its regular engineer had died, and for perhaps a month it had been run, at infrequent intervals, by a man named McGraw, whose regular employment was the running of a stationary engine in the yard. McGraw had come to the buildings in the spring of 1882, and had received a few lessons in running this lower traveler. He appears not to have run either of the upper travelers prior to the accident.

The three travelers and the yard engine were all owned by Struthers & Son, who were the contractors for erecting the marble, and who used them for their purposes. The various engineers were employed by them.

The other contractors at the building, including Jones & Benner, were in the habit of hiring from Struthers & Son, as work of hoisting was to be done, one or the other of the three travelers. When thus hired the engineer and traveler were under the control and direction of such contractor, who directed their movements. Struthers & Son assumed no control or direction while the hiring continued.

Richard McCarthy was the general foreman of Jones & Benner, who had control of their work at the buildings and gave all the directions to the employees of Jones & Benner. The latter were rarely at the building. It seems that when the traveler was needed, he (McCarthy) hired it from Struthers & Son.

On November 7, 1882, he hired the west traveler. Dupelle was absent from his work that day and McGraw, for the first time, had been put in charge of it. Barton swore that he was ignorant of the fact; that he supposed Dupelle was in charge; and that he would not have gone upon the pile had he known otherwise. The foreman of Struthers & Son, one Lawrence, told McCarthy of the change of engineers, and that it would be necessary for his men to be careful. The latter, however, hired the traveler, and gave no warning to Barton, whom he ordered to go upon the pile or bundle of iron beams.

Barton and one Owens, as they had often done before, mounted upon opposite ends of the bundle of iron beams, which weighed about three tons, and ascended in safety to the top of the wall, guiding the load so that it did not strike the timbers of the trestle and the marble work of the building in its ascent. On arriving at the top of the third floor wall, the engine was run in over the wall, preparatory to lowering the iron to the floor of that story. Upon the north or interior wall of the room into which the iron was to be lowered was a common bricklayers' scaffold, composed of pine planks extending about fifteen feet in height from the floor of the room. Plaintiff gave a signal to the engineer to lower, which was obeyed. Plaintiff either miscalculated the space necessary to permit the iron to pass or Owens, who was on the end nearest to the scaffold, neglected to guide it, for six inches of the end lodged for a moment upon the scaffold. Owens stepped off. The equilibrium was destroyed, and plaintiff slid from the lower end and fell to the floor below, causing the injuries for which this suit was brought.

Plaintiff at the trial claimed that McGraw was incompetent, that the traveler was managed in a bungling and inexperienced manner, and was lowered too rapidly; and evidence was given to prove such contention. At the close of plaintiff's case a nonsuit was ordered, which the court in banc subsequently refused to take off and plaintiff took this writ, *assigning such action of the court as error.*

Messrs. **James H. Shakespeare** and **John G. Johnson,** for plaintiff in error:

Where an employee is engaged in a hazardous work, and there are matters increasing the hazard, known by the employer, or which ought to be known by him, but not known to the employee, it is his duty to communicate them to the latter; and for a failure to do so, in case injury results, he is responsible.

Patterson v. *Pittsburg etc R. R. Co.* 76 Pa. 393; *Rummell* v. *Dilworth*, 1 Cent. Rep. 905; Wood, Master & S. §§ 349, 354–356; *Strahlendorf* v. *Rosenthal*, 30 Wis. 674; *Pantzar* v. *Tilly Foster Iron Mining Co.* 99 N. Y. 368.

It is the duty of the employer to use due care either personally or through an agent in selecting experienced employees.

Crispin v. *Babbitt*, 81 N.Y. 520; Wood, Master & S. pp. 723, 863,902; *Laning* v. *N. Y. Cent. R. R. Co.* 49 N.Y. 532; *Ford* v. *Fitchburg R. R. Co.* 110 Mass. 260; *Pa. etc. R. R. Co.* v. *Leslie*, 16 W. N. C. 322; *Mann* v. *Del. & Hud. Canal Co.* 91 N. Y. 500; *O'Donnell* v. *Allegheny Valley R. R. Co.* 59 Pa. 248; *Wabash R. Co.* v. *McDaniels*, 107 U. S. 459 (Bk. 27, L. ed. 607).

The fact of McGraw's inexperience was so clearly shown that it must have been known to Jones and Benner, if they had used due diligence.

57 Pa. 341; *Skerritt* v. *Scallan*, 11 Ir. R. C. L. 389; MacDonnell, Master & S. 316.

McCarty was not a coservant.

Corcoran v. *Holbrook*, 59 N. Y. 517.

Mr. **John B. Thayer,** for defendants in error:

Plaintiff cannot invoke the principle of *respondeat superior*, because the Messrs. Struthers were McGraw's superiors and not the defendants.

Wood, Master & S. § 317; *Crockett* v. *Calvert*, 8 Ind. 127; *Quarman* v. *Burnett*, 6 Mees. & W. 499; *Michael* v. *Stanton*, 3 Hun, 462; *Patterson* v. *Pittsburg, etc. R. R. Co.* 76 Pa. 393.

McCarthy was but a fellow servant engaged in a common employment with the plaintiff.

Del. etc. Canal Co. v. *Carroll*, 89 Pa. 374; *New York etc. R. R. Co.* v. *Bell*, 3 Cent. Rep. 576, 112 Pa. 400; *Lehigh Valley Coal Co.* v. *Jones*, 86 Pa. 433; *Keystone Bridge Co.* v. *Newberry*, 96 Pa. 246; *Chicago etc. R. Co.* v. *Ross*, 112 U. S. 377 (Bk. 28, L. ed. 787).

The question whether the danger assumed by an employee is one incident to the employment, as well as who are fellow servants, is also for the court and not for the jury.

Assop v. *Yates*, 2 Hurlst & N. 768; *Skipp* v. *Eastern Counties R. Co.* 9 Exch. 223.

The possible negligence of McCarty to warn the plaintiff was a risk incident to plaintiff's employment arising from their relations as fellow servants.

Sykes v. *Packer*, 99 Pa. 465; *Priestley* v. *Fowler*, 3 Mees. & W. 1; *McCullough* v. *Shoneman*, 105 Pa.169.

Per Curiam:

This was one of those unfortunate accidents that are liable to occur in the erection of large buildings. The zeal and ability with which the cause was argued by the counsel for the plaintiff has caused us to examine the evidence with great care. We think it is insufficient to send the case to the jury. It follows that there was no error in ordering a compulsory nonsuit and in refusing to take it off.

Judgment affirmed.

William FAIRCHILD, *Plff. in Err.*,
v.
Henry S. FAIRCHILD.

A **demise of** all the **coal under** the **surface** of a specified piece of land is a sale of the coal.

(Argued April 15. Decided April 25. 1887.)

JANUARY Term, 1887, No. 413, E. D., before Mercur, *Ch. J.*, Gordon, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Luzerne County, to review a judgment for the defendant in a case stated in an amicable action of assumpsit. *Affirmed.*

The case stated was as follows:

Now, January 5, 1887, it is agreed that an amicable action of trespass on the case in assumpsit in the above entitled cause be entered in said court, and the following facts are agreed upon as a case stated for the opinion of the court in the nature of a special verdict, either party reserving the right to a writ of error to the judgment of said court.

In the months of July and August, 1873, John Fairchild, late of said county, being seised in fee in possession of some fifty acres of coal land situate therein, executed to the Susquehanna Coal Company, a so-called lease of the coal in and under said land, the same being duly recorded in the recorder's office of said county, and a copy of which is hereto attached and made part of this case, the same being marked "exhibit A."

Shortly thereafter, and during the lifetime of the said John Fairchild, the said company, by means of shafts and slopes opening upon the surface of adjoining lands and connected with tunnels or subterraneous passages, entered upon and took possession of the veins and measures of anthracite coal under said fifty acres, and by means of gangways, headings, breasts or chambers, leading from said tunnels, slopes and shafts, and cut and driven into said veins and measures, began and have since continued, and are now continuing the mining, quarrying, removing, transporting, shipping and selling of the anthracite coal under the land described in said so-called lease.

On September 17, 1879, the said John Fairchild died intestate, seised of said land, subject to said so-called lease, leaving to survive him a widow, Martha Fairchild, and by her five children and heirs at law—all of full age, namely: Anna E. Fairchild, intermarried with William Fairchild, the plaintiff above named; Martha L. Fairchild intermarried with O. F. Ferris; John M. Fairchild, Henry S. Fairchild, the defendant above named, all of said county, and Alfred Fairchild, of the State of Michigan.

On October 16, 1879, letters of administration on the estate of said John Fairchild were granted by the register of said county, to the said John M. Fairchild and the said Henry S. Fairchild, defendant, who on April 14, 1884, filed a partial account of their administration, which was confirmed by the orphans' court of said county and distribution had thereon in said last named court; but said administrators have not yet filed a final account, and are unable so to do at this time by reason of certain uncollected debts due their estate for money loaned by their decedent.

On January 20, 1883, the said Anna E. Fairchild died intestate, leaving to survive her a husband, Willaim Fairchild, the above named plaintiff, and by him four children and heirs at law, namely: Monroe Fairchild, of full age and W. H. Fairchild, Edna L. Fairchild, and Edith L. Fairchild, then and now minors, having for their guardian O. F. Ferris, duly appointed by the orphans' court of said county. William Fairchild, the plaintiff, is the administrator of the estate of said Anna E. Fairchild, and has not yet filed or settled an account of his administration.

On January 31, 1883, the said Martha Fairchild, surviving widow of said John Fairchild, died intestate, leaving to survive her children and grandchildren heirs at law, namely: the said John M. Fairchild, Henry S. Fairchild, Alfred Fairchild and Martha L. Ferris, children, and the said Monroe Fairchild, W. H. Fairchild, Edna L. Fairchild and Edith L. Fairchild, grandchildren, being children of a deceased daughter, the said Anna E. Fairchild. Samuel Line of said county, is the administrator of the estate of said Martha Fairchild, deceased.

On account of coal mined, removed, shipped and sold as aforesaid by the said, the Susquehanna Coal Company under said so-called lease during the four periods following, to wit: first, during the lifetime of the said John Fairchild; second, during the period from the date of his death to January, 1883, the date of the deaths of said Anna E. and Martha Fairchild, and third, from January, 1883, to January, 1885, and fourth, from January, 1885, to the present time, the said company has paid as so-called rents or royalties certain moneys as follows: for the first period it paid the said John Fairchild for his own use, and for the second, third and fourth periods it paid to the said Henry S. Fairchild, defendant, as agent or trustee for the use of the parties who should legally be thereunto entitled; and the said Henry S. Fairchild paid over said moneys received during said second and third periods as follows: during said second period he paid one third to the said Martha Fairchild, widow, and to himself and said Anna E. Fairchild, Martha L. Ferris, John M. Fairchild and Alfred Fairchild each one fifth of two thirds; and during said third period he paid one fifth each to himself and said Martha L., John M. and Alfred, two thirds of one fifth to said William Fairchild, plaintiff, and one third of one fifth to the four children of said Anna E. Fairchild in equal proportions, of whom three were represented by their said guardian, O. F. Ferris.

During said fourth period the amount of said so-called rents or royalties paid by said company and received by said Henry S. Fairchild, defendant, for the uses aforesaid is, after deducting certain expenses paid for surveying, the sum of $17,360.42, of which no part has ever been paid to the plaintiff, William Fairchild or to any of the children of said Anna E. Fairchild or their guardian.

The said Henry S. Fairchild, defendant, and John M. Fairchild, administrators as aforesaid, have never accounted as administrators for any of the so-called rents or royalties received by the defendant as aforesaid. There are no unpaid debts against either of the estates of said John Fairchild, Anna E. Fairchild or Martha Fairchild, and each died solvent, irrespective of any interest in said coal land—so-called lease or royalties.

If, under the facts as above stated, the court be of the opinion that said sum of $17,360.42 is, in contemplation of law, to be regarded as rent, or of the nature thereof, accruing during the fourth period, *supra*, and incident to and issuing out of a coal estate, in the land described in said so-called lease, remaining in said John Fairchild at the time of his death, and descending to his heirs at law subject to the interest of his said surviving widow, Martha Fairchild, under the intestate laws of this Commonwealth, and that on the death of the said Anna E. Fairchild her surviving husband, the plaintiff, became entitled as tenant by the curtesy to the undivided one fifth of said coal estate subject to the interest of said Martha Fairchild, surviving widow, then judgment to be entered for the plaintiff for the sum of $3,472.08. But if the court be of the opinion that the plaintiff, as surviving husband aforesaid, by reason of said Martha Fairchild's survivorship after the death of said Anna E. Fairchild, became entitled as tenant by the curtesy to only an undivided one fifth of an undivided two thirds of said coal estate, then judgment to be entered for the plaintiff for the sum of $2,314.72.

If, however, the court be of the opinion that said sum of $17,360.42 is, in law, to be regarded as purchase money or in the nature thereof of real estate sold by the said John Fairchild in his lifetime, and collectible by his said administrators, to be by them accounted for as such to the orphans' court and distributed by the latter as personal estate of the said John Fairchild, deceased, to his four surviving children and to the estates of his deceased daughter, Anna E. Fairchild, and of his deceased widow, Martha Fairchild, according to the intestate laws of this Commonwealth, then judgment to be entered for the defendant.

The costs to follow the judgment.

"Exhibit A," to which reference was made in the case stated, was as follows:

This indenture, made the 25th day of July, 1873, between John Fairchild, of the Township of Newport, Luzerne County, Pennsylvania, of the one part, and the Susquehanna Coal Company, of the other part, *Witnesseth:* that the said John Fairchild, in consideration of the covenants to be kept and the rentals to be paid by the said Susquehanna Coal Company, hath demised, leased and to mine let, and by these presents doth demise, lease and to mine let unto the said Susquehanna Coal Company and their successors and assigns all the anthracite coal in, under and upon all that certain piece or parcel of land situate in the Township of Newport, Luzerne County, aforesaid, bounded and described as follows: Beginning in the line between lots Nos. 2 and 3 of the first tier, first division of lots in said township, at a common corner of the land hereby demised and land now or late of Solomon Fairchild, thence along said line north six and a quarter degrees west sixty-two rods to a corner in the center of the public road; thence along the center of said public road by its several courses and distances to the township line between Hanover and Newport; thence along the said line south seventeen and a quarter degrees east one hundred and twenty-five and four tenths rods to a corner of lands now or late of Solomon Fairchild, and thence along the said land south seventy and a half degrees, west eighty-four and six tenths rods to the place of beginning, being parts of lots Nos. 1 and 2 in the first tier of the first division of lots in the certified Township of Newport, and containing fifty acres one hundred and ten and six tenths perches strict measure. Together with the right to mine, quarry and remove all the coal in, under and upon the said tract of land but without opening thereto or transporting the same upon or across the surface of the said land. To have and to hold the said coal and the mining rights and privileges hereby granted with the appurtenances unto the said Susquehanna Coal Company and their successors and assigns until all the merchantable coal accessible by careful, prudent and skillful working shall be mined out and exhausted.

And the said Susquehanna Coal Company, in consideration of the premises, do hereby for themselves and their successors and assigns covenant and agree to and with the said John Fairchild and his heirs, executors, administrators and assigns, in manner as follows, to wit: first, that the rental for all coal mined under this lease shall be at the rate of twenty-five cents per ton of the size and pounds hereinafter specified; second, that for all coal mined and removed during the year ending July 1, 1874, they will pay at the said rate of twenty-five cents per ton; that for the year ending July 1, 1875, and for and during each and every subsequent year during the term, they will mine and remove not less than 12,000 tons of coal, or failing so to do will nevertheless pay for such number of tons, so that the minimum annual rental shall not be less than $3,000; Provided, however, That if during any year such minimum annual rental shall be paid and sufficient coal at the rate aforesaid shall not be mined and removed, the deficit may be mined and removed in any subsequent year of the term; third, that all the rentals under this lease shall be payable quarterly, to wit: on the first day of October, January, April and July in each year; fourth, that under this lease a ton shall consist of 2,240 pounds, and that the rentals aforesaid shall be payable on all coal which will pass over a screen of a half inch mesh. All coal passing through a screen of such dimension shall be regarded as "pea coal," and such coal may be used free of charge for the purpose of driving the machinery by which the said coal is mined and prepared, and shall be free from rental except when such coal shall be actually sent to market, when the rental shall be eight cents per ton, payable quarterly, in addition to the rentals aforesaid; fifth, that the said lessees shall pay all taxes or imposts, United States and local, which shall be assessed upon the coal in place or as it is mined; sixth, that all the mining operations shall be conducted with prudence, skill and care, so that all the coal may be won which can be taken without damage to the mines, and that in all gangways and chambers proper supports and pillars may be so left as to protect as well the surface as the overlying veins of coal; seventh, that the amount of coal mined and removed may be ascertained by reference to the weights returned by transportation companies for coal thus shipped and to the sales books for coal sold on the ground to local buyers, or by keeping an accurate account of the number of cars mined, making proper allowances for slate and dirt, verifying the accuracy of the accounts, if desired, by ascertaining the number of cubic yards of coal mined and removed; eighth, that as well the mines themselves as also the mining, shipping and sales books of the said lessees shall at all proper times be open to the inspection of the lessor and his engineers and agents for the purpose of ascertaining the condition of the mines and the amount of coal mined and removed; and also that the said lessees will furnish from time to time, on the request of the said lessor, maps of the mines, showing their actual condition; ninth, that the said lessees shall and will furnish annually to the said John Fairchild, his heirs and assigns, at the chutes nearest to or most convenient of access for said lessor, his heirs and assigns, twenty-five tons of coal of such sizes as may be desired at the price of $1.50 per ton, upon which coal no royalty shall be charged; tenth, that it is specially understood and agreed that if at any time an installment of rent or any part thereof shall become due and remain unpaid for the space of sixty days, then and in such case the said John Fairchild, his heirs and assigns, having first given to the said lessees, their superintendent or agent, thirty days' notice of his or their intent so to do, may at his or their option declare the term of this lease at an end; and thereupon all rights of the said lessees, their successors or assigns, shall absolutely cease and be determined, and the said lessor, his heirs or assigns, may resume possession of the demised premises with the improvements and appurtenances by legal process, or summarily and without legal process, at his or their option.

And in case a cause of forfeiture by reason of nonpayment of rent shall at any time arise under the aforesaid clause and such cause shall expressly or by implication be waived and the forfeiture be not enforced, the right of forfeiture shall be reserved and be in force whenever and so often as a new cause, by reason of the nonpayment of a future installment for the period aforesaid, shall arise. And it is further agreed by and between the parties aforesaid in manner as follows: that the said lessees, their successors and assigns, shall have the right to open through the surface of the said lands, the coal under which is hereby demised, such air shafts as may be necessary for the ventilation of the mines; provided, however, that they shall be placed at suitable distances from any dwelling house, and shall be made with as little damage as posssible and be properly secured upon the outside.

The instrument was duly executed and acknowledged.

Upon the entry of judgment for the defendant in the court below, the following opinion was delivered by RICE, *P. J.:*

We are of opinion that the sum of $17,360.42, mentioned in the case stated, is in law to be regarded as purchase money of real estate sold by John Fairchild in his lifetime and collectible by his administrators, to be by them accounted for as such to the orphans' court and distributable by the latter as personal estate of the said John Fairchild, deceased, to his four surviving children and to the estates of his deceased daughter, Anna E. Fairchild, and of his deceased widow, Martha Fairchild, according to the intestate laws of this Commonwealth. *Stoughton's App.* 88 Pa. 198; *Scranton* v. *Phillips*, 94 Pa. 15-22; *Sanderson* v. *Scranton*, 105 Pa. 469; *Delaware etc. R. R. Co.* v. *Sanderson*, 1 Cent. Rep. 102; *Hope's App.* 2 Cent. Rep. 48.

Therefore, pursuant to the stipulations of the case stated, it is ordered that judgment be entered for the defendant.

The assignments of error specified the entry of the judgment.

Messrs. **George K. Powell, E. P. & J. V. Darling** and **S. P. Wolverton,** for plaintiff in error:

Neither party to the lease in question thought at the time it was executed that it was a deed, and until the cases of *Sanderson* v. *Scranton*, 105 Pa. 469, and *Delaware etc. R. R. Co.* v. *Sanderson*, 1 Cent. Rep. 102, the legal profession, accustomed to drawing such instruments, never for a moment thought that they conveyed the fee of the coal.

The grant of a right to mine coal for so much per ton is a lease.

Offerman v. *Starr*, 2 Pa. 393; 44 Am. Dec. 211; *Greenough's App.* 9 Pa. 18.

These instruments of writing have for years been denominated, by the parties to them, as coal leases; they were intended as leases and not as conveyances; the words used in them are proper words and create a leasehold estate, and, technically, are incapable of creating anything else; both lessor and lessee have always supposed them to create such an estate and have invested large amounts of money on the strength of such construction. It is because of these important questions that counsel for plaintiff in error have again brought this question to the attention of the court.

In *Greenough's Appeal*, 9 Pa. 18, the operative words of the lease were: "May have the privilege of taking coal out of the P. mine, he paying to the respective owners thereof their respective proportions of the sum of twenty-five cents per cubic yard, of the coal so taken out as a rent for the said privilege." The supreme court held that this was a granted right to mine coal for so much per ton, and the *redditus* was consequently a certain rent, for which a distress might have been made.

In *Offerman* v. *Starr*, 2 Pa. 394, the owner passed the right to mine coal at a rent payable on each ton of coal taken out, reserving the right to examine the mine and re-enter on nonpayment of rent or neglect; and it was held that a right to use a mine necessarily implies a right to possess it; and a grant of the use and possession, in consequence of something to be rendered, is exactly what constitutes a lease of the thing to be possessed.

In *Griffin* v. *Fellows*, 81* Pa. 114, the words of the lease were: "Grant, demise, let, and to farm let, for 999 years; to have and to hold, the above granted and demised premises, with every power, right, member and appurtenance whatsoever, to the same premises belonging or in anywise appertaining, waters, ways, water courses, mines and minerals." This was held to be a coal lease.

In *Miner's Bank* v. *Heilner*, 47 Pa. 452, the question arose whether the rent due under a coal lease was not a prior lien under the Act of April, 1830, relating to mortgages, so that the mortgage of the leasehold would be discharged by a sheriff's sale, under an execution against the lessee. The supreme court said in speaking of this character of leases: "Millions of money are being invested in coal leases and mortgages, for very large sums often incumber them; still they are mere leasehold estates or chattel interests, which may be sold by a constable on an execution of a justice of the peace; and if such a judicial sale should be held to devest mortgages where a $1 rent remains unpaid, it would strike a death blow not only to the best security, but to one of the largest and most productive branches of our industry."

In *Turner* v. *Reynolds*, 23 Pa. 199, a son took possession of a coal vein under a parol agreement with his father, who claimed the whole tract on which a large vein was then opened, that he should have a smaller vein if he opened it. A lease was afterwards made by the father to the son and others, by which the lessor "demised, let and to mine let" all the tract of land known as No. 49 (the number of the lot on which the vein was opened) containing 160 acres or thereabouts, "and the coal bed thereon and now opened." Held, that after the lease the son was in possession as tenant and not as owner.

In *Moore* v. *Miller*, 8 Pa. 272, it was held that in estimating the language which constitutes a lease, the form of words used is of no consequence; it is not necessary that the term lease should be used. Whatever is equivalent will be equally available if the words assume the form of a license, covenant or agreement, and if the other requisites of a lease are present.

In *Gartside* v. *Outley*, 58 Ill. 210, a lease was granted by the Bellville & Illinoistown R. R. Co. to Twist, for an indefinite period, with the permission to take all the coal contained in the said land for the rents therein stipulated, with a clause of forfeiture for noncompliance by the lessee. The court said: "It is insisted that the instrument entered into by the parties is not a lease; that it conveys a higher estate. The counsel does not define the nature of the estate which he insists is created, except to indicate that the grant is in the nature of a 'servitude,' to which the company's land was subjected for an indefinite period. We think the fair construction to be given to that instrument is that it is in the nature of a lease, and creates only the relation of lessor and lessee."

Whatever words are sufficient to explain the intent of the parties, that the one should devest himself of the property and the other come into it for a determinate time, whether they run in the form of a license, covenant or agreement, will, in construction of law, amount to a lease as effectually as if the most proper and technical words were made use of for that purpose.

Watson v *O'Hern*, 6 Watts, 362.

***Mr.* L. H. Bennett,** for defendant in error:

This conveyance constituted a sale by John Fairchild, in his lifetime, of his coal estate to the Susquehanna Coal Company.

Kier v. *Peterson*, 41 Pa. 359; *Funk* v. *Haldeman*, 53 Pa. 244; *Stoughton's App.* 88 Pa. 198; *Delaware etc. R. R. Co.* v. *Sanderson*, 1 Cent. Rep. 102; *Sanderson* v. *Scranton*, 105 Pa. 469.

We are told in the argument for the plaintiff in error that until the cases of *Sanderson* v. *Scranton*, and the *Delaware etc. R. R. Co.* v. *Sanderson, supra*, the legal profession, accustomed to drawing such instruments, never thought that they conveyed the fee of the coal. This statement is questionable, in view of the action of the profession, in this county at least, in constantly refusing to advise loans on the security of the mortgage of the, so-called, lessor, unless the mortgagee receives, at the same time, an assignment of the royalties, with notice to the persons obligated to the payment of such royalties; and besides the statement in question involves the fault of the legal profession, and not a change in the law.

It is urged that if the present construction be adhered to, parties who suppose they yet hold the legal title of a lessor will find themselves without protection for purchase money, save in the personal covenants of a vendee. The protection which it is assumed has thus been taken from innocent lessors will, in all cases when the necessity for such protection arises, still be found to exist in the real covenants, conditions and clauses of forfeiture, invariably written in the conveyance itself, for the avowed purpose of securing payment of purchase money, and thus appearing of record as notice to everyone. All persons interested in such payments may enforce them against the land, and for that purpose maintain ejectment on such covenants, conditions and clauses.

This principle is enunciated in various cases, of which a few are: *Bear* v. *Whisler*, 7 Watts, 144; *Hiest* v. *Baker*, and *Strauss' App.* 49 Pa. 9, 353; *Perry* v. *Scott*, 51 Pa. 125; *Kensinger* v. *Smith*, 94 Pa. 384.

The rents, or payments, for coal mined and to be mined, under a sale, by a married woman, of such coal, with the right to mine and remove it, are personal property, payable to her executor on her death; and no part thereof belongs to her surviving husband as tenant by the curtesy.

Hope's App. 2 Cent. Rep. 48.

Per Curiam:

That a demise of all the coal under the surface of a specified piece of land is a sale of the coal is now too well fortified by authority to be successfully questioned in Pennsylvania.

The cases affirming this conclusion are cited in the opinion of the learned judge, and fully sustain the judgment he entered on the case stated.

Judgment affirmed.

Alonzo L. JONES, *Plff. in Err.*,
v.
Maria KROLL.

1. Error in submitting to the jury the **construction of a written instrument,** may be cured by a verdict in accordance with the construction that the court should have declared in the charge.
2. A lease for no determinate length of time but by which an annual rent is reserved, payable in any aliquot proportions, is a **lease for a year.**
3. A **lease** "from the first day of December, 1878, at the rent of $600 per annum, payable monthly when due" with a provision that if the lessee shall continue on the premises "after the termination of the contract, then this contract is to continue in full force for another year, and so on from year to year until legal notice shall be given for a removal," followed by a clause that if the lessee shall continue on the premises "after the termination of the above contract, then he shall have the privilege of staying another five years, at the above fixed rent per annum," is a lease **for one year with the option of continuing from year to year** for five more years.

(Argued March 29, Decided April 11, 1887.)

JULY Term, 1886, No. 80, E. D.

Error to Common Pleas No. 4. of Philadelphia County to review a judgment on a verdict for the plaintiff in an action of ejectment. *Affirmed.*

Reported below *Kroll* v. *Jones*, 1 Pa. C.C. R. 485.

The facts as they appeared at the trial before ARNOLD, *J.*, were these:

On November 11, 1878, Herman Kroll (acting as agent for his wife, Maria Kroll), made and executed with Alonzo L. Jones the following agreement of lease for the premises therein described:

"This agreement witnesseth, That [Herman Kroll, of the City of Philadelphia] doth hereby let unto [Alonzo L. Jones, of the same place, that four story brick house, No. 114, North Sixth Street, for plumbing, gas, and steam fitting business, from the first day of December, 1878] at the rent of [$600] per [annum] payable [monthly when due,] which said rent so reserved, the said lessee agrees to pay regularly as it may fall due, or within five days thereafter; in default of which the lessor may, without notice, re-enter upon and take possession of the premises, or at his option, enter judgment against the lessee, or any subtenants, in any action of ejectment to be brought to recover possession of the premises, without appeal, writ of error, or stay of execution; and for confessing said judgment this shall be the warrant of any person. And the lessee, as a security for the payment of all rent falling due under this lease, hereby grants, bargains and sells, to the lessor, all the goods, household and kitchen furniture of the lessee upon the premises, or to be brought thereon, without any exception; and should the rent at any time be unpaid, or the goods be removed from the premises, the lessor may follow said goods, take possession of them, and for all rent due, sell them at auction on three days' notice, and for all rent not due, hold them in possession in the meantime as a security; the said lessee hereby waiving the benefit of all laws or usages exempting any property from liability for rent, and the lessor not waiving any remedies given by existing laws.

"The premises are not to be underlet, or this lease transferred, without the lessor's consent, under penalty of instant forfeiture and right of re-entry for such breach of this lease; and on the expiration of this lease the property is to be surrendered in as good order as it now is, reasonable wear and tear alone excepted.

"It is hereby further agreed that if the above named [Alonzo L. Jones] should continue on the above described premises after the termination of the above contract, then this contract is to continue in full force for another year and so on, from year to year until legal notice shall be given for a removal.

"It is hereby understood and agreed to that if the above named [Alonzo L. Jones] should continue on the above described premises after the termination of the above contract, then he shall have the privilege of staying there for another five years at the above fixed rent per annum.

"In witness whereof, the said [Herman Kroll] and [Alonzo L. Jones] have hereunto set their hands and seals, the [11th] day of [November, 1878."]

The portions in brackets constitute the written parts of the lease.

The lessee entered and continued in possession thereafter. On August 29, 1884, he was served by Mrs. Kroll (her husband having died meanwhile) with a notice to quit on December 1, 1884. He disregarded the notice and on January 6, 1885, was summoned before Magistrate Becker in proceedings by Mrs. Kroll for recovery of possession under the Act of 1863.

After hearing, the magistrate gave judgment for the plaintiff. An appeal was taken from the judgment to the Court of Common Pleas, No. 4. The plaintiff filed a narr. in ejectment and the defendant pleaded not guilty.

At the close of the plaintiff's case below, counsel for defendant below moved the court to enter a nonsuit, which motion the court overruled.

The court then admitted the evidence of the defendant below in explanation of the making of the lease and of the term intended to be agreed upon by him. His statements were, in turn, contradicted by the plaintiff below; and after the testimony of these two witnesses, the court charged the jury, *inter alia*, as follows:

"The first clause of the lease is: If Jones continues after the expiration of the term, he may continue for another year, and so on from year to year. This shows a yearly letting. Then by another clause he has the privilege of staying another five years. What, then, is the extreme length of his term and option? If the first term was for one year, with the privilege of another five years, he has had that. If the lease was not for one year, but for five years, with the privilege of five years more, he has been prematurely warned out. Because of ambiguity in the lease I have admitted testimony to explain it. Jones says he hired the place for five years, and would not have taken it unless for five years, with the privilege of five years more. If you find that the term was for one year, with the privilege of five years, you will find for the plaintiff. If you find that the term was for five years, with the privilege of another five years, then this suit is premature, and you will find for the defendant. I leave it to you to say, upon the lease and the extraneous evidence, what the term was, whether of one year, with the privilege of another five years, or five years, with the privilege of another five years."

The defendant submitted the following points:

1. The lease given in evidence by the plaintiff must be so construed as to make a term of five years from the date thereof, with the privilege to the defendant of continuing as a tenant upon the premises therein described, "for another five years;" and the plaintiff has no cause of action. The verdict must, therefore, be for the defendant.

2. In the granting clause of the lease, material words defining the term of the demise appear to have been omitted; and the lease must be construed as if such words were inserted, and so as to give effect to the subsequent clause, which gives to the defendant "the privilege of staying there for another five years." The verdict, upon such construction, must be for the defendant.

3. The grant or demise of the term "from the first day of December, 1878, at the rent of $600 per annum," is without limitation or termination; and the same must be read and construed in connection with the clause which provides for the privilege of another five years; and the verdict must be for the defendant.

4. The lease must be construed in favor of the grantee or lessee and against the grantor or lessor, and so as to give effect to every beneficial intendment in favor of the lessee. It must, therefore, be construed as creating a term of ten years; and the jury must find a verdict for the defendant.

5. Upon any construction of the said lease, the defendant was entitled to have and maintain possession thereunder for a term at least of seven years. The notice to quit on the first of December, 1884, and proceedings upon the same by the plaintiff, were premature, irregular and void; and the verdict must be for the defendant.

These points the court affirmed or refused, according as they were answered in the general charge.

Verdict and judgment were for the plaintiff.

Upon discharging a rule for a new trial, ARNOLD, *J.*, delivered the following opinion:

The plaintiff leased a house to the defendant, "from the first day of December, 1878, at the rent of $600 per annum, payable monthly." It was agreed that on the expiration of the term the property should be surrendered in as good order as it then was, reasonable wear and tear excepted.

By another clause in the lease it was further agreed that if the defendant should continue on the premises "after the termination of the above contract, then this contract is to continue in full force for another year, and so on, from year to year, until legal notice shall be given for a removal."

By a subsequent clause it was agreed that if the defendant should continue on the premises "after the termination of the above contract, then he shall have the privilege of staying another five years, at the above fixed rent per annum."

Notice having been given to the defendant, to quit on December 1, 1884, he refused to comply; whereupon, this action of ejectment was commenced. A verdict was rendered for the plaintiff. The defendant now moves for a new trial, and the question is: What was the duration of the lease?

The construction of this lease is for the court. The ambiguity as to the duration of the estate is patent and not latent. There is enough on the face of the paper to enable us to settle the doubt which has been raised, without the aid of extrinsic evidence.

A lease for no determinate length of time, but by which an annual rent is reserved, payable half yearly, quarterly, monthly, or in any other aliquot proportions, is a lease for a year. *Lesley* v. *Randolph*, 4 Rawle, 123; *Hey* v. *McGrath*, 81* Pa. 310; *Richardson* v. *Langridge*, 4 Taunt. 128; *King* v. *Herstmonceaux*, 7 Barn. & C. 551; and a demise for a monthly or weekly rent affords a presumption of a monthly or weekly tenancy. *Hollis* v. *Burns*, 100 Pa. 206; *Huffel* v. *Armitstead*, 7 Carr. & P. 56.

The first term in the lease before us was for one year. The words "another five years" in the subsequent clause do not overcome the rule of law in this respect, because another five years might follow as well upon another and prior term of one, two or three, as of five years.

It is contended, however, by the learned counsel for the defendant, that a tenancy "for one year, and so on from year to year" (which Woodfall, in his work on Landlord and Tenant, at page 202, says is frequently done by mistake), is a tenancy for two years at least, and cannot be determined at the end of the first year.

It is true that such rulings have been made in England, but there are other and more numerous decisions the other way. In a settlement case, in order to piece out a term for a year so as to give a pauper a settlement, it was held that a lease for six months, and so on from six months to six months, until six calendar months' notice is given to quit, is a tenancy for twelve calendar months at least. *Regina* v. *Chawton*, 1 Ad. & El. N. S. 247.

How much influence the benevolent object to be attained had in the result we do not know. *Doe, dem. Chadborn*, v. *Green*, 9 Ad. & El. 658, and some earlier cases are to the same effect.

On the other hand, it was held that a tenancy from year to year may be determined by either party at the end of the first or any subsequent year, unless the parties use expressions showing that they contemplated a tenancy for two years at least. *Doe, dem. Clarke*, v. *Smaridge*, 7 Ad. & El. N. S. 957; *Thompson* v. *Maberly*, 2 Camp. 573.

Other decisions on both sides of this question may be found cited in *Lesley* v. *Randolph*, *supra*, by *Mr. Justice* Kennedy, who adopted the ruling of *Lord Chief Justice* Holt in *Dod* v. *Monger*, 6 Mod. 215, that a lease for a year, and so from year to year, is a lease binding but for one year, and that may now be considered the rule in this State. It was applied and enforced, although the question was not considered in *MacGregor* v. *Rawle*, 57 Pa. 184.

Besides, this is not a lease for a year and so on from year to year. It is a lease for one year, with an agreement that if the tenant should continue on the premises after the first year, then the lease should be in force for another year; and so on from year to year. The mistake which Woodfall says is frequently made was not made here.

At the trial the defendant was permitted to give evidence to show that the first term was to have been five years. This was an error, but it is one of which the defendant cannot complain. The verdict of the jury is founded upon the proper construction of the lease, such as the court now puts upon it.

The defendant was tenant of the premises for one year, with the option of continuing from year to year for another five years; and having enjoyed all that his option gave him, the plaintiff is entitled to the possession of the premises.

Rule discharged.

The assignments of error specified: 1, the portion of the charge given above; 2, the answer to the defendant's points; and 3, the action of the court in leaving to the jury the construction of the lease.

Mr. **William H. Ruddiman**, for plaintiff in error:

The construction of the lease and the determining, from its terms, of the period of the lessees' tenancy were solely for the court. In construing a deed the court will look at the entire instrument; and general words will be restrained by particular recitals.

Wood, Land. & T. § 237.

It is the duty of the court to reconcile inconsistent or repugnant clauses.

Taylor, Land. & T. § 160, note.

The words in the particular grant of "another five years," could have had no other significance or interpretation than that there had been a term of a previous five years agreed upon. It is not of doubtful character or effect; but if it were, the construction must still be in favor of the lessee and against the lessor.

Wood, Land. & T. § 237.

Where a deed may inure several ways, the grantee shall have his election which way to take it. An exception in a deed shall be taken most favorably to the grantee; and if it be not set down or described with certainty, the grantee shall have the benefit which may arise from such defect.

Jackson v. *Hudson*, 3 Johns. (N. Y.) 375.

If a lease for a term is made determinable at certain specified periods, and nothing is said as to the person by whom the option is to be exercised, the lessee only can exercise it, every doubtful grant being construed in favor of the grantee."

Wood, Land. & T. § 79.

No part of the language contained in the lease should have been separated from the whole instrument, and itself made the subject of particular instruction to the jury.

The points upon which the learned judge was requested to charge the jury, it is respectfully submitted, were clear, intelligible and specific; and if any one of them could be sustained, the verdict should have been for the defendant below. Especially is that the case, if greater stress can be laid upon one than upon another, as to the second point, respecting the omission of material words, and the construction of the lease as if such words were inserted. Where a material word appears to have been omitted in a lease by mistake, and other words cannot have their proper effect unless it be introduced, the lease must be construed as if that word were inserted, although the particular passage where it ought to stand conveys a sufficiently distinct meaning without it.

Taylor, Land. & T. § 160, note 6, 7th ed; *White* v. *Eagan*, 1 Bay, 247; *Wright* v. *Dicksons*, 1 Dow, 141; Wood, Land. & T. § 302.

Or as to the fifth point, that defendant below was entitled to a term of seven years, at least; the law touching the same being as follows: A demise for a year, and so on from year to year, is a lease for two years certain, at least.

Wood, Land. & T. § 292.

A lease for one year certain, and so on from year to year, creates a tenancy for two years at least.

Reg v. *Chawton*, 1 Q. B. 247.

A tenancy for one year certain, and so on from year to year, cannot be determined before the end of the second year.

Wood, Land. & T. § 31.

The first two years thus made his, and the special provision of "another five years," gave the lessee an estate for at least seven years; and the jury should have been so instructed.

But as to all the points, taken separately or together, it is impossible to discover where or how in the learned judge's charge the same were covered or referred to, or even suggested. He should have given the defendant below the benefit of either an affirmance or denial of each single and specific point.

Messrs. **Matthew Ditmann** and **Charles Davis**, for defendant in error:

A lease for no determinate length of time, but by which an annual rent is reserved, payable half yearly, etc., is a lease for a year.

Lesley v. *Randolph*, 4 Rawle, 128; 2 Bl. Com. 144, 145; *Hey* v. *McGrath*, 81* Pa. 310, 212.

Leases for uncertain terms are leases at will; the reservation of an annual rent turns them into leases from year to year.

Bree v. *Lees*, 2 W. Bl. 1173; *Richardson* v. *Langridge*, 4 Taunt. 131; 4 Kent, Com. 111, 112; *Logan* v. *Herron*, 8 Serg. & R. 473; *Clark* v. *Smith*, 25 Pa. 137.

The court below did, in effect, construe the lease in question, in charging the jury that, "If Jones continues after the expiration of the term, he may continue for another year, and so on, from year to year. This shows a yearly letting. Then by another clause he has the privilege of staying another five years. What, then, is the extreme length of his term and option? If the first term was for one year, with the privilege of another five years, he has had that."

At all events the court corrected this in its opinion refusing a new trial; and the verdict of the jury being in full accord with the opinion of the court the result reached was the same, and in this there was no error.

It is not the rule of law in Pennsylvania that "A lease for one year certain, and so on from year to year, creates a tenancy for two years at least." The rule is as laid down by *Lord Chief Justice* Holt, in *Dod* v. *Monger*, 6 Mod. 215, that "A lease for a year, and so on from year to year, is a lease binding but for one year."

The points were substantially answered in the general charge, and this is all that is required.

Patterson v. *Kountz*, 63 Pa. 246; *Winsor* v. *Maddock*, 64 Pa. 231; *Smith* v. *Bouvier*, 70 Pa. 325; *Scheuing* v. *Yard*, 88 Pa. 286.

Per Curiam:

Conceding that there was error in leaving to the jury to find the construction which should be given to the written lease, yet inasmuch as they found it what the court should have declared it to be, and what the learned judge in fact stated in discharging the rule for a new trial, the plaintiff in error has no just cause of complaint. He attempted by parol evidence to induce the jury to give an erroneous construction to the written instrument; but having failed in this, he must now submit to the verdict and the judgment entered thereon.

Judgment affirmed.

W. P. KRUM *et al.*, *Plffs. in Err.*,
v.
William MERSHER.

1. **Where** the **lessee of a quarry,** in consideration of hand money and **a further** sum to be paid in monthly installments out of net profits, **assigns** the **lease** by an agreement in which it is **provided** that, if the **assignee makes no profits** and believes that the quarry is not a profitable one to work, **he may abandon** it and the agreement shall become a nullity, the **assignee's right to terminate** the contract depends upon the fact that he makes no profits and believes the quarry is not a profitable one to work.
2. If in fact the **assignee** has made, after a fair trial, no profits and believes the quarry is not a profitable one to work, he **may terminate** the **contract** and surrender the lease to the lessor.
3. In an action by the lessee against the assignee for so surrendering the lease, **testimony** that the quarry might have been worked profitably is **irrelevant.**

(Argued Feb. 19, Decided April 11, 1887.)

JULY Term, 1886, No. 93, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett and Clark, *JJ.*

Error to the Common Pleas of Lehigh County, to review a judgment on a verdict for the plaintiff in an action of covenant. *Reversed.*

This was an action by William Mersher against W. P. Krum and B. F. Peters, upon the following agreement, under seal:

"Articles of agreement made and concluded this 20th day of October, A. D. 1883, between Wm. Mersher of Washington Township, State of Pennsylvania, of the first part, and W. P. Krum and B. F. Peters of the same Township, County and State aforesaid, of the second part, viz.: the party of the first part agrees to sell to the party of the second part one half interest of a certain lease which he holds on the property of M. C. Hirsch, situated in Washington Township, Lehigh County, Pa., with all the slates on bank, tool shanty, machine truck, railroad iron, derrick, ropes, horse powers and all outstanding accounts for slates sold previous to this agreement, the said half interest Wm. Mersher has granted and sold to the said W. P. Krum and B. F. Peters for a certain sum conditioned for the said sum shall be $1,600, of which sum $200 is to be paid at the above date and the balance to be paid monthly out of the clear proceeds, that is after deducting all expenses. And out of the clear proceeds cash in hand he shall receive the balance that is out of the one half. Should the quarry prove a failure that no proceeds should be in hands of the second party, or that they should abandon the quarry, believing that the quarry would not be a paying one or a profitable one to them in their estimation, and if the quarry had not netted any clear profit to the second party at abandoning said quarry, then the second party shall not be responsible for any further payment, and this agreement shall be null and void and of no effect. And further, for the true and faithful performance of each and every of the above parties do hereby bind themselves, their heirs, executors and administrators and every of them firmly by these presents."

This agreement was duly signed and sealed by the parties.

The declaration alleged two breaches: first, that the quarry was a paying and profitable one, yet the defendants had not worked the same and paid the monthly installments; second, that they did not abandon the quarry as provided in the covenant; and then claims the balance of the consideration named in the covenant, to wit: $1,400.

It appeared at the trial that the defendants worked the quarry from October, 1883, to June, 1884. They put up at the quarry new machinery at a cost to them of $1,600. They expended in labor and other things, exclusive of the cost of the machinery, over $3,100. And the slate taken out by them while they worked the property did not exceed in value $1,110. Exclusive of the cost of the new machinery they sunk about $1,991 from October, 1883, to June 1884, and adding the cost of the new machinery, their total expenditures exceeded the value of the slate quarried, $3,591.

The plaintiff was told that the quarry was unprofitable, and that the defendants would surrender the lease. He made no objections; but asked for a week's time in which to try to sell. The defendants then surrendered the lease to the lessor Hirsch. Other facts are stated in the charge. During the trial the plaintiff asked a witness the following question:

What was the value of this property and the machinery on these premises when they left and gave it up to Hirsch? Objected to.

By the Court: The plaintiff has offered to show that the abandonment of the quarry by the defendants was not in good faith, and that the quarry was in a condition to have been worked profitably. In addition to that, he proposes to show that when the defendants did abandon the quarry, they sold or carried away a portion of the machinery and personal property, which the plaintiff had transferred to them by the written agreement, and he seeks to show the value of the property thus carried away, with a view of recovering for it. In addition to the demand to recover for what the profits were or would have been if the quarry had been properly worked, the plaintiff's position being that upon the abandonment by the defendants, the agreement, as stated in it, was null and void, and that the plaintiff's rights to the quarry, machinery and personal property there were then revived. To this the defendants object as incompetent and irrelevant, and not admissible under the pleadings; which objection is overruled and a bill sealed for the defendants. *Fifth assignment of error.*

A. It was worth $5,000 to any party.

The court charged as follows:

This action of covenant brought by William Mersher against W. P. Krum and B. F. Peters arises in this wise: it appears that Mr. M. C. Hirsch was the owner of a tract of slate land in Washington Township, and that he had leased it for the purpose of working to Messrs. Mersher, Blose and Fink. Some time in 1883, Mersher and the defendants agreed that he (Mersher) would sell out his interest to the defendants. There was a verbal arrangement to that effect. It seems that Hirsch knew of this and agreed to it. It appears further that it was agreed by words between the parties concerned that Mersher, Blose and Fink should cease to be the lessees of this property, and that Krum and Peters and several other persons should become the lessees; that in pursuance of that understanding Mersher gave up the lease, which he and others had, to Mr. Hirsch, and then Hirsch made a new lease to Krum and Peters and his associates (Gross, Fritzinger and one or two others), and that when that was done a writing was made between Mersher, the plaintiff, and Krum and Peters, the defendants, and with that writing and the contract embodied in it we have to do. On it this action of covenant is brought. It is dated the 20th day of October, 1883, and is between Mersher, Krum and Peters:

By this agreement it is agreed that the party of the first part (Mr. Mersher) sells to the party of the second part (Krum and Peters) the one half interest of a certain lease, which he (the said Mersher) holds on the property of Hirsch, situate in Washington Township, Lehigh County, with the slate on the bank, tools, shanties, track, railroad iron, derrick, ropes, horse power, and all the outstanding accounts for slates sold previous to this agreement. The said half interest of William Mersher is granted and sold to the said Krum and Peters for a certain sum, conditioned for, said sum shall be $1,600, of which $200 is to be paid at the above date, and the balance to be paid monthly out of the clear proceeds, that is, after deducting all expense, and out of the clear proceeds cash in hand he shall receive the balance, that is out of the one half; should the quarry prove a failure that no proceeds should be in hand of the second party, or that they should abandon the quarry, believing that the quarry would not be a paying one or a profitable one to them in their estimation, and if the quarry had netted any clear profits to the second party at abandoning the said quarry, then the second party shall not be responsible for any further payment, and this agreement shall be null and void and of no effect.

The parties could make their own agreement; and by that agreement they must stand, whether it is a hard bargain or not, whether it is a bargain more favorable to one side than to the other.

It is admitted that the $200 which was stipulated for at the time of the making of the agreement was paid, and the contest now is about the $1,400. The uncontradicted evidence on both sides is and the fact is conceded by the plaintiff, that on the 14th day of June, or thereabouts, 1884, Krum and Peters gave up the lease which they had to Hirsch, and it was ended.

By the agreement Krum and Peters reserved the right to give up the lease; and if they gave up the lease, then they were not obliged to pay after that, provided it was given up in good faith as I shall explain to you presently. You will understand by this agreement, under the construction which the court gives it, that Mersher was to receive, after the $200 had been paid down, one half of the profits for his pay —that is, after deducting the expense of working the quarry from it, if there was any profit, the profit to be divided by two and out of the one half Mersher was to be paid and out of nothing else; and the agreement says if there are no profits, he is to receive no further pay; and by that he must stand.

It has been proved to you, that is the uncontradicted evidence is, that a certain amount was expended between October, when this working was begun, and in June, when it was given up, and that a certain amount of slate was taken out. It was argued by plaintiff's counsel that there would be a profit if you did not take into account the machinery and labor. In the opinion of the court that argument is untenable. There was no profit. The plaintiff has not shown that there was any profit, nor does the defendants' evidence show any profit during the time Krum and Peters worked the quarry. The agreement says out of the profit Mersher is to be paid; and you have the fact that it is not proved that there was any profit during the time they worked, and the fact that the agreement was given up. The plaintiff, then, has no claim against Krum and Peters under his own writing, except on one theory; and the question arising upon that theory will be submitted to you.

The agreement says that if Krum and Peters should abandon the quarry, believing that the quarry was not a paying one or a profitable one to them in their estimation, and if the quarry had not netted clear profits to the second party at the time of abandoning the said quarry, the second party shall not be responsible for any further payments. The quarry was given up, but not with the consent of Mr. Mersher. They had a right to give it up under the writing of Mr. Mersher.

[The allegation of the plaintiff is that the agreement implies that the quarry was to be worked in good faith; that the quarry might have been worked so as to render a profit. I say to you that when this lease was given up in June, 1884, if it is proved that at that time by ordinary diligence and ordinary business enterprise and capacity it might have been made to pay a profit, Mr. Mersher may recover, because there is implied in this agreement a covenant or understanding that they shall work it in an ordinary workmanlike manner. Mersher's pay depended upon the profits of the quarry; and therefore the lessees, Krum and Peters, had a right to give up the lease, if they in good faith believed it could not be made to pay. The plaintiff says they did not give it up in good faith; that they gave it up from some other motives, and alleges that at the time the lease was given up the quarry might have been worked with profit by the defendants. If that is proved, the plaintiff may recover].

If the plaintiff recovers, it will be the balance which is owing on the $1,600; but before the plaintiff can recover on this theory and condition he must prove his case. The plaintiff must prove that the quarry could have been worked with a profit, and that it was not given up honestly and in good faith. The plaintiff has testified, as well as witnesses in his behalf, that the quarry at the time it was given up might have been worked with profit; and it has been shown to you on the plaintiff's part what the quarry was, and how it was worked, and what was taken out, and it was argued by plaintiff's counsel that it was profitable. On the defendants' part they allege they gave it a fair trial and that it was worked at a great loss; that the material was not good; that the slates were of such a quality that the product of the quarry would not be marketable. The plaintiff alleges that it was not worked skillfully all the time. From this evidence you are to ask yourselves whether it is proved that the quarry could have been worked at a profit at the time it was given up in June, 1884.

If the material in the quarry was as bad as the defendants say, it is very likely you will come to the conclusion that they could not work the quarry with a profit. This the plaintiff denies and says that the stone there was as good as the average in the region where the quarry was located, and that quarries there could be operated with a profit. The lease was given up in June, 1884. If the plaintiff has satisfied you that the quarry, when the lease was given up, was of such a kind and the material was of such a quality, and the quarry itself was of such a character, as to be workable with profit, the plaintiff can recover. If that is not shown, the plaintiff has no case.

If you consider all the evidence on that question and you are convinced that the quarry could have been worked with profit at the time it was given up, the plaintiff can recover; and in that event he may recover all that is owing to him under the stipulation to give him $1,600, $200 of which he already has. It is not enough for the plaintiff in order to recover to show that the defendants gave up the quarry and nothing more, because they reserved by the writing the right to give it up. [The plaintiff can recover on the ground, and on that ground only, that he has satisfied you that when they gave up the lease the quarry might have been worked with a profit.]

The defendants allege that $523.18 has been paid, and that they say is the $200 paid on the agreement which is not disputed, and the store bill of $123.18, and $200 on a note which it appears the defendants indorsed for Mersher and which they afterwards paid. The defendants say that the $200 was paid on the agreement, but the other $325.18 was not paid on account of the $1,600; that they have that as a separate claim, and they plead what they call "set-off" or "defalcation."

If the plaintiff has not shown that the quarry may have been worked with a profit, your verdict will be in favor of the defendants; and in that case the defendants claim their set-off of $323, which they say the plaintiff owes them outside of this transaction. The law says that where the jury find a set-off in favor of the defendants and against the plaintiff they shall so certify. If you find in favor of the defendants—if you find the quarry could not be worked with a profit—you will say you find in favor of the defendants, and certify that the plaintiff is indebted to the defendants, in the sum of blank dollars, whatever you may estimate that amount to be.

The plaintiff claims the $1,600 stipulated in the agreement. He is willing to take that $523.18 as having been paid on the agreement. If you find in favor of the plaintiff, that would leave $1,086.82 on the $1,600 mentioned in the agreement, which amount he claims with interest from the time it should have been paid up to this day.

[You will take the case and inquire as to the main question, whether the plaintiff has shown that the defendants, when they gave up the lease, by ordinary business enterprise could have worked the quarry with a profit, and that it was not given up in good faith; and if you find that issue in favor of the plaintiff, he will be entitled to your verdict for whatever may appear to be due under the explanations I have given to you.]

If you find this issue against the plaintiff, your verdict will be in favor of the defendants; and then you will find in favor of the defendants and against the plaintiff for whatever, if anything, is due on the store bill and the note paid; and in that event you may sign the certificate filling out the blanks, which I will send out with you. If you find in favor of the plaintiff, you will not need that paper; and in that case you will sign a paper stating your verdict and bring it into court in the morning.

The defendants submitted, *inter alia*, this point:

"Under all the evidence of this cause the defendants are entitled to a verdict."

Ans. "Negatived." *First assignment of error.*

Verdict and judgment were for the plaintiff for $1,157.09.

The second, third and fourth assignments of error specified, respectively, the portions of the charge inclosed in brackets.

Messrs. **John D. Stiles & Son, Levi Smoyer** and **Edward Harvey,** for plaintiffs in error:

Payment of the balance of the consideration was expressly restricted to the one half of the net profits to be realized. The contract is clear upon that point. The mode of payment is agreed upon—the fund out of which payment is to be made is designated—and the contingency upon which payment is made to depend is specified. By the term "profits" is meant the net return to the capital invested after deducting all expenses. As there were no profits there was no fund out of which payment could be exacted.

In *Williams* v. *Hathaway*, L. R. 6 Ch. Div. 544, the plaintiff was not permitted to recover because by the terms of the contract he was restricted to a particular fund.

In *Chambers* v. *Jaynes*, 4 Pa. 39, the remedy was restricted to separate rents.

See also 1 Whart. Cont. p. 598.

By its very terms the contract made the defendants the exclusive and absolute judges of the conditions under which the agreement should become void. The obligation to perform was made dependent upon the contingency that the defendants would conclude, as a matter of opinion, that the quarry could be worked at a profit to them. It is only on the happening of the contingency, whatever it may be, that the obligation to perform becomes operative.

Benninger v. *Hankee*, 61 Pa. 343.

What does this contract mean but that the defendants will pay the balance of the consideration if they are satisfied the venture will be profitable? If that is the true construction then they are of necessity the exclusive judges of its conditions.

In *Grafton* v. *Eastern Counties R. Co.* 8 Exch. 699, the contract provided as a condition precedent that the coke should be furnished to the satisfaction of the inspecting officer of the company. It was held that this was the condition upon the performance of which the contract depended.

In *Taylor* v. *Brewer*, 1 Maule & S. 290, work was performed under a resolution that any service to be rendered by him should be taken into consideration, and such remuneration be made as should be deemed right. It was held that an action would not lie to recover a recompense for such work, as the resolution imported that the committee were to judge if any remuneration was due.

In *Andrews* v. *Belfield*, 2 C. B. N. S. 779, the contract provided that the carriage should be made in a manner which shall meet my approval, not only on the score of workmanship but also of convenience and taste. It was held that these words were an express condition that the carriage should meet the approval of the purchaser on the score of convenience and taste; and he was entitled to reject it, provided he did not act from mere caprice.

In *McCarren* v. *McNulty*, 7 Gray, 139, the plaintiff agreed to construct a bookcase in a "good, strong and workmanlike manner to the satisfaction" of one of the defendants. It was held that proof that it was constructed according to the terms of the agreement would not suffice to support the action, but that the plaintiff must prove that it was satisfactory to or accepted by the defendant. Morton, *J.*, says in the opinion of the court: "Having voluntarily assumed the obligation and the risk of the contract, his legal rights are to be ascertained and determined solely according to its provisions."

In *Brown* v. *Foster*, 113 Mass. 136, the plaintiff agreed to make the defendant a satisfactory suit of clothes; the defendant returned the delivered suit as unsatisfactory. It was held that an action could not be maintained.

In *Zaleski* v. *Clark*, 44 Conn. 218, the plaintiff, a sculptor, made a plaster bust of the deceased husband of the defendant under an agreement that she was not to take it unless she was satisfied with it. When it was finished she was not satisfied, and refused to accept it. In a suit for the price it was found that the bust was a fair piece of work, a correct copy of a photograph furnished by the defendant, and that it accurately portrayed the features of its subject, and that the only fault found with it was that it did not have the expression of the deceased when living, which was caused by no imperfection in the work, but by the nature of the material. It was held that the plaintiff was not entitled to recover.

In *Bernard* v. *Cushing*, 4 Met. 230, the payee of a note, at the time it was signed by the maker, and as part of the same transaction, indorsed thereon a promise not to compel payment thereof, but to receive the amount when convenient for the maker to pay it; it was held that the payee could never maintain an action.

In *Nelson* v. *VonBonnhorst*, 29 Pa. 352, a party gave an instrument of writing, under seal, acknowledging an indebtedness to another in a certain amount, and which he agreed "to pay whenever in my opinion my circumstances will enable me to do so." It was held that such instrument imposes no legal obligation which can be enforced by action.

In *Hartman* v. *Blackburn*, 7 Pitts. Legal J. 140, a person got a set of teeth from a dentist under an agreement that they were to be satisfactory. It was held that he was the exclusive judge.

All the cases hold that it is not in compliance with such contracts to prove that the defendant ought to have been satisfied.

Gray v. *Cent. R. R. Co. of N. J.* 11 Hun, 70; *Gibson* v. *Cranage*, 39 Mich. 49; *Hoffman* v. *Gallaher*, 6 Daly, 42; *Barlow* v. *Thompson*, 46 Ind. 384.

In *Singerly* v. *Thayer*, 108 Pa. 291, the words of the contract were: "Warranted satisfactory in any respect." The court below charged the jury that if they were of the opinion that the elevator was reasonably fit for the purpose for which it was intended and the defendant ought to have been satisfied with it, the verdict might be for the plaintiff. This was held to be error.

The fair inference from the contract was that the elevator was to be satisfactory to the defendant; and while it could not be rejected for mere caprice, yet a *bona fide* objection by him to its working was a sufficient defense.

Where it is not alleged in the pleadings nor found in the decision that the defendant acted fraudulently or in bad faith, fraud or bad faith is not to be presumed.

Whart. Cont. p. 588.

Messrs. **R. E. Wright's Sons and C. J. Erdman,** for defendant in error:

Mersher sold his property to Krum and Peters for a consideration which was to be paid out of the income from the products of the quarry. There was, therefore, an implied covenant on the part of Krum and Peters that they would, in good faith, work the quarry with proper diligence, to the end that Mersher might receive the consideration for his sale.

In support of this proposition we refer to the following authorities:

A lease of the right to dig and mine coal, the lessee to pay three eighths of a cent for every bushel he may mine or dig, applies not only to the coal actually mined, but to what the defendant reasonably could and should have mined upon the land leased. For the quantity not mined, the measure of damages is the difference between the stipulated rate of compensation and the value of the coal left unmined.

Lyon v. *Miller*, 24 Pa. 393.

A lease of a stone quarry in consideration that the lessee shall pay to the lessor a certain price per perch for all stone taken out of it, is a contract on the part of the lessee that he will work the quarry; and upon his failure so to do the lessor may maintain covenant on the contract and recover damages. And one verdict and judgment on such contract, pending the lease, is not a bar to another, when the term is further advanced.

Watson v. *O'Hern*, 6 Watts, 362.

Where the right to mine ore or other minerals is granted in consideration of the reservation of a certain proportion of the product to the grantor, the law implies a covenant on the part of the grantee to work the mine in a proper manner, and with reasonable diligence, so that the grantor may receive the compensation or income contemplated when the agreement was entered into; but unless there are special reasons for equitable interference such covenant will not be enforced in a court of equity, as an adequate remedy is afforded by an action at law for damages.

Koch's App. 93 Pa. 434.

From these authorities it follows that so long as the plaintiffs in error retained the quarry and did not avail themselves of their right under certain conditions to abandon it, they were obliged to work it diligently, and that if the failure to realize the profits, out of which we were to be paid, arose from their clear breach of their implied covenant, they were chargeable with such profits as they might have realized through a proper performance of their implied covenant.

The agreement did not give the plaintiffs in error the right out of mere obstinacy and caprice and without honest cause to abandon the quarry, keep the personalty, and deprive the defendant in error of compensation. He did not agree to part with his property, leaving his compensation dependent upon the mere whim of the purchaser.

Where an offer of a reward is made to parties who come up to certain conditions determined by the promisor, or where an offer is made to architects to submit plans for a proposed building, such plans to be paid for if satisfactory, the duty of examination must not be exercised capriciously, but there must be a reasonable trial, although it is competent for the parties to leave the question absolutely to the determination of the employer, in which case it will be sufficient if he exercises his option in good faith.

1 Whart. Cont. p. 787; *Singerly* v. *Thayer*, 108 Pa. 298; 1 Pars. Cont. 542; *Andrews* v. *Belfield*, 2 C. B. N. S. 779.

Mr. Justice **Green** delivered the opinion of the court:

We think the learned court below was in error in the interpretation of the clause of the contract which subjected its obligatory force to the will of the grantees. The language of this portion of the agreement is certainly inartistic and indeed uncouth. But it is not unintelligible.

It is practically conceded in the charge that "Krum and Peters had a right to give up the lease if they in good faith believed it could not be made to pay." We agree with this, but as we understand the charge, this is not the question upon which the case was given to the jury. On the contrary the court said: "I say to you that when this lease was given up in June, 1884, if it is proved that at that time, by ordinary diligence and ordinary business enterprise and capacity, it might have been made to pay a profit, Mr. Mersher may recover because there is implied in this agreement a covenant or understanding that they shall work it in an ordinary workmanlike manner."

And again: "If the plaintiff has satisfied you that the quarry when the lease was given up was of such a kind and the material was of such a quality, and the quarry itself was of such a character, as to be workable with profit, the plaintiff can recover. * * * If you consider all the evidence on that question, and you are convinced that the quarry could have been worked with profit at the time it was given up, the plaintiff can recover."

The same idea was repeated at the close of the charge, where it was characterized as the main question.

According to this view of the defendants' obligation it did not depend in any degree upon their own estimation or belief as to their ability to work the quarry at a profit; nor even upon the actual results of the best and most faithful efforts they could put forth with whatever capital or facilities they possessed. Instead of that the crucial test of liability as stated to the jury was the *possibility* of the quarry being worked at a profit with ordinary diligence by anybody or by any means.

That of course is a mere question of opinion, to be proved by witnesses who would testify as to *their* belief on the subject, and who might thus induce a jury to find according to *their* belief as to what *could* be done with the quarry. Such opinions as this are easily obtained from willing friends of the interested parties, as unhappily is the case in too many other kinds of cases. They cost nothing to the witness. He does not go through the hazardous ordeal of actually conducting at his own expense, the practical operations concerning which he testifies. He ventures nothing but an opinion and in that he assumes no risk. Upon reading the testimony in this case we find that it was tried upon this principle precisely. Witnesses were examined on behalf of the plaintiff, to prove that the quarry *could* be worked at a profit, and they gave their opinions to that effect.

It was proved most clearly for the defense that in point of fact no profit was made, but on the contrary, a heavy loss; and there was no proof in the case that in reality any profit was made, yet the jury were instructed that if they found that the quarry could be worked at a profit the plaintiff was entitled to recover. But the agreement provided for a very different standard of liability. The language is: "Should the quarry prove a failure that no proceeds should be in hands of the second party, or that they would abandon the quarry believing that the quarry would not be a paying one or a profitable one to them in their estimation, and if the quarry had not netted any clear profit to the second party, at abandoning said quarry, then the second party shall not be responsible for any further payment, and this agreement shall be null and void, and of no effect."

All this verbiage simply means that if Krum and Peters made no profit, and believed that the quarry was not a profitable one to work they could abandon the quarry and the contract was a nullity. In other words, the test of their right to terminate the contract was the fact that they had made no profit, and their belief that the quarry was not a profitable one to work. It was conceded they had made no profit, and the proof was most ample that they believed the quarry to be an unprofitable one to work, and they did actually abandon it, and surrendered the lease. Now, according to the terms of their contract, they were entitled to have their liability tried by these tests. Did they make no profit and did they really believe the quarry an unprofitable one? If so, they were not liable, and there could be no recovery. They had an undoubted right to contract in that way if the other party was willing, as he certainly was.

The books abound with authorities which prove this, but a single reference is sufficient. *Singerly* v. *Thayer*, 108 Pa. 291.

In a contract for an elevator the words were "Warranted satisfactory in every respect." The court below charged the jury that if they were of the opinion that the elevator was reasonably fit for the purpose for which it was intended, and the defendant ought to have been satisfied with it, the verdict might be for the plaintiff. We held that this was error. The fair inference from the contract was that the elevator was to be satisfactory to the defendant, and while it could not be rejected for mere caprice, yet a *bona fide* objection by him to its working was a sufficient defense. The present *Chief Justice* said, speaking of the charge of the court below: "In other words it may have been wholly unsatisfactory to him, yet if the jury thought he ought to have been satisfied he was bound to accept it. In effect that is it need not have operated to his satisfaction in any respect, but to the satisfaction of the jury which might be called to pass on the rights of the parties * * * He did not agree to accept what might be satisfactory to others, but what was satisfactory to himself. This was a fact which the contract gave him a right to decide. He was the person negotiating for its purchase. He was the person who was to test it and to use it. No other persons could intelligently determine whether in every respect he was satisfied therewith."

The foregoing reasoning applies with a still greater force to the present case. Krum and Peters were the persons who were to work the quarry. It was they who were to pay all the expenses and incur all the risk. This they must do in any event; and hence, they would be most anxious to provide for a means of extrication from what might prove to be a ruinous loss. For that very reason they stipulated for an absolute privilege to terminate the contract if they made no profit, and believed the quarry unprofitable to work. They did not choose to be subject to the opinions of others in this most important matter, and in this they were wise. Doubtless they knew, as nearly all men in the business would do, that the making of profits, on paper, is an affair of the simplest and easiest character. Thousands of men of good business capacity are being constantly led on to loss and great numbers to ruin, by the seductive array of profits, on paper, which are never realized.

Against the possibility of having their obligation to continue a losing contract to depend upon the easily obtained and loosely formed opinions of strangers, they took care to provide by their agreement, and they are now entitled to the protection for which they bargained. Of course they could not from mere caprice and without reason, say they were losing and thus terminate the contract. But that is a very different matter from being obliged to submit to the mere opinion of strangers, whether witnesses or jurors, on the question of a possible profit in conducting their operations. These views sustain the second, third and fourth assignments of error.

We also sustain the fifth, as we do not see the relevancy of the testimony there offered and admitted; and we are unable to discover any evidence of bad faith on the part of the defendants.

Judgment reversed.

CENTENARY METHODIST EPISCOPAL CHURCH OF PHILADELPHIA, *Plff. in Err.*,

v.

Hiram CLIME.

1. The **circumstances attending** the **making of** an **instrument** in writing may be **proved by parol** evidence, when by itself the instrument is affected with uncertainty.
2. When a matter necessarily pertaining to the subject of the contract is not mentioned in the contract **parol evidence is admissible to ascertain** the **meaning.**
3. In an **action** by a stone mason **for** labor in **erecting** a **building according to** a **contract** which does not specify the kind of stone to be **used, parol evidence** is admissible to prove the **kind of stone** which the parties **intended,** and that the defendant furnished instead a stone that was harder to work.
4. For **extra labor** expended **in working** the **harder stone,** the plaintiff is entitled to recover extra compensation.

(Argued March 25, Decided April 18, 1887.)

JULY Term, 1886, No. 203, E. D., before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Green and Clark, *JJ.*

Error to Common Pleas No. 1 of Philadelphia County, to review a judgment on a verdict for the plaintiff in an action of *scire facias* upon a mechanics' lien. *Affirmed.*

At the trial the following facts appeared:

The edifice of the Centenary Methodist Episcopal Church at Spring Garden and Forty-First Streets, in West Philadelphia, was begun about the year 1876 and carried up the first story only, which was roofed and used for worship by the congregation until the year 1883. In the erection of so much of the walls a gray stone had been used, procured from the quarry of one Bunting at Forty-Fourth and Walnut Streets. In 1883 the defendant began the work of carrying up the walls and completing the second story of the building and adding wings.

The plaintiff, a stone mason, made application for the contract for laying the stone. He met the building committee of the defendant at the church, where the terms of the contract were agreed upon. Mr. Rudolph, the president of the board of trustees of the defendant, and Mr. Bailey, who was superintendent of the entire erection, and the Rev. Dr. Wood, the pastor of the church, were present at that meeting.

After this meeting at the church the agreement was written up by Mr. Bailey, and in a day or two the plaintiff called upon Mr. Rudolph and signed it.

The following is the contract:

"This agreement, made and entered into this 11th day of July, 1883, between Hiram Clime, stone mason, of Philadelphia, of the first part, and the Board of Trustees of Centenary M. E. Church, of the second part.

"Witnesseth, the said Hiram Clime agrees to do all the stone work according to the plans furnished by D. B. Price, architect, for the above mentioned stone work, at the rate of $4 per perch. The said Hiram Clime agrees to do the work in a good workmanlike manner, including the pointing and other work necessary to make a good job. In consideration of paying the said Hiram Clime $4 per perch for the new work he agrees to do all necessary repairs and pointing to the old work or present building without additional cost. The said Hiram Clime also agrees to push the work as rapidly as the committee requires.

"The committee agrees to pay the said Hiram Clime for the above work in installments, as follows: When the said Hiram Clime shall render an account of the number of stone masons and laborers actually employed on the building a payment shall be made on each Saturday (during the progress of the work) sufficient to pay the wages of the men, and when the two wings are level with the main building, whatever may be due as per agreement, and the balance when the work is finished."

The agreement was signed by Hiram Clime and Philip Rudolph.

Clime did the work according to the contract and filed a lien against the Church for the contract price and an amount beside, which he claimed as compensation for extra labor expended in working stone which the Church furnished for part of the edifice and which was harder to work than the stone from Bunting's quarry. The testimony on this point is sufficiently set forth in the opinion.

Verdict and judgment were for the plaintiff for the full amount of his claim.

Messrs. **Marshall G. Kinney,** and **Rudolph M. Schick,** for plaintiff in error:

On the trial the plaintiff attempted to add a term to the contract by his offer to prove by himself that at the time the contract was signed Mr. Rudolph stated to him that the stone he would be required to work was to come from the Bunting quarry and that that was the inducement that led him to accept the contract.

The parol evidence which will be effective to reform a written instrument in such a case must be clear, precise and indubitable; that is to say, it must carry clear conviction to the minds of the jurors that the witnesses are credible, that the facts are distinctly remembered, and are truly and accurately stated; and to the mind of the court, that if the facts alleged are true, the matters in issue are definitely and distinctly established.

Cullmans v. *Lindsay,* 4 Cent. Rep. 748.

When such terms as "clear, precise, explicit, unequivocal and indubitable" are used by the courts in defining the requisite proof of a particular fact to be made out by verbal testimony, it is meant that a conviction shall be fastened in the minds of jurors as strong as verbal testimony is able to convey. It is meant that witnesses shall be found to be credible; that the facts to which they testify are distinctly remembered; that details are narrated exactly and in due order, and that their statements are true.

Spencer v. *Colt,* 89 Pa. 318.

It is not enough that there are parol stipulations contradictory of a written agreement, in order to change the legal effect. There must be fraud, accident or mistake, and the evidence of either must be clear, precise and indubitable.

Thorne v. *Warfflein,* 100 Pa. 526.

A party to a contract shall not testify his undisclosed purpose or intention to nullify words and acts relied upon by others which in themselves are *prima facie* evidence of the agreement. Minds cannot meet when one keeps to itself what he means to do.

Juniata Bldg. Asso. v. *Hetzel,* 103 Pa. 512; *Spencer* v. *Colt,* 89 Pa. 314; *Cullmans* v. *Lindsay,* 4 Cent. Rep. 747.

The court said in *Phillips* v. *Meily,* 106 Pa. 544, that the defense set up, if it amounts to anything, must be sufficient to reform the note, and the evidence must be strong enough to justify a chancellor in doing so. It is only where a chancellor would reform the instrument that parol evidence is admissible to contradict it. It is true, under our practice in Pennsylvania, it is accomplished through common-law forms. But the fact remains that the defense set up is purely equitable; and the judge ought not to submit the case to the jury unless the evidence is such that he would feel himself bound as a chancellor to reform the instrument.

The court should not, therefore, have submitted that point in the case to the jury.

Phillips v. *Meily.* 106 Pa. 544; *Juniata Bldg. Asso.* v. *Hetzel,* 103 Pa. 514; *Brawdy* v. *Brawdy,* 7 Pa. 157.

The verbal agreement relied on to establish the plaintiff's claim was an addition to a written agreement, and was supported by the testimony of only one witness who was not "corroborated by other facts which are equivalent to the testimony of an additional witness." That degree of proof is not sufficient to effect an addition to a written contract.

Juniata Bldg. Asso. v. *Hetzel,* 103 Pa. 507; *Phillips* v. *Meily,* 106 Pa. 544; *Penn Iron Co.* v. *Diller,* 4 Cent. Rep. 691; *North & West Branch R. Co.* v. *Swank,* 105 Pa. 555; *Cullmans* v. *Lindsay,* 4 Cent. Rep. 748; *Jones* v. *Backus,* 5 Cent. Rep. 138.

An answer is conclusive unless contradicted by two witnesses, or by one witness and corroborating circumstances.

Bisph. Eq. § 9.

That rule requires two witnesses to the substantial facts, or at least one witness and other attendant circumstances which supply the want of another witness.

3 Greenl. Ev. § 289.

The additional evidence must be a second witness or very strong circumstances.

In order to obtain a verdict the plaintiff must make out his case with reasonable certainty.

Wood v. *Donahue,* 94 Pa. 128, 132.

The true question, therefore, in trials of fact is not whether it is possible that the testimony may be false, but whether there is sufficient probability of its truth.

1 Greenl. Ev. § 1.

A thing is probable when it is likely, having more evidence than the contrary or evidence which inclines the mind to belief. If facts are adduced in proof of a proposition, they should at least render the contrary of the proposition unlikely.

Messrs. **Ernest Lowengrund, Octavius A. Law** and **F. Carroll Brewster,** for defendant in error:

When the Gorman stone was substituted for the Bunting stone Mr. Clime testifies: "I said to Mr. Bailey, 'I want you distinctly to understand these are not Bunting stones, and that it will cost me double as much to work these stones as to work Bunting's.' He replied that the church people would make it all right." This is evidence of a subsequent and not a contemporaneous alteration of the written contract, or rather the substitution of a new one; and no matter how flatly it is contradicted, is entitled to go to the jury.

Weaver v. *Craighead,* 104 Pa. 288.

Here it was proposed by the aid of parol evidence to define and identify, not to vary or contradict, the agreement. After the jury had been apprised of all that was said and all that was understood at the making of the contract, its terms were still that plaintiff should cut and work the stone at $4 a perch; but the kind of stone that was to be cut and worked was ascertained and specialized. Thus the tenor of the instrument was neither altered, varied nor contradicted, but was explained and made clear. If the contract was altered it was by the subsequent agreement on the part of the Church "to make it all right;" and such an alteration is not governed by the rules applicable to a contemporaneous variance. The numerous cases cited by plaintiff in error are not in point.

In *Cullmans* v. *Lindsay*, 4 Cent. Rep. 747, it was proposed to show by parol that a party to a contract was induced to sign it by the representation that it meant nothing.

In *Spencer* v. *Colt*, 89 Pa. 318, the purpose was to show that at the time of signing a bond and mortgage it was agreed by parol that only the mortgaged premises should be bound.

In *Juniata Bldg. Asso.* v. *Hetzel*, 103 Pa. 512, that a bond absolute on its face was to be resorted to only after the exhaustion of a mortgage.

In *Penn Iron Co.* v. *Diller*, 4 Cent. Rep. 691, that a permissive clause in a contract was intended to be obligatory.

In *Phillips* v. *Meily*, 106 Pa. 536, that a promissory note was given merely as a receipt for another note in the hands of the defendant belonging to the plaintiff; and so throughout the list. Everywhere the parol evidence would, if received, have entirely abrogated the written contract or changed it into something other than what its terms imported.

Whatever indicates the nature of the subject is a just medium of interpretation of the language and meaning of the parties in relation to it, and is also a just foundation for giving the instrument an interpretation, when considered relatively, different from that which it would receive when considered in the abstract. The object is to discover the intention; and to do this the court may put itself in the place of the party and then see how the terms of the instrument affect the property or subject matter. With this view, evidence must be admissible of all the circumstances surrounding the author of the instrument. In the simplest case that can be put, namely: that of an instrument appearing on the face of it to be perfectly intelligible, inquiry must be made for a subject matter to satisfy the description.

Greenl. Ev. §§ 286–288.

Extrinsic parol evidence is admissible generally to give effect to a written instrument by establishing its authenticity or applying it to its subject matter.

Starkie, Ev. 1021; 2 Whart. Ev. § 961 a; Add. Cont. 847; *Swett* v. *Shumway*, 102 Mass. 367; *Barnhart* v. *Riddle*, 79 Pa. 92.

Parol evidence is not admissible to alter or contradict what is written, upon the very obvious principle that the writing is the best evidence of the intention of the parties, but parol evidence has many times been received to explain and define the subject matter of written agreements. Herein is no contradiction.

McCullough v. *Wainwright*, 64 Pa. 171; *Miller* v. *Fichthorn*, 31 Pa. 252; *Baltimore etc. Steamboat Co.* v. *Brown*, 54 Pa. 77; *Gould* v. *Lee*, 55 Pa. 99; *Bertsch* v. *Lehigh Coal & Nav. Co.* 4 Rawle, 130; *Jackson* v. *Litch*, 62 Pa. 451; *Aldridge* v. *Eshleman*, 46 Pa. 420; *Lycoming Mut. Ins. Co.* v. *Sailer*, 67 Pa. 108; *Teutonia Fire Ins. Co.* v. *Mund*, 102 Pa. 89; *Hoffman* v. *Ætna Ins. Co.* 32 N. Y. 405; *Morris' App.* 88 Pa. 368.

Mr. Justice **Trunkey** delivered the opinion of the court:

Clime agreed to do all the stone work of the building according to the plans furnished by the architect, and also do all necessary repairing to the old work, for the consideration of $4 per perch for the new. Nothing is said of the kind of stone in the writing.

The first story of the building was erected in 1876, roofed and used for worship until 1883. That story was built of gray stone from Bunting's quarry, and is the work referred to in the written agreement to be repaired and pointed. J. W. Bailey had charge of the construction of the work, and after consulting the trustees made contracts. The defendant furnished stone from Bunting's quarry for the greater part of the work, but on Clime's complaint that he was losing time by delay in delivery, stone was furnished from Gorman's quarry. Thus far the parties agreed as to the facts.

Clime testified that the stone from Gorman's was flinty and dryer, harder, more treacherous and plucky; and that he said to Bailey: "I want you distinctly to understand that these are not Bunting's stone; that it will cost me double as much to work this stone as to work Bunting's. He replied that the church people would make that all right." And this testimony is uncontradicted.

There was testimony tending to show that at and before the signing of the instrument Rudolph and Bailey told Clime that Bunting was to furnish the stone; that Clime knew what that stone was, as he had previously worked it; and thereupon he made the contract.

The plaintiff was the sole witness to so testify, and on this point he was contradicted by Rudolph and Bailey.

The only assignment of error is that the court refused to charge that "The plaintiff has failed to establish his claim for extra work in cutting and dressing 2,000 feet (superficial measure) of stone at twenty-five cents per foot, amounting to $500, and the jury will disregard it in making up their verdict. All evidence relating thereto is withdrawn from the jury."

It was not contended in the argument that the point should have been affirmed for any reason other than that the plaintiff's claim involved a contradiction of or addition to the terms of the written agreement; and the defendant urged that the testimony was insufficient for reformation of the instrument. Perhaps the evidence was insufficient to reform the instrument; but if it was explanatory of the subject and consistent with what is written, and necessary for its interpretation, it was sufficient to submit to the jury. Had the plaintiff demanded a softer stone, easier to work than Bunting's, the defendant would have understood that it was intended, if not expressed, that the new work should be of the kind of stone which was used in the first story. They would not have been satisfied with a call for stone of like color, more expensive for them to furnish than Bunting's, even if more profitable for the contractor.

That the building has been already partly constructed of stone from a convenient quarry tends to show that the parties meant it should be finished with stone of the same kind, in absence of evidence to the contrary. That the larger portion was furnished from that quarry before any was obtained from another is a circumstance immediately following the making of the agreement.

It can hardly be doubted that the parties understood what stone should be furnished and used. A familiar principle is that the circumstances at the making of the instrument may be proved when by itself it is affected with uncertainty. The intention of the parties may be ascertained by extrinsic testimony, and this intention will be taken as the meaning of the parties expressed in the instrument, if it be a meaning which may be distinctly determined from a fair and reasonable interpretation of the words actually used. If the words are clear, a different contract from that expressed cannot be made by proof of outside circumstances. But when a matter necessarily pertaining to the subject of the contract is unmentioned therein, parol testimony is admissible to ascertain the meaning.

"It is a rule of interpretation that the intention of the parties to a contract is to be ascertained by applying its terms to the subject matter. The admission of parol testimony for such purpose does not infringe upon the rule which makes a written instrument the proper and only evidence of the agreement contained in it. * * * It may be shown that a sample, to which the terms of the contract are applicable, was exhibited or referred to in the negotiation, and other statements then made may be resorted to."

Accordingly, it has been held that in an action on a written contract relating to advertising charts, parol testimony is admissible to show the material of which the chart was to be made and the manner in which it would be published. *Swett* v. *Shumway*, 102 Mass. 365.

The rule of law which forbids parol evidence to be received to contradict or vary a written instrument has reference to the terms of the writing. Evidence to explain the subject matter of an agreement is essentially different from that which varies the terms in which the contract is conceived. *Barnhart* v. *Riddle*, 29 Pa. 92.

Parol evidence is not admissible to alter or contradict what is written, but is admissible to explain and define the subject of a written agreement. *Gould* v. *Lee*, 55 Pa. 99.

Parol evidence of the circumstances, and of what was said by the parties as to the stone to be used under the contract, does not contradict or change any part of the writing, nor does it add another promise or nullify any of the written terms. The plaintiff was to do the work, the defendant to furnish the stone, and each was bound to perform, one by furnishing and the other by using the kind of stone to which they referred at the making of their agreement.

Had it been attempted to vary or contradict the terms of the agreement, or to show that the instrument meant either nothing or something else than is written, then the doctrine so well advanced in the defendant's argument would apply with full effect.

Judgment affirmed.

Elizabeth S. DAVIS, Executrix of Samuel C. Davis, deceased, *Plff. in Err.*,
v.
John TINGLEY.

An **affidavit of cause of action in foreign attachment**, which stated that a partnership had been formed between Davis, the plaintiff's testator, and Tingley, the defendant, to manufacture a certain patented article; that the plaintiff's testator was to be a silent partner; that they granted the patent right to the garnishee for a royalty, recited "to be paid to Tingley;" but that the grant was in consideration that the royalties should be paid to the plaintiff's testator and the defendant, and that the defendant received them for their joint benefit, held to be **sufficient**, in connection with the agreements of partnership and grant of the patent right.

(Argued March 31, Decided April 11, 1887.)

JANUARY Term, 1887, No. 162, E. D., before Mercur, *Ch. J.*, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to Common Pleas No. 1 of Philadelphia County, to review the action of the court in dissolving a writ of foreign attachment. *Reversed.*

On October 11, 1886, the plaintiff issued the writ of foreign attachment against the defendant. It was served on Charles G. Blatchley, as garnishee. On November 30, 1886, rule to show cause of action was taken and on December 11, 1886, the plaintiff filed her affidavit of cause of action. On December 18, 1886, the rule was made absolute and the attachment dissolved. On December 21, 1886, this writ was filed in the court below.

On December 23, 1886, a rule was entered on the plaintiff to show cause why she should not file, as part of the affidavit of cause of action, a copy of articles of agreement of copartnership dated January 1, 1871, and a copy of agreement made with Charles G. Blatchley dated June 6, 1871, referred to in her affidavit and produced at the hearing of the rule to show cause of action.

The rule was made absolute January 8, 1887. The agreements recited that all the parties were of the City of Philadelphia.

Further facts appear by the opinion.

The assignments of error specified the action of the court: 1, in dissolving the writ; and 2, in ordering the plaintiff to file certain papers so as to make part of the record in this case after this writ of error had been brought into the office of the court below.

Mr. **William C. Mayne**, for plaintiff in error:

The affidavit of cause of action as filed by the plaintiff in this case was sufficient.

I. Because the action of account render is a proper remedy.

Act of October 13, 1840, P. L. 7; *Shriver* v. *Nimick*, 41 Pa. 81; *Persch* v. *Quiggle*, 57 Pa. 258.

An action of account render lies between copartners.

Tutton v. *Addams*, 45 Pa. 70; *Griffith* v. *Willing*, 3 Binn. 317; *Irvine* v. *Hanlin*, 10 Serg. & R. 221; *Knerr* v. *Hoffman*, 65 Pa. 126; *Adams' App.* 5 Cent. Rep. 135, 113 Pa. 449.

II. Because an action of account render can be commenced by foreign attachment; for to entitle a party to the benefit of this process, the plaintiff must show that the damages are reducible to such a standard as will enable the court to fix the amount of the bail.

Carland v. *Cunningham*, 37 Pa. 228; *Fisher* v. *Consequa*, 2 Wash. C. C. 382; Sergeant, Attachments, 54.

When an action of account render is the only form of action between the copartners, it is very plain there is no debt that can be attached. But where the partnership is a single transaction, or where the action of assumpsit would also lie, as in *Ozeas* v. *Johnson*, 1 Binn. 195; *Andrews* v. *Allen*, 9 Serg. & R. 241; *Van Amringo* v. *Ellmaker*, 4 Pa. 281, the proceeding can be commenced by writ of foreign attachment.

Strock v. *Little*, 45 Pa. 416; *Knerr* v. *Hoffman*, 65 Pa. 128.

Where the ground of the damages is specified, it seems that it is not necessary even to specifically allege them.

Hanson v. *Watson*, 13 W. N. C. 534.

A declaration in account render as between partners is sufficient, if it charge the defendant generally with the receipt of money for their joint benefit; and if the plaintiff proves a receipt of money from anyone mentioned in his declaration, he is entitled to a general verdict.

James v. *Browne*, 1 Dall. 339 (1 U. S. bk. 1, L. ed. 165); *Martin* v. *Smith*, 5 Binn. 16; 2 Troubat & H. Pr. § 1697.

The affidavit presenting a meritorious cause of action, sued by a proper action, the amount of the bail susceptible of a standard to be fixed by the court, the rule to show cause of action should have been discharged, and the amount of bail entered by the plaintiff approved or bail in lieu thereof prescribed.

2 Troubat & H. Pr. §§ 2272, 2273.

The plaintiff had a right to a trial by jury.

Pleasants v. *Cowden*, 7 Watts & S. 379; *Murdock* v. *Steiner*, 45 Pa. 349; *Lancaster Co. Bank* v. *Gross*, 50 Pa. 224; *Lorenz* v. *Orlady*, 87 Pa. 226; *Steel* v. *Goodwin*, 4 Cent. Rep. 659, 113 Pa. 288.

Mr. **Leoni Melick**, for defendant in error:

The royalty was not to be paid by Blatchley to Davis and Tingley, but to Tingley alone.

The affidavit of cause of action does not show that the defendant below was a nonresident and not in the county when the writ issued.

Mr. Justice **Trunkey** delivered the opinion of the court:

The defendant asserts that the attachment was dissolved for the sole reason that no cause of action was shown. At the hearing the two contracts referred to in the plaintiff's affidavit were before the court; and subsequently, by order of the court, copies of said instruments were filed.

Davis and Tingley on January 1, 1871, agreed "to form a copartnership for the manufacture and sale of articles under their patent, known as Tingley's Patent Contracting Band for Casks and other vessels." It stated in the instrument that "Said Tingley has recently added the very important improvement known as the New Revolving Ice Cream Machine;" and they further agree that "In view of the important addition of the freezer to the original list of articles made under the said patent, the said Samuel L. Davis agrees to furnish $600, free of interest, as additional capital for the business."

They also stipulate that "Davis shall act as a silent partner, and that his name shall not be used or known publicly in connection with this partnership." And Tingley agreed to carry on the business for a named compensation.

On June 6, 1871, Davis and Tingley granted to Blatchley the exclusive right to use both patents referred to in the articles of copartnership, in the manufacture of ice cream freezers, within the United States, for a royalty or license fee of 5 per centum of the sales of said freezers, to be paid to said Tingley. The recital in this grant shows that Davis was a patentee in the first patent; and hence, the necessity that he should be a party to the grant to Blatchley.

The grant stopped the manufacture of freezers by Davis and Tingley, but it made no other change in their business so far as appears at present. Davis was a joint owner in the first patent, and for a valuable consideration; he had an interest in manufacturing under the second; and unless he was to share in the royalties and license fees paid by Blatchley, he gave away his interest so far as related to the use of the patents for manufacturing said freezers in the United States.

Nothing appears to indicate a gift. The affidavit sets forth that the grant was made in consideration that the royalties were to be paid to Davis and Tingley, and that Tingley received the same for their joint benefit. Tingley was to carry on the business of the partnership in his own name, and the provision that he should receive the royalties or license fees was consistent with the terms of their partnership. It is hardly probable that the silent partner, in the firm which was using both patents, would have joined in a sale of an important part of the business, as well as of the right to use the patents, without any real consideration for himself.

We think the plaintiff's affidavit and the agreements show cause of action.

The judgment dissolving the attachment is reversed, and procedendo *awarded.*

Thomas BIRKBECK, *Plff. in Err.*,

v.

Edward KELLY.

1. In **ejectment by the purchaser of land at sheriff's sale against** the **defendant in** the **execution, evidence** of the judgment, process and sheriff's deed is **conclusive** and sufficient to establish for the plaintiff a *prima facie* case.
2. To take a **parol sale of land** out of the

Statute of Frauds it is indispensable that the purchaser shall take possession in pursuance of the sale.

3. The fact that the **purchaser** was **in possession when he bought,** although every other requisite to take the case out of the statute has been proved, **defeats** the **purchaser's title.**

(Argued April 14, Decided May 2, 1887.)

JANUARY Term, 1887, No. 431, E. D., before Mercur, *Ch. J.*, Gordon, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Luzerne County, to review a judgment on a verdict for the defendant in an action of ejectment. *Reversed.*

The facts as they appeared at the trial before WOODWARD, *A. L. J.*, are stated in the opinion.

The assignments of error specified the action of the court in excluding evidence of the judgment, execution and sale on the ground that the plaintiff had not shown title or color of title, and in admitting evidence of the alleged parol sale.

Messrs. **N. Taylor** and **C. W. Kline,** for plaintiff in error:

When the purchaser at sheriff's sale has to bring his ejectment against the person whose land was taken in execution or any person coming into possession under him, he need do no more than show the judgment and proceedings under it.

Little v. *Delancey,* 5 Binn. 270.

As between the purchaser and the defendants in the action, the purchaser can recover on the strength of the sale and the sheriff's deed, nor can the defendants show title in another.

Green v. *Watrous,* 17 Serg. & R. 393; *Snavely* v. *Wagner,* 3 Pa. 275; *Drake* v. *Brown,* 68 Pa. 223; *Ferris* v. *Irons,* 83 Pa. 179.

Possession must be delivered in execution of an alleged parol sale of land. A previous possession will not withdraw a parol sale from the effects of the Statute of Frauds.

Parker v. *Wells,* 6 Whart. 153; *Galbreath* v. *Galbreath,* 5 Watts, 146; *Brawdy* v. *Brawdy,* 7 Pa. 157; *Christy* v. *Barnhart,* 14 Pa. 260; *Myers* v. *Byerly,* 45 Pa. 368.

There must be valuable improvements put upon the property, such as cannot be compensated in damages.

Moore v. *Small,* 19 Pa. 461; *Postlethwait* v. *Frease,* 31 Pa. 472.

There must be more than oath against oath; the parol contract must be proved, not only to the entire satisfaction of the jury but also of the court.

Sower v. *Weaver,* 78 Pa. 443; *Brawdy* v. *Brawdy,* 7 Pa. 157; *Lord's App.* 105 Pa. 451.

Whether the evidence is sufficient to take the case out of the statute is a question for the court and not for the jury.

Overmeyer v. *Koerner,* 81* Pa. 517, and cases there cited.

When the parol contract is not unequivocally established as required by law, the court should so instruct the jury.

Bowers v. *Bowers,* 95 Pa. 477; *Detrick* v. *Sharrar,* 95 Pa. 527.

(No brief filed for defendant in error.)

Mr. Justice **Gordon** delivered the opinion of the court:

On the 18th of November, 1876, the defendant, Edward Kelly, was in the possession of the land in controversy, and at that date the property was sold by the sheriff of Luzerne County, on process regularly issued from a judgment of the Freehold Building & Loan Association, against the said Kelly, to E. V. Jackson, the plaintiff's vendor, and a deed executed to him which was acknowledged in due form of law, on the 29th of November, 1876. By this sale and deed whatever of right or title the defendant had was conveyed to Jackson, the sheriff's vendee, and as against Kelly, the judgment, process and deed, as aforesaid, were conclusive and the court should have required nothing else from the plaintiff to establish a *prima facie* case. *Drake* v. *Brown,* 68 Pa. 223.

Against this *prima facie* title the defendant set up an oral sale from Birkbeck to himself. This alleged sale is supported only by his oath, and that is positively contradicted by Birkbeck. This of itself should have determined the controversy against him. *Sower* v. *Weaver,* 78 Pa. 443.

But aside from this, the proof did not establish a single element necessary to relieve the sale from the ban of the Statute of Frauds and Perjuries. There was no evidence of the payment of purchase money, or of the valuable improvements; neither was possession taken in pursuance of the alleged sale, for according to his own oath he was in possession when he bought. This fact standing alone, although every other requisite to take the case out of the statute had been proved, was sufficient to cut up the defendant's professed purchase by the roots, and to leave him without the shadow of a defense. *Myers* v. *Byerly,* 45 Pa. 368; *Christy* v. *Barnhart,* 14 Pa. 260.

As what we have said does, in effect, sustain all the assignments of error we need not discuss them separately.

The judgment is reversed and a new venire *ordered.*

Austin M. PURVES, *Plff. in Err.*,
v.
William H. LEX.

SAME *v.* Herman F. BACHMAN.

SAME *v.* William GERLACH.

SAME *v.* Edward V. MAITLAND, to Use, etc.

A **debt due** from a third person **to** the **defendant in a judgment** (here, the share of the defendant as legatee in the estate of a decedent in the hands of an executor) may be **attached by service** upon the garnishee **of a writ of attachment** issued on the judgment, **in** the **manner provided for** the **service of** a writ of **summons** in a personal action.

(Argued April 4, Decided April 18, 1887.)

JANUARY Term, 1887, Nos. 158–161, E. D., before Mercur, *Ch. J.*, Gordon, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas No. 1 of Philadelphia County, to review a judgment discharging a rule to show cause why certain judgments and executions in attachment proceedings should not be set aside. *Affirmed.*

Reported below, 1 Pa. C. C. R. 206.

This is a contention between two sets of attachment creditors.

Herman F. Bachman, William Gerlach, Edward V. Maitland and William H. Lex obtained separate judgment against John J. Thomas, and caused attachments to be issued thereon against Thomas Shipley, executor of the will of Samuel Harvey, Jr., deceased, to attach in his hands the interest of the defendant John J. Thomas in said estate, he being a legatee under the will of said Harvey. To each of the three former writs the sheriff made following return:

"Attached as commanded and made known to garnishee as follows: by leaving a true and attested copy of the within writ at the dwelling house of Thomas Shipley, executor, etc., residing at corner Locust and Magnolia Avenues, Germantown, with an adult member of his family, December 5, 1884, at 11.45, A. M., and by giving a like copy to John J. Thomas, defendant, and making known to him the contents thereof, December 5, 1884."

The return to the last writ was similar in all respects; save that it was served on the garnishee later in the same day, and on the defendant, December 6, 1884.

Judgments were entered upon the answers of the garnishee to the interrogatories filed, to bind only such sum or sums as should be found to be due to John J. Thomas as legatee and distributee, upon the settlement of the estate of said Harvey.

On December 4, 1885, Maitland, Gerlach, and Bachman issued writs of *fi. fa.* returnable the first Monday of December, 1885, under which the sheriff levied on all the real and personal property of John J: Thomas, the defendant, in the hands and possession of Thomas Shipley, as garnishee, and all the interest of the said John J. Thomas, of, in and to the estate of Samuel Harvey, Jr., deceased, in the hands of Thomas Shipley, as executor aforesaid.

The sale was advertised for Wednesday, December 30, 1885.

No execution was issued in the Lex case. Subsequent to the service of the writs of attachment in the cases as above mentioned, Austin M. Purves, on a judgment obtained in the U. S. Circuit Court, caused an attachment to be issued against Thomas Shipley as executor of Samuel Harvey, Jr., deceased, to which the marshall made the following return:

"Attached as commanded by going to Thomas Shipley on Monday, December 7, 1885, at 12.30 P. M., at his office No. 21 North Seventh Street, Philadelphia, and then and there declaring in his presence and in the presence of George Frescoln, of No. 21 North Seventh Street, and Elliston P. Morris, of 21 North Seventh Street, two credible persons of the neighborhood, that I attached the goods and effects of John J. Thomas, in the hands of the said Thomas Shipley, and particularly the interest of said John J. Thomas in the estate of Samuel Harvey, Jr., deceased, in the hands of the said Thomas Shipley, executor of the will of said Samuel Harvey, Jr., deceased, and made known to the said Thomas Shipley, executor aforesaid, garnishee, by giving him a true and attested copy of the within writ, and making known to him the contents thereof, on said December 7, 1885, at 12.30 P. M."

After the issuing of the executions in the cases of Maitland, Gerlach and Bachman, Austin M. Purves filed an affidavit which set forth the facts above stated, and alleged that the service of the attachments issued by the several plaintiffs above named are invalid, as not made in the manner provided by the Acts of Assembly, of April 13, 1843, P. L. 235, and June 13, 1836, § 48, P. L. 580; that the attachment issued upon the deponent's judgment has been duly served in accordance with the Act of Assembly aforesaid, and, therefore, is the first and only lien upon the interest of said John J. Thomas, in the estate of said Samuel Harvey, Jr., deceased.

Upon this affidavit the court granted a rule to show cause why the judgments in favor of Lex, Maitland, Gerlach and Bachman against the garnishee, and the executions issued in favor of Maitland, Gerlach and Bachman should not be set aside and service of the writs of attachment quashed. After hearing, the court discharged this rule; and Purves took this writ, assigning such action of the court as error.

Messrs. **J. M. & W. P. Gest,** for plaintiff in error:

I. A legacy can only be attached under the Act of April 13, 1843, § 10, P. L. 235, Bright. Purd. 746, in the same manner as debts due are made subject to attachment by the Act of June 16, 1836, entitled "An Act Relating to Executions." §§ 32–37, P. L. 767, Purd. 745.

II. Under the above Acts a legacy like a debt due can only be "attached and levied in satisfaction of a judgment in the manner allowed in the case of a foreign attachment," that is under the Foreign Attachment Act of June 13, 1836, § 48, P. L. 580, Bright. Purd. 824, which provides, "In the case of personal property the attachment shall be executed as follows, viz.: 'The officer to whom such writ shall be directed shall go to the person in whose hands or possession the defendant's goods or effects are supposed to be, and then and there declare in the presence of one or more credible persons of the neighborhood that he attaches said goods and effects.' "

III. Goods and effects, including therein, debts due, can be attached by process of foreign attachment only in the prescribed manner; that is, by the declaration of the sheriff in the presence of one or more credible witnesses of the neighborhood, that he attaches said goods and effects,—and this is clear:

1. From the plain and direct wording of the Acts of Assembly.

2. From the nature of the writ and the attachment process *in rem.*

3. From the decided cases.

Hoolisten v. *Goodale,* 8 Conn. 332; *Pa. R. R. Co.* v. *Pennock,* 51 Pa. 244, 253; *Hayes* v. *Gillespie,* and *Lambert* v. *Challis,* 35 Pa. 155, 156; *Vandergrift's App.* 83 Pa. 126; *Shriver* v. *Harbaugh,* 37 Pa. 399; *Jaffray's App.* 101 Pa. 583; *Morgan* v. *Watmough,* 5 Whart. 125; *Hunter* v. *Clarke,* 16 W. N. C. 558; *Wanamaker* v. *Stevens,* 43 Legal Int. 56; *Connell* v. *Godfrey,* 22 Pittsb. L. J. 136.

IV. The attachment execution, assimilated to the foreign attachment both by its very nature and the Acts of Assembly, is really a combination of two writs: one, the attachment directed against the *res* or thing attached, and to be executed by the solemn declaration in the presence of a credible witness, and the other a clause of *scire facias* to the person garnished or warned of the attachment. Both commands of the writ must be obeyed, in order to perfect the attachment.

Wray v. *Tammany*, 13 Pa. 394; *Gochenaur* v. *Hostetter*, 18 Pa. 414; *Lex* v. *Potters*, 16 Pa. 295; *Fitch* v. *Ross*, 4 Serg. & R. 563; *Childs* v. *Digby*, 24 Pa. 23; *Franklin* v. *Rush*, 1 Phila. 571; *Strouse* v. *Becker*, 44 Pa. 206; *Kase* v. *Kase*, 34 Pa. 130; *Stewart* v. *M'Minn*, 5 Watts & S. 100; *Lorenz* v. *King*, 38 Pa. 93; *Schober* v. *Mather*, 49 Pa. 21; *Poor* v. *Colburn*, 57 Pa. 415; *Skidmore* v. *Bradford*, 4 Pa. 300.

V. Every question which has yet arisen upon the construction of the Act of June 16, 1836, on attachment executions, has been decided upon the analogies afforded by the Act of June 13, 1836, on foreign attachment, and the cases decided under that Act.

Neely v. *Grantham*, 58 Pa. 438; *Baldwin's App.* 86 Pa. 483; *Roth's App.* 94 Pa. 186; *Raiguel* v. *McConnell*, 25 Pa. 362; *Shaffer* v. *Watkins*, 7 Watts & S. 227; *Reed* v. *Penrose*, 36 Pa. 238; *Hall* v. *Knapp*, 1 Pa. 213; *Fulweiler* v. *Hughes*, 17 Pa. 447; *Rhoads* v. *Megonigal*, 2 Pa. 39; *Layman* v. *Bean*, 6 Whart. 181; *Sheetz* v. *Hobensack*, 20 Pa. 412; *Silverwood* v. *Bellas*, 8 Watts. 420; *Mahon* v. *Kunkle*, 50 Pa. 216.

VI. The provision in the Act of June 16, 1836, § 36, that the writ shall be served on the garnishee as a summons in a personal action, has no reference to the execution of the attachment itself, but was intended simply to point out the method in which an attachment properly executed might be perfected by the service of the *scire facias* contained in the writ upon the persons entitled to notice.

VII. If the property itself is not attached in the statutory manner, but the writ is served merely "as a summons" on the garnishee, the property or *res* is not brought within the jurisdiction of the court; and a judgment rendered in the suit is ineffectual to bind the property, and is absolutely void. Other attaching creditors, whose attachments have been levied on the *res* and who have thus acquired a valid lien upon it, have a right to intervene and show the invalidity of prior attachments.

Vandergrift's App. 83 Pa. 127; *Noble* v. *Thompson Oil Co.* 79 Pa. 354; *Eby* v. *Guest*, 94 Pa. 160; *Betts* v. *Towanda Gas Co.* 97 Pa. 367; *Frost* v. *Holmes*, 11 W. N. C. 442; *Sterrett* v. *Howarth*, 76 Pa. 438; *Bryan* v. *Trout*, 90 Pa. 492; *Pfoutz* v. *Comford*, 36 Pa. 420; *Reed's App.* 71 Pa. 378; *Hayes* v. *Gillespie*, 35 Pa. 155; *Gibson* v. *Wilson*, 5 Ark. 422; *Southern Bank* v. *McDonald*, 46 Mo. 31; *Suydam* v. *Huggeford*, 23 Pick. 472; *Norvell* v. *Porter*, 62 Mo. 310; *Rankin* v. *Dulaney*, and *Moore* v. *Coates*, 43 Miss. 197, 225; *Crizer* v. *Gorren*, 41 Miss. 565; *Ezelle* v. *Simpson*, 42 Miss. 515; *Sanford* v. *Atwood*, 44 Conn. 140; *Stone* v. *Miller*, 62 Barb. 442; Drake, Attachment, § 262; Wade, Attachment, § 126; *Murray* v. *Hankin*, 30 Hun, 37; *Bates* v. *Plonsky*, 28 Hun, 112; 64 How. Pr. 232; *Donnell* v. *Williams*, 21 Hun, 216; *Ruppert* v. *Haug*, 87 N. Y. 141.

Mr. **Wm. Henry Lex**, for Lex, *Messrs.* **Harry L. Neall** and **James W. Latta**, for Bachman, Gerlach and Maitland, defendants in error, and *Messrs.* **Rufus E. Shapley** and **David W. Sellers**, for the Sheriff of Philadelphia County:

I. The attachments of the defendants in error were issued under the provisions of the Act of April 13, 1843, § 10, Pl. 235, Bright. Purd. 746, against the distributive share of John J. Thomas, the defendant, in the hands of the executor of Samuel Harvey, Jr., deceased; and the attachments were executed and pursued to final judgment in accordance with the requirements of the law.

In the case of an absent foreign debtor, foreign attachment is an efficient remedy against his three classes of property, viz.: 1, real property; 2, personal property (goods and effects); 3, debts and choses in action.

Prior to the Act of June 16, 1836, a debtor's debts and choses in action could not be made responsible to satisfy his own obligations. That Act provided a remedy, commonly known as attachment in execution, by which this class of property could be taken in execution. To this end it operated primarily to transfer to the plaintiff the right to sue and recover from the debtor of the defendant and apply the results in satisfaction of the judgment, as fully and amply as the defendant himself might have done.

The Act in this particular has reference wholly to intangible things, and is essentially a garnishment, rather than an attachment.

In 1843 the Legislature extended the foreign attachment process so as to include the interest of an absent foreign debtor in either of the three classes of property obtained in the estate of a decedent by will or intestacy.

Act of April 13, 1843, § 10, P. L. 235.

This Act is utterly without provision for its enforcement except that the proceedings must be according to the terms of the Act of 1836.

II. Under the Act of June 16, 1836, debts due may be attached and levied in satisfaction of a judgment, in the manner allowed in the case of a foreign attachment; and section 36, in providing that the writ shall be served in the manner provided for the service of a writ of summons in a personal action, clearly regulates the manner in which the garnishment shall be made, and is, as well, declaratory of the manner allowed in the case of foreign attachment against a debt or chose in action.

King v. *Hyatt*, 41 Pa. 233.

In Pennsylvania the action of foreign attachment is not a purely statutory remedy, depending solely upon the statutes for its life and vigor, but is part of our common law, having been brought here, together with other customs, by the earliest colonists, who were largely citizens of the privileged Cities of London, Bristol and Liverpool. And if all the laws that are now, or ever have been, on the statute books of this Commonwealth were repealed, the process of foreign attachment would nevertheless be open to suitors as a remedy for the collection of debts.

Lyle v. *Richards*, 9 Serg. & R. 330; Duke of

Yorke's Book of Laws, pp. 149, 150, 153, 162, 171, 212, 289; Sergeant, Attachments, p. 48; *Craighle* v. *Notnagle*, 1 Pet. C. C. 249; *Schacklett's App.* 14 Pa. 329.

There is no particular mode prescribed by the Act regulating foreign attachment for the garnishment of a debt or chose in action, although there is full and complete provision for the subsequent proceedings to compel the garnishee to answer as well for his debts to the absent defendant as for the real and personal property, goods and effects of said defendant in his hands or possession.

Ludlow v. *Bingham*, 4 Dall. 55 (4 U. S. bk. 1, L. ed. 739); *Schacklett's App.* 14 Pa. 329; *Keyes* v. *Milwaukee etc. R. Co.* 25 Wis. 693; Drake, Attachment, § 244, *et seq.*; *Vandergift's App.* 83 Pa. 126, 129.

"Goods and chattels" is a term which includes not only personal property in possession, but choses in action and chattels real.

Bouvier, Law Dic. *Goods and Chattels.*

Worcester—"Effects (law), goods, movables, furniture, personal estate, personal and movable goods."

Webster—"Effects, goods, movables, personal estate."

Encyclopædia Dictionary—"Effects, goods, movables, personal estate."

3 Bl. Com. chap. 27; *Barnes* v. *Treat*, 7 Mass. 272; *Banning* v. *Sibley*, 3 Minn. 404; Bouvier, Law Dic. *Effects*, ed. 1848 ; *Vandergrift's App.* 83 Pa. 129.

There has been a constant practice "whereof the memory of man runneth not to the contrary" to garnish or attach a debt merely by service of the writ of attachment on the garnishee.

Hunter v. *Clark*, 16 W. N. C. 558; *Wanamaker* v. *Stevens*, 48 Legal Int. 56; *Brock* v. *Brock*, 43 Legal Int. 37; Viner's Abridgment "Custom of London" (*k*) "Foreign Attachment," p. 232; Sergeant, Attachment, p. 19; *Shriver* v. *Harbaugh*, 37 Pa. 401; *Raiguel* v. *McConnell*, 25 Pa. 363; *Barr* v. *King*, 96 Pa. 485; *Childs* v. *Digby*, 24 Pa. 25.

Per Curiam:

These four cases were argued together. Each presents the question of the sufficiency of the service of the writ of attachment which issues on a judgment. The property attached was not of that kind of movable property which the officer of the law could take into his possession. It was debts due from the garnishee to the defendant in the judgment. Whatever doubt may exist as to the manner of service necessary where the purpose is to reach some kind of property, it is clear that a debt may be attached in the manner these were; that is, in the manner provided for the service of a writ of summons in a personal action,

Judgment in each case affirmed.

Harris SEFF'S APPEAL.
SEFF'S ESTATE.

1. **Where** the **maternal grandmother of a minor** under fourteen years old **petitions for** the appointment of a **guardian of** the **estate** to which the petitioner alleges the minor is entitled, **and** the **minor's father answers denying** that the **minor** is **entitled to any estate** whatever, the **proper practice** is to take testimony to determine the truth of the respective allegations; but a decree appointing a fit person guardian on petition and answer will not be reversed.

2. A **decree appointing a guardian** of the person and estate of a minor, in accordance with the prayer of a petition, **may be amended** by limiting the guardianship to the estate, although the father of the minor has meanwhile filed an appeal from the decree.

(Argued April 21, Decided May 2, 1887.)

JANUARY Term, 1887, No. 357, E. D., before Mercur, *Ch. J.*, Gordon, Trunkey, Sterrett, Green and Clark, *JJ.*

Appeal from a decree of the Orphans' Court of Schuylkill County, appointing a guardian of the estate of two minors. *Affirmed.*

The petition of Elizabeth Olenick set forth that she was the grandmother of Solomon Seff and Isidore Seff, minor children of Selina Seff, late of the Borough of Pottsville, deceased, under the age of fourteen years; that they had no guardian to take care of their persons and estates; that there was a personal estate of about $2,500 belonging to them, left by their mother, and that said property was being used and employed by their father in business, and that she feared it might be lost or wasted, and therefore prayed the appointment of a guardian for them.

Harris Seff, the father of the children, filed an answer the same day, that this application was made without any notice to him, and without his knowledge or consent; that Mrs. Olenick was a resident of New York, and not on friendly terms with him, and was trying to make trouble between him and his children; that he resided in Pottsville, where he was permanently engaged in business, and had his said children living with him; that he was keeping, supporting and educating them, and was, as always, willing and able to provide for them, and to look after their welfare, and that there was no occasion for any interference between him and his children.

Afterward he filed a second answer in which he denied that said Selina Seff left any estate whatsoever, or that the children had any estate.

Afterward the court below, without taking testimony, entered the following decree:

"And now, February 21, 1887, upon reading within petition, the court appoints I. J. Lichtenberg, guardian of said minors, and directs that he give bond in the sum of $300 for each child, with surety to be approved by the court."

From this decree Harris Seff, in February 24, 1887, appealed, and on the same day, but afterward the court made this order:

"And now, February 24, 1887, it is hereby ordered that the above application be filed, and that the appointment of I. J. Lichtenberg, as guardian, made upon the 21st of February, last, be modified and changed so as to constitute and make the said Lichtenberg only guardian of the estates of the said minor children."

Mr. **A. W. Schalck,** for appellant:

The appointment of a guardian is a final decision upon the right to the care and control of the person of the minor, or to the possession and management of his estate, or to both, as the case may be. It is not an interlocutory order, but a definitive decree from which an appeal lies to this court.

Senseman's App. 21 Pa. 334; *Heinemann's App.* 96 Pa. 112; *Pote's App.* 15 W. N. C. 289.

Where the father is in full life, and within the jurisdiction of the court, he ought to have notice of the proceedings, and is entitled to be heard.

Senseman's App. 21 Pa. 333.

Testimony should have been taken, and the truth of the charges legally established by proofs.

Heinemann's App. 96 Pa. 112.

The modification of the order first made was beyond the power of the court. Filing the appeal suspended the court's jurisdiction.

"Any person aggrieved by a definitive sentence or decree of the orphans' court may appeal from the same to the supreme court:——— which appeal, thenceforth shall stay all proceedings in the orphans' court until the same be determined in the supreme court, and the record be remitted to the orphan's court."

Act of March 29, 1832, § 59, Purd. Dig. ed. 1883, p. 1286, *pl.* 62.

The power of the orphans' court to appoint a guardian is purely statutory.

"The orphans' court of each county shall have the care of persons of minors resident within such county, and of their estates; and shall have power to admit such minors when, and as often as there shall be occasion to make choice of a guardian, and to appoint guardians for such as they shall judge too young," etc.

Act of March 29, 1832, P. L. 191.

The court has no power to appoint a guardian for minors, simply because some one (perhaps an entire stranger or an interloper) asks it, or because some relative or pretended friend, out of whim or caprice, or perhaps from improper motives, demands it,

There must be "occasion" for it, a legal cause or ground for the action or interference of the court.

McCann's App. 49 Pa. 304; *Gray's App.* 96 Pa. 243

This occasion to warrant the action of the court, when questioned, must be legally shown, and the *ex parte* affidavit attached to the petition does not *per se* establish anything.

Pittsburg's App. 79 Pa. 317.

Mr. **John W. Ryon,** for appellee:

The Act of March 29, 1832, provides that the orphans' court of each county shall have the care of minors residing within such county, and of their estates, and shall have power to admit such minors, when and as often as there shall be occasion, to make choice of guardians and to appoint guardians of such as they shall adjudge too young or otherwise incompetent to make choice for themselves.

The orphans' court is to judge whether there is occasion for the appointment of a guardian and is to judge of the fitness of the person proposed for the guardian. A legal discretion is vested in the orphans' court to appoint guardians of the persons and estates of minors; and such discretion is not the subject of review in a court of error.

Gray's App. 96 Pa. 243; *McCann's App.* 49 Pa. 304.

Per Curiam:

As a matter of correct practice evidence should have been taken before making the decree; but modified as it has been, and being now restricted to a guardianship of the estate only, of the minor children, we cannot discover that the appellant is injured thereby. If they have no estate as he avers, the guardian will take nothing from him. If they have some which the appellant conceals, the necessity for a guardian is apparent.

Decree affirmed and appeal dismissed, at the costs of the appellant.

Daniel McLAFFERTY *et al., Piffs. in Err.,*
v.
Hugh SWEENEY.

1. The **action of a corporation,** if in a regular manner, **in expelling a member** is final and conclusive until reversed by a judgment of the common pleas.
2. It is the **duty of a member** so **expelled to serve** on the officers of the corporation, before attempting again to participate in the proceedings of the corporation, a **decree of the common pleas establishing his rights.**
3. If without serving such a decree he insists on participating in the proceedings of the corporation, after he has been requested by vote to retire, he **may be ejected by force,** and cannot maintain against the members (who eject him without using more force than is necessary) an action of trespass on the case for conspiracy.
4. It is **immaterial that one of** the **officers of** the **corporation** who is present at the member's ejection but takes no part therein **knows of the decree** of the common pleas reinstating the member.

(Argued April 6, Decided April 25, 1887.)

JANUARY Term, 1887, No. 274, E. D., before Mercur, *Ch. J.,* Gordon, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to Common Pleas No. 1 of Philadelphia County, to review a judgment on a verdict for the plaintiff in an action of trespass on the case. *Reversed.*

The declaration was as follows:

Daniel McLafferty, Dennis McDevitt, Hugh Peyton, Charles Fay, Patrick McCormick, Thomas Caton, Charles Aikins and Patrick O'Brien were summoned to answer Hugh Sweeney of a plea of trespass on the case; whereupon, the said plaintiff, by Richard P. White, his attorney, complains. for that whereas the said plaintiff, heretofore, to wit: on the first day of April, 1884, at the county aforesaid was member of a certain beneficial society named, to wit: the Rev. Hugh McLaughlin Beneficial Association, and as such member, under the laws and rules thereof, was entitled to receive certain benefit and payments in case of his sickness, and the said defendants did then and there conspire, combine, confederate and agree together, unlawfully and unjustly, to expel the said plaintiff from the said society and to deprive him of his rights and membership thereof, and of the payments due and which were to fall due to him from the said society by reason of his sickness. And the said defendants in the pursuance of the said unlawful and wicked conspiracy, combination, confederacy and agreement, and for carrying the same into effect, did afterwards, to wit: on the day and year last aforesaid, took, pushed and shoved the said plaintiff, and caused and procured the said plaintiff to be taken, pushed and shoved from a certain room in which the said plaintiff was present at a meeting of the said society; hindered, prevented and totally excluded the said plaintiff from that time to again enter the said room and from attending or being present at the said meeting and the subsequent meetings of the said society, and hindered and prevented the said plaintiff from claiming, having or obtaining any benefits and payments from the said society by reason of his said membership and sickness.

By means of which several premises the said plaintiff has lost and been deprived of his rights and privilege of attending and being present at the meetings of said society, and of having and receiving sick benefits and payments from the said society. And other wrongs to the said plaintiff then and there did, to the damage of the said plaintiff $5,000; therefore he brings suit.

The defendants pleaded not guilty.

At the trial before PIERCE, *J.*, the following facts appeared:

Plaintiff joined the "Rev. Hugh McLaughlin Beneficial Society" in 1869, and prior to 1880 had been drawing frequent benefits from the society. In 1880 he claimed to be sick again, and the stewards, whose business it was, visited him, and after paying him one week's benefits ($5) declined to pay him any more, because, as they alleged, they could see nothing the matter with him, and he declined to show them a certificate which he claimed Dr. Thomas G. Morton had given him. The stewards reported to the society adversely to plaintiff's claim for benefits. He then went to counsel, who in September, 1880, sent a claim to the society for $35, being seven weeks' benefits at $5 per week. Thereafter on September 7, 1880, the society voted to request plaintiff to arbitrate, and notified him of it the next day; but he declined to arbitrate.

His claim not having been paid, suit was brought by him against the society before a magistrate, and judgment obtained October 4, 1880, from which an appeal was taken to the court of common pleas.

April 5, 1881, John H. Kirk, a member, made a charge against Sweeney that he had violated the by-laws of the society by not having an arbitration to settle his dispute with the society before going to law; and May 10, 1881, a special meeting of the society was called to consider the charge, at which meeting Sweeney was present and took part—the vote on expulsion being 116 in favor to 29 against it.

January 6, 1882, the appeal was tried in the court of common pleas, before Biddle, *J.*, and a nonsuit was entered, on the ground that plaintiff should have complied with the by-laws as to arbitration before bringing suit.

After the nonsuit in 1882 he alleges that he was ready to arbitrate; but as in the meantime he had been expelled, the society did not consider him a member.

In September, 1882, he filed a petition for a *mandamus* in Common Pleas No. 3, against the society, which it answered, to which answer a demurrer was filed. On March 24, 1884, judgment was entered for the relator on the demurrer.

On April 1, 1884, a regular meeting of the society was being held, when plaintiff and a stranger were discovered to be present. The secretary announced that he had business of importance to lay before the meeting, but could not do so as long as persons were present who were not members; whereupon, the stranger left. Plaintiff said he was as good a member as anyone present, and refused to leave, He now asserts that he said in a loud voice that the court had so decided. In this statement he is contradicted by almost every other witness. However, he did not show any authority of any kind from the court. No one present in the room knew of any decision of the court, except the secretary, and he has not been made a defendant. Plaintiff persisted in remaining. A member then offered a resolution as follows:

"*Whereas*, Hugh Sweeney appeared in this hall and claimed to be a member of this society, without any authority being shown by him for such claim, and having been requested by the president to leave the hall and Mr. Sweeney's refusal to do so,

"*Resolved*, That the president requests the assistance of police officers to put Sweeney out of the hall."

This resolution was agreed to, and in pursuance of it the president, McLafferty, requested the doorkeeper to call in an officer, who laid his hand on Sweeney's shoulder and told him to go out, which he did.

After plaintiff was put out the secretary read a communication from the counsel of the society which stated that No. 3 Court had decided to reinstate plaintiff, and which further advised an appeal to the supreme court. By a resolution the society decided to follow the advice of counsel and an appeal was taken.

In May, 1885, the supreme court affirmed the decree of the common pleas, and plaintiff then took a certificate of the decree to the society. Counsel advised the society that plaintiff was compelled to pay back dues before reinstatement; and when the president and secretary told plaintiff what counsel had advised, and that he must pay the back dues or they could not reinstate him, he procured an attachment to be issued against them for contempt in not obeying the decree, and they were fined.

Immediately thereafter plaintiff was reinstated by putting his name on the roll as usual, and he has continued a member since.

Of the defendants, Aikins never was a member of the society, and never was present; Thomas Caton was not present on April 1, 1884; Dennis McDevitt did not come in until just before plaintiff was put out.

The court, after reviewing the testimony and calling attention to the action of the defendants for which the action was brought, charged the jury as follows:

Now, you have heard the evidence and it is for you to say whether this was done in pursuance of an unlawful conspiracy on the part of the defendants in this action to deprive him, the plaintiff, of his rights of membership in this society.

[These societies are very beneficial to the poor, to the laboring classes, who most usually take advantage of them, and they ought to be encouraged in the line of their duty; but if they go beyond that and do what they ought not to do, then they are liable for their acts or omissions like other individuals or associations.

In this case it is alleged that he, the plaintiff, refused to arbitrate; and in refusing to do that refused to do his duty; and if these defendants, members of the society, did that which they ought not to have done, the law will visit upon them the damages for their misdoing, for any offense against the rights of a private member.

It is for you to say, however, whether what they did was in the line of their duties as members of the society or whether they went outside of their duties as members of the society to oppress this man. If they did that, then they would be liable for anything not in the line of their duty as members of the society.]

It is charged that the defendants, or this society or some of them, were not only depriving him of his rights as a member but also undertook to find fault with what the court had done. In that instance, however, the court vindicated itself and imposed a fine.

[There is one feature in the case that strikes me with considerable force; and that is, at the meeting in 1884, I think it was, they then knew or ought to have known that there had been a decision in favor of Mr. Sweeney and which they disregarded. Sweeney says that he told them of this; and it is admitted that the secretary of the society had with him a letter from the counsel for the society, notifying them of the decision of the Court of Common Pleas No. 3; notwithstanding which they undertook to expel him, and did put him out by main force. Even if the secretary had no such notice from the counsel, Sweeney, if you believe him, said enough to put them on inquiry, at least as to whether he had been sustained in court; but they went right ahead and put him out—expelled him.]

The defendants submitted, *inter alia*, the following points:

2. "There is no evidence in this case of any illegal combination between the defendants."

3. "Under all the evidence the verdict should be for the defendants."

After refusing these points the court added: "[Mr. White calls my attention to the fact that I have said nothing about punitive damages; that I intended to embrace that subject. If you are satisfied that the plaintiff was expelled improperly, you can visit upon the defendants what in the law are known as punitive damages; not simply compensatory damages, but done to punish the defendants; that is, if the act was done willfully and maliciously.]"

Verdict and judgment were for the plaintiff for $449.50.

The assignments of error specified the portions of the charge inclosed in brackets; the refusal of the points quoted, and the action of the court in admitting in evidence for plaintiff the record of the *mandamus* case, and in admitting in evidence for plaintiff facts before and after April 1, 1884, the date laid in the narr.

Messrs. **Mann & Miles, Thomas P. Judge** and **E. Cooper Shapley,** for plaintiffs in error:

An action does not lie against individuals for acts erroneously done by them in a corporate capacity, from which detriment happens to the plaintiff.

Harman v. *Tappenden*, 1 East, 271.

If an individual stockholder has suffered damages in a contract with the corporation, through the fraudulent and illegal acts of the directors, done by color of their office, his only remedy is against the corporation.

Smith v. *Poor*, 40 Maine, 415; Hilliard, Torts, 419.

Many acts which, if productive of harm to a single person, are mere torts, become crimes when they result in damage to a large number of persons; and all proceedings which are invasions of the rights or privileges, not of some one individual specially, but of the public at large, or which are detrimental to the general well being or to the interests of the State, similarly fall under the category of crimes.

Green's Brice, Ultra Vires, 272, citing 1 Bennett, Lead. Cr. Cas. p. 174.

Under the principle of *Hyatt* v. *Johnston*, 91 Pa. 196, and many similar cases, the court should not have sent the case to the jury.

See also *Newall* v. *Jenkins*, 26 Pa. 159; *Gaunce* v. *Backhouse*, 37 Pa. 350; *Kirkpatrick* v. *Lex*, 49 Pa. 122.

In order to recover damages in an action on the case for a conspiracy, a criminal intent must be proved to exist in the minds of all the defendants. A transaction, honest in fact, yet against legal policy would not constitute a conspiracy.

Biever v. *Herr*, 1 Pearson, 510.

Admitting the record of the *mandamus* case was error.

It is a record between Sweeney as plaintiff, and the corporation as defendant, and is therefore between third parties and cannot bind defendants.

If it shows anything, it is that this action should be against the corporation, and not against the individual members.

A great distinction exists between tortious and contractual liability for acts *ultra vires*. It is no defense to legal proceedings in tort that the torts were *ultra vires*. If the torts have been done by the corporation, or by their direction, they are liable for the results, however much in excess of their powers such torts may be.

Green's Brice, Ultra Vires, 265, citing *Sharp* v. *Mayor*, 40 Barb. 273; *Salt Lake City* v. *Hollister*, Book 30, U. S. Sup. Ct. Reports, 176, L. C. P. Co. decided May 10, 1886.

Admitting evidence of facts before and after April 1, 1884, was error.

The narr. averred one date only, viz.: April 1, 1884. As this is a quasi criminal action, plaintiff should have been confined to his narr. In any event, facts subsequent to the date laid should not have been admitted.

This is not similar to a case where the narr. charges the occurrences as having happened between two dates.

The narr. charges one specific act at a meeting of the society on a certain date. Defendants were entitled to know what they would have to meet. To allow evidence as to other dates and other acts is to mislead defendants.

Messrs. **Thomas E. White, George H. Earle, Jr.,** and **Richard P. White,** for defendant in error:

Parties who by concerted action prevent a citizen from obtaining the fruits of a decision of the courts are personally liable to him.

Findlay v. *McAllister*, 113 U. S. 104 (Bk. 28, L. ed. 930).

If a wrong doer in fact had authority from a corporation so to act, both are liable.

Bates v. *Pilling*, 6 Barn. & C. 38.

Any other rule would be absurd; for the law would indeed be easily evaded, if wrong doers must escape by simply announcing that they intended to commit their torts for others.

Where a state official invades the rights of a citizen under the express mandate of that State's law, he is liable as a trespasser, unless he can establish the State's constitutional right to pass the law.

Poindexter v. *Greenhow*, 114 U. S. 282 (Bk. 29, L. ed. 185).

While the continued, joint, persistent and known invasion of the plaintiff's rights by the defendants is ample evidence that they conspired to so injure him, it is settled that the gist of actions of conspiracy is the wrong done; and proof of the conspiracy is only essential as to defendants who took no other part in the perpetration of that wrong, further than combining to commit it; and as the direct participation of each of the defendants has been shown, the question of conspiracy becomes of but little moment, although largely discussed by defendants.

Laverty v. *Vanarsdale*, 65 Pa. 507.

Mr. Justice **Gordon** delivered the opinion of the court:

The testimony adduced by the plaintiff, in the court below, and as we have it now before us, exhibits no cause of action against the defendants. There is not the slightest evidence of a conspiracy to deprive him of the rights and benefits of the association to which he belonged. He was expelled in a regular manner, and by the decisive majority of ninety in a vote of 116.

The action was that of the corporation, and was final and conclusive, until reversed by the judgment of the court of common pleas. When that court gave its judgment in his favor on the *mandamus*, it was his business to serve the decree, in a regular manner, on the officers of the society; and if, in that case, they did not restore him, he had his remedy by attachment, which, it seems, he finally resorted to.

But when he appeared at the April meeting, he appeared, so far as the association knew, as an intruder without right, and on being requested, as he was, by a vote of the members then present, to retire, he should have quietly obeyed; and not having done so, he made himself liable to forcible expulsion. His declaration that he had been restored by the judgment of the court, even if heard by a majority of those present, was not the kind of information that they were bound to regard; they had a right to require the production of the order of the court; and even after that, they were entitled to a reasonable time for its consideration, and for that purpose might well have ordered him to retire from the lodge room.

Instead of pursuing this regular and quiet course, he chose to intrude himself on the society and attempt his own restoration, in a manner which accorded rather with his own will than with propriety and law. The result of his experiment is on himself; fortunately, it was not at all serious; and as he was finally restored to his membership he has nothing of which to complain. But had the result been more serious than it was, it could not have been visited on the defendants, since they did nothing in the transaction but what they were warranted to do in the exercise of their corporate rights.

The judgment of the court below is now reversed and set aside.

Louiza DURAIND, Trustee, *Appt.*,
v.
George L. DYCH, *Admr.*, *et al.*

An **instrument in the form of a deed,** purporting to convey lands **to a trustee,** in trust for the trustee's children, the grantor reserving the right to collect the rents, issues and profits for her own use during life, was duly **signed and acknowledged, but** not in the presence of the trustee or *cestuis que trustent*, and no consideration paid; and it was **retained by the grantor** in her possession until death. *Held*, that it was **not a valid deed.**

(Argued March 29, Decided April 11, 1887.)

JANUARY Term, 1887, No. 117, E. D., before Mercur, *Ch. J.*, Trunkey, Sterrett, Green and Clark, *JJ.*

Appeal from decree of Common Pleas No. 2, of Philadelphia County, dismissing a bill in equity to compel delivery of deed. *Affirmed.*

The facts appear by the opinion of the court on exceptions to the report of William Kelley, Esq., Master, the opinion being by FELL, *J.*, as follows:

The bill in this case was filed to compel the delivery to the grantee of a deed, executed by Marie F. Duraind, now deceased, and found in her trunk, by the administrator of her estate, and to restrain the defendants from interfering with the control of the property described in the deed.

The master finds that Marie F. Duraind was the owner in fee of a lot of ground, situate at the corner of Twelfth Street and Sheaf Alley, in the City of Philadelphia.

In August, 1879, about four years and six months before her death, she directed her attorney to prepare a deed conveying the property to Louiza Duraind, the widow of her deceased brother, in trust for her, the said Louiza's, six children, reserving to the grantor "the right to collect the rents, issues and profits of the said property for her own use during her life."

In pursuance of this direction the deed was prepared and handed to her on the 8th of August, 1879, and on the same day taken by her to a notary and acknowledged. The only explanation of her intention made to anyone was to her attorney, to whom she said that, in case of her death, she wished all of her property to go to the children of her deceased brother James, as her sister Josephine had treated her badly, and she was determined that she should have none of her property.

The deed was retained by the grantor and was found in her trunk after her death, which occurred January 31, 1884. The fact of its existence had never been communicated to the trustee or any of the parties in interest, all of whom resided in California. The consideration named, $10,500, was, of course, not paid, and the receipt at the end of the deed was unsigned.

At the time that this deed was prepared, another deed to the same party and upon the same trust, for a property at Jenkintown, Pa., was prepared. Both deeds were received by her from her attorney and acknowledged by her at the same time. She afterwards sold this property and deposited the money received therefor in a savings institution in Philadelphia, where it was at the time of her death. The last mentioned deed was also found in her trunk, but was torn in two. Upon this finding of facts, the master recommends a decree dismissing the bill.

[Excepting the reservation in the deed, this case does not differ materially from *Critchfield* v. *Critchfield*, 24 Pa. 100.] In that case a father executed a deed for land to his son, but retained the deed in his possession until his death. The son had no knowledge of the deed, which had not been recorded, until it was found among his father's papers. Notwithstanding evidence that the father had said to a stranger that he had given the land to his son, that he would keep the title during his life, but that the son would get the land after his death, it was held that the intention of the grantor that the deed should be delivered after his death was insufficient, and no title passed.

It was urged upon the argument of the case before us that as the grantor had reserved an interest, she had a motive for retaining the deed, and that its retention by her was not inconsistent with the belief that she regarded it as a completed intrument; and *Scrugham* v. *Wood**, 15 Wend. 545, and *Souverbye* v. *Arden*, 1 Johns. Ch. 240, were cited in support of this view.

The facts in *Scrugham* v. *Wood* are very similar to those of the case under consideration, except that the deed was acknowledged by the trustee and recorded. A father in that case conveyed his property in trust for the benefit of his children, he to possess and enjoy the premises during life, to enable him to apply the proceeds to their support and education. The deed was signed by the grantor and the trustees, acknowledged by all the parties, recorded, and after his death found among his papers. It was held to be valid.

In *Souverbye* v. *Arden* it was held by the court that "A voluntary settlement fairly made is always binding in equity upon the grantor, unless there be clear and decisive proof that he never parted or intended to part with the possession of the deed; and if he retain it, there must be other circumstances besides the mere fact of his retaining it to show that it was not intended to be absolute." In this case the fact of the conveyance had been, at the time it was made, communicated to all the parties in interest, and the deed delivered to the trustee. It afterwards came into the possession of the grantor, and the attempt was to defeat the deed by proof of a subsequent condition.

In *Garnons* v. *Knight*, 5 Barn. & C. 671, a leading case upon the subject, in which there is a full discussion of the authorities referred to in the preceding cases, a conveyance was made by an attorney to secure an indebtedness to his client for money misapplied. The misapplication of the money and a promise to secure him were communicated to the grantee. The deed was handed by the grantor to his sister to hold for the grantee. Upon the trial the distinct question was whether the delivery to the third party was a good delivery; and the jury were instructed that if the delivery was a parting with the possession and the power and control over the deed for the benefit of the grantee, in order that it might be delivered to him in the grantor's lifetime or after his death, the delivery was good; but if delivered for safe keeping for the grantor, to be subject to his future control and disposition, it was not a good delivery. On this instruction the jury found the delivery good, and, upon the argument of a motion for a new trial, the correctness of the instruction, as well as the sufficiency of the evidence to justify such a finding, was raised. The court held the instruction to be correct, and that the evidence justified the finding of the jury. The further question was considered, "whether where a deed is duly signed and sealed, and formally delivered with apt words of delivery, but is retained by the party executing it, that retention will obstruct the operation of the deed;" and it was said: "Where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery except the keeping of the deed in the hands of the executing party, and nothing to show that he did not intend it to operate immediately, it is a valid and effectual deed; delivery to the party who is to take under it, or to any other person for his use, is not essential."

In all of the cases cited in support of this opinion, *Boughton* v. *Boughton*, 1 Atk. 625; *Clavering* v. *Clavering*, 2 Vern. 473; *Naldred* v. *Gilham*, 1 P. Wms. 576, and *Lloyd* v. *Bennett*, 8 Carr & P. 124, there had either been an actual delivery to a third party or a formal delivery of the deed.

These cases do not in any degree affect the settled rule that [delivery is essential to the validity of a deed] and that a mere intention to convey, where the conveyance is voluntary and the determining act is unexecuted, is without effect.

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* See note, Lawyers' edition. [Ed.]

After the delivery the deed may remain in the possession of the grantor; but delivery, actual or constructive, is essential to its validity. Acts of the grantor in relation to the deed, such as recording, may give rise to the legal presumption of delivery. *Stewart* v. *Riddett*, 3 Md. 67.

The recording of a deed is a publication and places the title under the control of the grantee as effectually as the delivery of a deed. [It is, moreover, an act inconsistent with any other thought than that the grantor has finally and completely devested himself of the title. The signing and acknowledgment of a deed cannot be said to have this effect. They are preparatory to a conveyance, and indicate only an intention. This intention, where the act is voluntary, the grantor is always free to change until the deciding and determining act is performed].

In the case before us the grantor did change her mind as to one of the properties, having destroyed the deed and conveyed it to another party for a valuable consideration; and [as to the remaining property there is only evidence by the deed, and by her language to her attorney that she at one time contemplated a conveyance to the complainant; but the fact remains that she never carried this intention into effect].

If the deed in this case is imperfect by reason of a want of delivery, the complainant cannot obtain relief in a court of equity. Equity will not aid an imperfect voluntary conveyance, even when by accident the deed was not delivered. *Clavering* v. *Clavering*, 2 Vern. 473.

No imperfect conveyance, which is also merely voluntary, will be aided or enforced in equity. Bisph. Eq. 101 and cases there cited.

The assignments of error specified the action of the court:

In dismissing the first exception to the report of the master as follows: "1. The master erred in finding that the deed for the premises in controversy was never delivered, and was therefore inoperative to vest title in the complainant as trustee."

2. In dismissing the second exception to the report of the master as follows: "2. The learned master erred in finding as follows: 'That the case in question so strongly resembles that of *Critchfield* v. *Critchfield*, 24 Pa. 100, and the law as held in that case is so clearly applicable to the facts of the present case, that in the opinion of the master it is ruled by it.'"

3. In dismissing the third exception to the report of the master as follows: "The learned master erred in suggesting a decree dismissing the bill."

4. In dismissing the exceptions to the master's report, 5, 6 and 7—the portions of the opinion in brackets.

Mr. **Jerome Carty,** for appellant:

"It is certainly the tendency of all modern authorities to maintain the general doctrine, which may be stated as a formula: that whenever the party has the power to do a thing (statutory provisions being out of the way), and means to do it, the instrument he employs shall be so construed as to give effect to his intention." *Bond* v. *Bunting*, 78 Pa. 210.

Mere possession of a deed by the grantee is no more tangible evidence of absolute delivery than possession thereof by the grantor.

Rhine v *Robinson*, 27 Pa. 30.

Nor is actual delivery to the grantee necessary. Nor is recording absolute delivery, but only evidence thereof.

Chess v. *Chess*, 1 Penr. & W. 32.

When an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping of the deed in the hands of the executing party—nothing to show that he did not intend it to operate immediately—that is a valid and effectual deed, and delivery to the party who is to take it, or any other person for his use, is not essential.

Garnons v. *Knight*, 5 Barn. & C. 671, and *Lloyd* v *Bennett*, 8 Carr. & P. 124.

Deeds acting under the Statute of Uses may give an estate of freehold to commence in future.

2 Preston, Con. 127.

A grant to A, merely, creates a life estate only; but when a party pays his money, and the intention is clear that a fee was to be conveyed, a use which chancery would execute is raised.

Lynn v. *Downes*, 1 Yeates, 520; *M'Girr* v. *Aaron*, 1 Penr. & W. 49.

Wherever a deed of conveyance, etc., is made, and the intention of the grantor, etc., is clear, and a technical principle might defeat the intention, courts will declare the grantor a trustee and the deed a covenant to stand seised for the use of the grantee.

Martin v. *M'Cord*, 5 Watts, 495; *Allison* v. *Kurtz*, 2 Watts, 188; *Wilt* v. *Franklin*, 1 Binn. 519; *Witman* v *Lex*, 17 Serg. & R. 88.

The words bargain and sell make a covenant to stand seised.

4 Cruise, Dig. title 32, chap. 10, § 1.

A bargain and sale for a pecuniary consideration to commence *in futuro* will operate as a covenant to stand seised according to the intention, without technical words.

Jackson v. *Swart*, 20 Johns. 85; *Barrett* v. *French*, 1 Conn. 354; *Wallis* v. *Wallis*, 4 Mass. 135.

A deed to a son reserving a life estate to the grantor is a covenant to stand seised for grantee.

French v. *French*, 3 N. H. 258; *Jackson* v. *McKenny*, 3 Wend. 233; *Jackson* v. *Sebring*, 16 Johns. 515; 9 Wend. 641.

In *Critchfield* v. *Critchfield* the decision of the court is entirely based upon the disputed facts as found by the jury, which negative the idea or intention of delivery on the part of the grantor.

Mr. **Thomas Greenbank,** for appellees.

The citations by the appellant fail to meet the point of the case or to sustain the positions assumed.

In *Rhine* v. *Robinson*, 27 Pa. 30, it is held that possession of a deed by the grantee is *prima facie* evidence of delivery.

In *Chess* v. *Chess*, 1 Penr. & W. 32, the court says: "A delivery is essential to the proper and legal execution of a deed, and the delivery may be to the party—to one authorized by the party to receive it, or to a stranger for the use of the party. The placing of a deed on record by the grantor is not absolute delivery, but only evidence of it, of which the jury may judge."

In *Garnons* v. *Knight*, 5 Barn. & C. 671, the syllabus is misleading. Both in that case and in *Lloyd* v. *Bennett*, 8 Carr. & P. 124, there had been an actual delivery to a third party.

The remaining cases in appellant's book relate to the construction of deeds or bequests for charitable uses in which no question of delivery arises.

The rule in regard to the delivery of voluntary deeds is the same as in regard to gifts of chattels. A gift is not consummate and perfect until a delivery of the thing promised; and until then the party may revoke his promise. *Pringle* v. *Pringle*, 59 Pa. 281.

Where the donor retains the control of a voluntary bond, given or assigned, he may cancel or destroy it. If the determining act be *in fieri*, the intention to deliver does not execute the gift. *Trough's Est.* 75 Pa. 115.

Per Curiam:

A delivery is essentially necessary to give effect to a deed. The signing and sealing thereof are insufficient to bind the grantor, or to pass title to the vendee therein named. In the present case no question of presumptive or conditional delivery either to the vendee or to any person for her arises.

It is conclusively shown that although the deed was signed and acknowledged, yet in fact it remained in the possession of the person who signed it until her death. Neither the grantee named, nor the persons for whose benefit it professed to be made, gave any consideration therefor, nor were any of them present when it was signed or acknowledged; and they had no knowledge of its existence during the life of the maker. In law it was not a deed.

Decree affirmed and appeal dismissed, at the costs of the appellant.

N. C. HARRIS *et al.*, *Plffs. in Err.*,
v.
PENNSYLVANIA & NEW YORK CANAL & R. R. CO.

1. Under the Acts of February 25, 1826, and April 9, 1827, the **Board of Canal Commissioners** had **power to purchase lands** through which the Pennsylvania Canal was intended to pass, without limitation either as to amount or quality.
2. Land so purchased became *ipso facto* **canal land** and appurtenant to the canal.
3. Until the Act of April 9, 1827, the board received **authority to sell the remainder not occupied by** the **canal;** but whether they should make such sale or not was left entirely to their own discretion.
4. **Land so purchased** and **not sold by** the **board** although only **partially occupied by** the **canal, passed by a sale under** the **Act of April 21, 1858,** of that portion of the canal "with all the property thereto belonging or in any wise appertaining," and proclamation and deed in accordance with the Act.

(Argued March 15, Decided April 25, 1887.)

JANUARY Term, 1886, No. 219, E. D,, before Mercur, *Ch. J.*, Gordon, Paxson, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Bradford County, to review a judgment on a verdict for the plaintiff in an action of ejectment. *Affirmed.*

The facts as they appeared at the trial before Morrow, *J.*, were as follows:

In the construction of the Upper North Branch Division of the Pennsylvania Canal in Athens Township, Bradford County, the line of the canal passed through certain land of John Spalding, and the west end of a dam built across the Chemung or Tioga River, for the purpose of feeding the canal with water, was built upon said land, as well as a lock. This dam was one of the largest and most important works of the State, appurtenant to the canal, and its erection consumed a vast amount of timber, earth and stone, all of which were necessarily obtained from the land in suit, and in fact could not be obtained elsewhere, except at an increased and unwarranted expense. The same materials were in constant demand for the maintenance and repair of the dam, and the amount of land required to furnish the necessary material, not only for the construction of the dam, the lock, and the canal, but also constantly needed for their maintenance, could alone be determined by the commissioners.

February 25, 1826, P. L. 55, the Legislature provided for the commencement of the "Pennsylvania Canal;" and sections 7 and 8 of said Act, P. L. 57, authorized the purchase of lands, and provided the mode of procedure in ascertaining damages, etc.

April 9, 1827, P. L. 192, the Legislature provided for the further extension of the Pennsylvania Canal, and by the same Act, pp. 197, 198 (where private property may be in a great measure destroyed by the public works, and when in the opinion of the commissioners it would be more advantageous to purchase the land than pay the probable amount of an assessment of damages), said commissioners were authorized to purchase such lands on behalf of the State, and to sell the remainder not occupied by the canal, and convey to the purchasers respectively the estate and title thus acquired.

September 25, 1838, the canal commissioners, being of the opinion that the erection of the dam and canals materially injured the farm of John Spalding, so as to destroy it for farming purposes, voted to pay said Spalding $4,000, in full compensation for all damages by the building of said dam and canal, and as full pay and consideration of the purchase money of said Spalding's farm or tract of land through which said canal passes (including all that farm and land connected with it), upon said Spalding's conveying said farm to the Commonwealth in fee simple.

September 18, 1839, John Spalding conveyed to the Commonwealth the said land, being seventy-two acres and 180 perches, more or less, by deed, which was recorded in Bradford County, January 31, 1840, in Deed Book No. 16, p. 348.

Under the authority of the Act of 1858, P. L. 414, the Upper North Branch Division of the Pennsylvania Canal, *inter alia*, was sold to the Sunbury & Erie Railroad Company, with all the property thereto belonging, or in any wise appertaining, and all the estate, right, title and interest of the Commonwealth therein, the deed for which, dated May 19, 1858 (that was made by the Governor in pursuance of the Act), has since been lost. May 19, 1858, the Governor made proclamation, in pursuance of the sale of all the property.

May 25, 1858, the Governor assented to the sale by the Sunbury & Erie Railroad Company to the North Branch Canal Company, of that part of the canal *inter alia* beginning at the line of the State of New York, in the County of Bradford, and thence down through the said County of Bradford, etc., embracing the land in question.

May 25, 1858, the Sunbury & Erie Railroad Company made deed to the North Branch Canal Company, which was recorded in Bradford County, June 8, 1875.

April 12, 1859, P. L. 530, the Legislature passed an Act for the assessment and recovery of damages upon the Upper North Branch (and Wyoming) Canal.

March 20, 1865, P. L. 427, the Legislature authorized the North Branch Canal Company to change their name, style and title to the Pennsylvania & New York Canal & Railroad Company, and to construct a railroad along and upon or near the towing path or berme bank of its canal. The railroad was constructed, and continues to be operated.

This action was begun by the said Pennsylvania & New York Canal & Railroad Company, against N. C. Harris and others in possession. The defendants, having no paper title, relied entirely on their possession.

The court below charged the jury as follows:

This is an action of ejectment brought by the Pennsylvania & New York Canal & Railroad Company against N. C. Harris and A. C. Elsbree, to recover a lot of land in Athens Township, containing seventy-two acres and 130 perches. The land is on the west of the Chemung River—the dam that was built across the river when the North Branch Canal was constructed, abutted against this land. From the river it extends west, over a high hill. It is a narrow strip, about one mile long.

After the suit was brought, the defendants disclaimed any right, title or possession to all that part of the land lying east of a certain dug road that crossed it along the side hill. This piece contained thirty-nine acres and sixty-one perches. They are in possession of all the land (thirty-three acres and sixty-nine perches) lying west of the dug road, and claim to hold it as against the plaintiff.

In the construction of the North Branch Canal, a dam was constructed across the river at Athens and the west end of it abutted against the land of John Spalding. The canal commissioners, under authority of law, purchased Spalding's land December 18, 1839, for $4,000, in pursuance of a resolution to that effect adopted September 25, 1838. The deed is to the Commonwealth of Pennsylvania and bears date December 18, 1839, and covers the land in dispute.

In pursuance of an Act of Assembly, the state canals were sold, and the title to the North Branch Canal became vested in the North Branch Canal Company, May 19, 1858. In 1865 this Company's name was changed to the Pennsylvania & New York Canal & Railroad Company and was authorized to construct a railroad along, upon or near the towing path or berme bank. The road was constructed and passes through the land in suit some little west of the Chemung River, and west of the canal.

The plaintiff claims that all of the Spalding farm passed to it under the sale of the state canals, for the reason that it was appurtenant to and part of the canal.

The defendants claim that it was not appurtenant nor necessary to operate the canal. They have given no evidence. Their possession is sufficient to protect them, and there can be no recovery here until the plaintiff has shown a better title. This depends upon the construction of the Acts of Assembly under which the canals were sold. They provide that the sale shall convey all the property appurtenant to the canal or in any wise appertaining thereto, and all the estate, right, title and interest of the Commonwealth in and to the same—and all claim and demand whatsoever, etc.

[The defendants ask us to submit to you whether this land was necessary for the use of the canal—that is, the thirty-three acres and sixty-nine perches. This we refuse to do, and say our opinion is, under the evidence, and the Acts referred to, the plaintiff is entitled to recover.]

This affirms the plaintiff's points, and denies the points of the defendants.

Verdict and judgment were for the plaintiff.

The assignments of error specified, *inter alia*, the portion of the charge inclosed in brackets.

Messrs. **Edward Overton, Jr.,** and **John F. Sanderson,** for plaintiffs in error:

The plaintiff was never in possession of the land in controversy, and it was therefore incumbent on it to show a good title thereto in order to recover against the defendants who are in possession.

Shumway v. *Phillips*, 22 Pa. 151.

The lot in controversy was not purchased for canal purposes, but under the Act of 1827, which expressly authorized the purchase for the State of lands not required for the canal, when a portion of them had been destroyed by the public works.

In the case of the *Plymouth R. R. Co.* v. *Colwell*, 39 Pa. 339, it was said: "They (the company) had very express authority by the incorporating law to buy, hold and sell lands; and in locating their road they probably found it expedient to buy the Larkins farm rather than pay damages for crossing it. But lands so bought and not actually dedicated to corporate purposes are bound by the lien of judgments," etc.

The Act of 1858 authorized the sale of the public works but not the sale of any other property belonging to the State.

A contract between the Commonwealth and

a private person is ordinarily to be construed in the same manner as a like contract between natural persons.

Commonwealth v. *Pa. R. R. Co.* 51 Pa. 351.

The title of the plaintiff extends only to such lands actually and permanently occupied by the State for canal purposes.

Western Pa. R. R. Co. v. *Sharp,* 26 Pittsb. L. J. 129.

"Any ambiguity in the grant must be construed against the corporation and in favor of the public."

Comrs. v. *Gas. Co.* 12 Pa. 321.

While the rule is that "The words of an instrument shall be taken most strongly against the party employing them," yet "Where a question arises on the construction of a grant from the Crown, the rule under consideration is reversed, for such grant is construed most strictly against the grantee, and nothing will pass to him but by clear and express words."

Broom, Legal Maxims, 260.

The land was clearly no part of the North Branch Canal. When it was purchased by the State the canal board put upon record their reasons for purchasing it. They deemed it to the advantage of the Commonwealth to buy a farm, the portion of which lying on the flats had been injured, and which might be utilized for a water power, rather than pay damages to the owner. The part now in controversy could by no possibility be used in connection with the canal. It was several hundred feet higher than the canal and more than half a mile from it. "What is necessary to the enjoyment of the thing devised passes with it as an appurtenant without express words, but what is merely convenient does not."

Howell v. *McCoy,* 3 Rawle, 256.

This land was not necessary to the enjoyment of the canal.

"Town lots held by a railroad company do not pass by a sheriff's sale upon a mortgage of the road with its corporate privileges and appurtenances, unless directly appurtenant to the railroad and indispensably necessary to the enjoyment of its franchises."

Shamokin Valley R. R. Co. v. *Livermore,* 47 Pa. 465.

It is only such property belonging to corporations as is appurtenant and indispensable to its construction, and fitting it for use, that can claim to be exempt from taxation.

Railroad v. *Berks Co.* 6 Pa. 70.

Town lots owned by the corporation are no part of the railroad.

Youngman v. *Elmira etc. R. R. Co.* 65 Pa. 278.

The report of viewers must show that the land taken is necessary for railroad purposes.

O'Hara v. *Pa. R. R. Co.* 25 Pa. 445.

Messrs. **Davies & Hall** and **Henry Streeter,** for defendant in error:

This land was purchased by the canal commissioners under the Act of February 25, 1826, P. L. 57, as follows: "That it shall and may be lawful for the said board, or a majority of them, to agree with the owner or owners of any land through which the said canal is intended to pass, for the purchase, use and occupation thereof, on behalf of the State."

The land was not purchased under the Act of April 9, 1827, P. L. 198, which expressly stated that "Nothing therein contained shall be construed as limiting the powers already granted to the canal commissioners for the purchase of lands through which the canal was expected to pass." The land was wholly destroyed for farming purposes in the opinion of the commissioners.

But even if the land in question had been purchased under the Act of 1827, this would not materially affect the title of the defendant in error to these lands. It is true the canal commissioners had the right to sell such portions of the land so purchased as they might think unnecessary for the canal. But they, and they only, had this right and this discretion. They never did sell any of these lands, and the right to so sell or part with them under the Act of 1827 ended with the expiration of their powers. And from their not having sold any of this land, under the authority of that Act, it should be presumed that they considered it all necessary for the convenient use and occupation of the canal.

The action of the canal commissioners was conclusive of the question as to the amount of land necessary for the convenient use of the canal. The time to dispute their discretion was before them, in the way pointed out by the Act of Assembly creating the board.

It was not for the appraisers of damages to determine that the Commonwealth should take less than a fee, nor even what should be the duration of interest in what was taken for temporary use. This was to be determined by the board of canal commissioners. It was what was required by the board for the use of the State that they were to value and describe; and it was of that thus required and described, not of that which the viewers might think necessary, that the law defined the seisin of the State.

Haldeman v. *Pennsylvania R. R.* 50 Pa. 425.

The question, Who has authority to judge of such encroachments, the canal commissioners or the jury? is begged when it is left to the jury to say whether the canal commissioners act arbitrarily or not.

Downing v. *McFadden,* 18 Pa. 337. See also *Ridge Turnpike Co.* v. *Stoever,* 6 Watts & S. 378.

The extent of the transfer to the defendant in error is to be determined by the Act of Assembly authorizing the sale, and the Governor's proclamation showing what was sold and transferred.

There is no ambiguity in either the Act of Assembly or the proclamation; and therefore the cases cited by counsel, that grants are to be construed in favor of the Commonwealth, are not applicable.

The construction of this Act of Assembly is for the court, and not for the jury; but the court in construing it must look into the circumstances under which it was made, as evidencing the intention of the parties.

Cox v. *Freedley,* 33 Pa. 124.

In order to interpret this Act of Assembly and this proclamation and give each clause in them its full meaning, we must look at things as they then existed, and the canal as it then was. To give a particular description was impossible. The canal property was over 100 miles long. Its boundaries were irregular. In some places its title extended only so far as its permanent monuments had been built on the ground. In others the title extended as far as the descriptions contained in deeds and releases, which had been placed on record. The property varied in width from about sixty feet, when it passed through flat and level land, to that of many rods when it passed through deep cuts or along steep hillsides. Besides this, there were many pieces of land used in connection with toll houses, lock houses, weigh locks, basins, docks, besides lands overflowed by the back water from the dams, necessary for the convenient use of the canal, of different sizes, irregular shapes, in some cases with undefined or perhaps undefinable boundaries. As these pieces of land could not be particularly described, it was necessary to convey them by general words, and we claim that those used in the Act are the most general and sweeping that could have been selected.

The property is to be conveyed with the appurtenances. Later cases have modified the rule stated in *Howell* v. *McCoy*, 3 Rawle, 256, as to what will pass under the term, appurtenances.

Appurtenances do not pass alone on the ground of absolute necessity, as some of the more ancient cases seem to show, or on the principles governing right of way, of necessity. One general test is how far the incidents claimed are necessary for the reasonable enjoyment of what is expressly granted.

Wright v. *Chestnut Hill Iron Ore Co.* 45 Pa. 482; *Buckholder* v. *Sigler*, 7 Watts & S. 154; *Grubb* v. *Guilford*, 4 Watts, 223; *Grubb* v. *Grubb*, 74 Pa. 33.

The construction of the dam would consume a vast amount of earth, stones, timber and other materials, and for its maintenance and repairs the same would be constantly needed. A piece of land from which these materials could from time to time be obtained would be necessary for the convenient and economical use and maintenance of the canal at this point.

By the Act of Assembly, all the property of the State in the said public works was to be conveyed. Property signifies every species of property; it is *nomen generalissimum*, and comprehends all his earthly possessions. It is equivalent to a disposition of all I am worth in the world; whatever else I am worth in the world; whatever else I have in the world; all my substance; which has been construed not only to pass lands but to pass the fee simple.

Rossetter v. *Simmons*, 6 Serg. & R. 456; *Stoever* v. *Stoever*, 9 Serg. & R. 445; *Foster* v. *Stewart*, 18 Pa. 23-25; *Morrison* v. *Semple*, 6 Binn. 98.

But even the word, property, was not considered strong enough to describe all that the grantors intended to convey; and it is mentioned as "property thereto belonging, or in any wise appertaining." Webster defines the word appertain: "to belong to, whether by right, nature or appointment."

The Commonwealth alone can object to a want of capacity in a corporation to hold lands which it was not authorized to purchase. It takes and conveys to its alienee a defeasible title.

Leazure v. *Hillegas*, 7 Serg. & R. 313; *Goundie* v. *Northampton Water Co.* 7 Pa. 233.

Mr. Justice **Gordon** delivered the opinion of the court:

The case before us involves nothing of material consequence and might well be affirmed, with little or no discussion. It is admitted that the defendants have no title whatever to the land described in the writ. If it belongs not to the plaintiff, then it does belong to the Commonwealth of Pennsylvania; and although it may belong to the latter, yet it is not now and never was open to settlement, warrant or patent; nor is it property over which the land-office has ever had jurisdiction.

The defendants rest their defense solely on the ground of possession, a ground sufficiently substantial if it be found that the plaintiff has not a superior right. It is conceded that the Pennsylvania & New York Canal & Railroad Company, through the Sunbury & Erie Railroad Company, and the North Branch Canal Company, was and is the vendee of the Commonwealth as to all the property belonging or appurtenant to the North Branch Canal; but it is alleged that the land in suit was not so appurtenant, and this because it was not necessary for the use of that improvement; hence, although the grant to the Company above named was, "of the upper North Branch Canal, with all the property thereto belonging, or in any wise appertaining," it did not convey the land in controversy. That is, as the defendants contend, although this whole tract of seventy-two acres was bought by the canal commissioners for the use of the canal, and on part of which the canal was actually located, they have nevertheless the right to define what was necessary for that purpose; to run off what they may think was really appurtenant to the state works, and settle upon and occupy the balance.

The mere statement of this claim, involving, as it does, an assumption so unwarranted, ought of itself to settle this controversy; for the question naturally presents itself: Who gave these men the authority to say what should or should not be canal property, or to limit the power of the state officers? If the Commonwealth treated this as canal property, and as such conveyed it to her grantees, we cannot understand by what warrant private citizens undertake to sit in judgment on and annul her acts, and the resolutions of her officers. But, passing this feature of the case, let us see how, in fact and in law, this matter stands. By the Act of the 25th of February, 1826, P. L. 55, the canal commissioners were authorized "to agree with the owner, or owners of any land, through which the said canal is intended to pass for the purchase and occupation thereof, on behalf of the State."

Here was the grant of a power certainly of sufficient breadth and generality; their purchases were to be confined to lands through which the canal was intended to pass, but there was no limitation either as to amount or quality; that was left to their sole discretion. They might be extravagant to the last degree; they might buy 100 acres where but ten were necessary, but there was no power which could call them to account, or reverse their judgment, except that by which they were created: the General Assembly of the Commonwealth.

Again; if they did so purchase, under the provisions of the said Act, whether economically or extravagantly, the land so purchased was canal land—appurtenant to the canal, for they had no power to purchase for any other purpose. The land-office had nothing to do with it, nor was any department of the Government authorized to sell or otherwise dispose of it. Hence, but for section 16 of the Act of the 9th of April 1827, P. L. 201, lands so purchased must have remained canal property as long as the State retained its improvements.

In such case, however, that is, had neither that Act nor one similar to it been passed, it is very clear that all the property purchased by the commissioners under the Acts of 1826 and 1827 would have to be regarded as belonging to the public works; and in case of the sale of those works and their appurtenances, all such property must pass and be held by the Commonwealth's vendee. But the latter Act put no compulsion on the commissioners; authority was thereby given to them "to sell the remainder not occupied by the canal, and to convey to the purchasers respectively the estate and title thus acquired;" but whether they should make such sale or not was left entirely to their own discretion.

We have, then, in this department of the Commonwealth (called the "Board of Canal Commissioners," which said board represented the public works and nothing else), the power to purchase lands for the use of the state canals and for no other purpose; the power also to sell them, should it seem to that board necessary; so, from this, it would seem to follow as a corollary that the judgment of this board must be final, since there was no tribunal in the State having power to revise that judgment.

If, then, it purchased the land in controversy for the use of the canal, and never declared any part thereof unnecessary for such use by putting the surplus on the market for sale, by what authority may either a lower court or this court revise and correct the act and judgment, or discretion, of this governmental department, in which was vested all right, title and power in and over the canal lands?

It may be that the canal commissioners acted improvidently in buying the whole of John Spalding's farm for canal purposes when but part of it was necessary for such purposes, or in not running off and selling the surplus, but when we have made this admission, what then? Who can revise and annul their deliberate act? They certainly did need part of it for the use mentioned; and in their resolution of September 25, 1838, they declared that the erection of dam No. 1 so impaired the land of Spalding as to render it unfit for farming purposes; and as the erection of the said dam would create a good water power on said land, therefore, they directed the superintendent of the Tioga line to pay to Spalding the sum of $4,000, for the fee of the whole tract. Thus was the land in controversy bought expressly for the use of the canal by the properly constituted authorities of the State, and it is not within our province to say that they did not act providently.

Did the State still own the canals, the idea that the defendants could squat upon the lands connected with them, and set at defiance the power of the commissioners, on the plea that they were not necessary for the purposes for which they were bought, would be too absurd to talk about. But the plaintiff is the vendee of the State, and by its deed it took that over which the canal commissioners had control for the State; and it now represents both the State and the canal board, so that if the defendants could not claim as against the canal board, prior to the time of the sale, neither can they now claim as against the Pennsylvania & New York Canal & Railroad Company.

The judgment of the court below is affirmed.

Mr. Chief Justice **Mercur** and *Mr. Justice* **Sterrett** dissent.

William M. VANDERMARK, *Plff. in Err.*,
v.
Esther PHILLIPS *et al.*

At the time of **assessment of taxes for 1876,** Thomas Hughes owned an improved lot on Hazel Street in the fourteenth ward in Wilkesbarre, and a vacant lot on Parrish Street in the same ward. Taxes for that year were duly assessed against the first lot: "Bridge tax eighteen cents, and county tax $2.88, total $3.06;" and against the second lot: "Bridge, six cents and county ninety-six cents, total $1.02." **In March, 1878,** the **receiver of taxes made return** to the county commissioners on the exoneration claimed by him for 1876, and the only return concerning property of said Hughes was: "Hughes, Thomas—vacant lot — sold three years ago— Bridge, twenty-four cents, county $3.84." The **county commissioners** thereupon **exonerated** the **receiver, and** in 1880 certified to the county treasurer both of said **lots** as delinquent, and thereafter they **were sold for** said **taxes.** *Held,* in an action of ejectment to obtain possession of the Hazel Street lot under the tax sale, that the **return** was made **too late and** was **too defective** in form **to constitute a valid basis for** the **sale.**

(Argued April 12, Decided April 25, 1887.)

JANUARY Term, 1877, No. 121, E. D., before Mercur, *Ch. J.*, Gordon, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to the Common Pleas of Luzerne County, to review a judgment overruling exceptions to the report of a referee granting a compulsory nonsuit in an action of ejectment. *Affirmed.*

At the trial before the referee, George W. Shonk, Esq., the following facts appeared:

In the year 1876, at the time when the taxes of that year were assessed, Thomas Hughes was the owner of an improved lot on Hazel Street, in the fourteenth ward in the City of Wilkesbarre, being the premises in controversy, and also owner of a vacant lot on Parrish Street, in the same ward.

The taxes for the year 1876 were duly and lawfully assessed against the former property as follows: bridge tax, eighteen cents, and county tax, $2.88; a total of $3.06.

The second lot for the same year was assessed as follows: bridge, six cents, and county, ninety-six cents, total, $1.02.

On March 6, 1878, George M. Miller, receiver of taxes for the City of Wilkesbarre, made his return to the county commissioners of Luzerne County on the exoneration claimed by him for the year 1876, and the only return concerning said Thomas Hughes or his property was as follows:

"Hughes, Thomas—vacant lot—sold three years ago—Bridge, twenty four cents, county, $3.84."

The county commissioners thereupon exonerated said receiver of taxes from the aforesaid taxes.

The county commissioners, influenced no doubt by the fact that the amount of said taxes thus exonerated was exactly equal to the amount of taxes assessed against said two properties, disregarded the return of the receiver of taxes, and in the year 1880 certified to the county treasurer both of the said lots delinquent, as follows: "Vacant lot, Hughes, Thomas, Parrish Street, six cents bridge, 96 cents county." Also, "House and lot, Hughes, Thomas, Hazel Street, bridge tax eighteen cents, county tax $2.88."

The county treasurer, after duly advertising the two properties, September 14, 1880, sold the property in controversy to the county commissioners and made a deed to them in which the only description was, "house and lot, Thomas Hughes, Hazel Street, fourteenth ward, Wilkesbarre, for taxes of 1876."

At the expiration of five years the commissioners duly made and passed a resolution to sell all lands which had been held by them for five years or more, in pursuance of which, after due and legal notice, they, November 5, 1885, sold said lot on Hazel Street to William H. Vandermark, plaintiff, who received a deed December 14, 1885, containing a description as last above given, under which he claimed title in this action.

The defendant moved for nonsuit on the ground that under the Act of April 21, 1856, the county treasurer had no authority to sell the lands in question, they having been returned and the taxes exonerated, March 6, 1878, and that the return was otherwise defective.

1. Section 3 of the Act of April 21, 1856, Purd. 1674, pl. 13, as amended by the Act of February 23, 1858, provides as follows: "It shall be the duty of * * * all collectors of any taxes whatsoever, to make return to the county commissioners of any exonerations claimed by them, on or before the first day of February in each year; and it shall not be lawful for the said county commissioners to grant any exonerations after that time, nor for the county treasurer to sell any lands which shall have been returned and taxes exonerated after time."

The referee held that the Act of April 21, 1856, had not been repealed prior to the time these taxes were returned and exonerated; that the provisions therein are mandatory on the officers, and their observance a condition precedent of their right to sell the land; that a sale of land not thus returned, as in the present case, is void, and the purchaser takes no title; that the return of the collectors was not sufficiently definite to enable the owner, the officer and the public to identify and determine therefrom the exact property which is delinquent and liable to sale, and that such uncertainty would vitiate the sale; whereupon, the referee granted the nonsuit and subsequently refused to strike the same off. Exceptions filed by the plaintiff to his report were overruled in the court below by WOODWARD, *J.*, and the report confirmed; and the plaintiff took this writ, assigning such action of the court as error.

Mr. **Michael Cannon,** for plaintiff in error:

Any negligence by the assessors or collectors in that respect for failing to make their return in a given time cannot defeat the deed or sale made by the county treasurer, all irregularities of that character being cured by the Act of 1815.

Heft v. *Gephart*, 65 Pa. 510; *Hubley* v. *Keyser*, 2 Penr. & W. 501; *Devinney* v. *Reynolds*, 1 Watts & S. 333; *Crue* v. *Burke*, 25 Pa. 377.

It was the assessment of the land and the levy of taxes thereon that made the charge against the land, and not the collector's return, the return being only evidence of its nonpayment or collectibility.

Cohn's App. 10 W. N. C. 230, is a case directly in point. The collector's return was not made for two years after assessment and levy of the taxes, and it was held right.

Messrs. **Allan H. Dickson** and **Q. A. Gates,** for defendants in error:

The return is a condition precedent to sale of seated land. The Act of 1844 does not extend the unseated land laws to seated lands in general.

Potter's Dwar. Stat. 257; *East Union Township* v. *Ryan*, 86 Pa. 459; *Bennett* v. *Birmingham*, 31 Pa. 15.

In this case a house and lot on Hazel Street and a vacant lot on Parrish Street were assessed to Thomas Hughes. The collector returned a vacant lot of the size of the Parrish Street lot. The treasurer sold to the commissioners a house and lot on Hazel Street; hence, the lot returned was never sold, and the lot sold was never returned. It seems beyond dispute, then, that this land on Hazel Street, which is the subject of this ejectment, never came within the operation of the unseated land laws; and the treasurer had no more right to sell it than any other land not returned.

The return was not made in time.

Act of April 21, 1856, § 3, P. L. 477, Purd. Dig. 1674, pl. 13, as amended by Act of February 23, 1858, P. L. 45.

In the case of *Hess* v. *Herrington*, 73 Pa. 445, it does not appear that any duplicate was ever issued to a collector for the unseated land tax, and no question was raised as to the time of return.

The return here is too indefinite and misleading to authorize a sale.

Dunn v. *Ralyea*, 6 Watts & S. 479; *Philadelphia* v. *Miller*, 49 Pa. 449; *Lyman* v. *Philadelphia*, 56 Pa. 501; *Strauch* v. *Shoemaker*, 1 Watts & S. 177; *Hess* v. *Herrington*, 73 Pa. 447; *Brotherline* v. *Hammond*, 69 Pa. 134.

The præcept from commissioners to tre surer of unseated land must describe the land ordered to be sold; otherwise, it confers no authority on treasurer to sell.

Stewart v. *Graffies*, 8 Serg. & R. 344.

This was a sale of a lot for a joint tax on two lots, and it is therefore void.

Stark v. *Shupp*, 8 Cent. Rep. 146.

Per Curiam:

There is no error in this judgment. The return of taxes was made too late in time, and too defective in form, to constitute a valid basis for a sale of the land in question.

Judgment affirmed.

City of PHILADELHPIA, *Plff. in Err.*,
v.
William R. MATCHETT.

Satisfaction of a municipal claim for water pipe, entered of record in accordance with an ordinance of the councils of Philadelphia, not only discharges the lien but **operates as an estoppel** to prevent the City from denying payment when a subsequent purchaser of the land, against which the claim was filed, applies for a permit to introduce water from the pipe to the premises.

(Argued March 29, Decided April 11, 1887.)

JANUARY Term, 1887, No. 137, E. D., before Mercur, *Ch. J.*, Trunkey, Sterrett, Green and Clark, *JJ.*

Error to Common Pleas No. 3 of Philadelphia County, to review a judgment for the defendant in a case stated in an action of trespass on the case. *Affirmed.*

Reported below, 2 Pa. C. C. R. 272.

The case stated was as follows:

It is hereby agreed that an amicable action be entered in the above entitled suit, and that a case stated therein be agreed to, as follows, to wit:

That in and prior to the year 1872 the German Hospital, a charitable corporation, was, *inter alia*, the owner of a lot of ground in the City of Philadelphia, situate on the east side of Twentieth Street, extending from Norris Street to Park Avenue (now called Diamond Street), containing in front on said Twentieth Street, 500 feet, and extending in depth eastward of that width along Norris Street and Park Avenue or Diamond Street 150 feet, on which were erected the buildings of said hospital, and the said lot and buildings were occupied by it for the purposes of a charitable hospital until the month of October, 1872, at which time the said hospital was removed to the new buildings of the corporation situate at Twentieth Street and Girard Avenue in said City, but that the said lot continued in the ownership of said corporation until the time hereafter mentioned, but after the last mentioned date was no longer used for the purpose of a hospital.

That some time in the year 1873 the City of Philadelphia laid a water pipe in the said Twentieth Street along the whole front of said lot.

That on the 11th day of March, 1874, the said City, through its solicitor filed in the district court, as of March Term, 1874, No. 12, a claim for $400 for said water pipe laid in front of said lot. A copy of the docket entries of said claim is hereto annexed as part hereof marked exhibit "A."

That on the 12th day of December, 1874, an ordinance of the select and common councils of the said City was duly approved by the mayor thereof, ordaining that "The said solicitor be authorized and directed to enter satisfaction on the claims of the City against the German Hospital for water pipe laid in front of their property on Twentieth Street from Diamond to Norris Street, D. C. M. T. 1874, No. 12, C. C. D." A copy of which said ordinance is hereto annexed, as part hereof, marked exhibit "B."

That the said city solicitor on the 22d day of December, 1874, entered satisfaction of record of the said claim for water pipe against said lot, as appears by the docket entries, a copy of which is hereto annexed.

That the said German Hospital, by indenture dated the first day of December, 1879, duly recorded in Deed Book L. W. No. 66, page 29, etc., granted and conveyed the said lot of ground, *inter alia*, to George Sergeant in fee.

That the said George Sergeant, by indenture dated the second day of December, 1879, and recorded in Deed Book L. W., No. 71, page 12, etc., granted and conveyed the said lot, *inter alia*, to John D. Lankenau in fee.

That the said John D. Lankenau, by indenture dated the 12th day of May, 1885, and recorded in Deed Book G. G. P., No. 40, page 298, etc., granted and conveyed the said lot, *inter alia*, to the said William R. Matchett in fee.

That, prior to the delivery of the last mentioned deed, the said William R. Matchett caused certificates of search to be procured from the office of the court of common pleas (which since the adoption of the Constitution of 1874 includes searches in the late district court) and also from the city solicitor's office, which said certificates are dated the 21st day of May, 1885, and show no municipal claim for water pipe, or any other claims, against said lot. A copy of said searches is hereto annexed as part hereof, and marked exhibit "C."

That, prior to the payment of the purchase money of said lot, the said William R. Matchett knew that the said water pipe had been laid in front of the same, that the said claim had been filed therefor, and that the said claim had been satisfied of record by the then city solicitor, and relying on these facts, neither he nor anyone on his behalf, before paying said purchase money made any inquiry at the water department, to ascertain there if the said pipe had been paid for.

That, by inquiry at the said office of the water department, he would have ascertained that said pipe had not been paid for. That there is connected with said water department a search office, and that for a fee of twenty-five cents, as provided by a resolution of councils, dated the 4th day of March, 1884, searches are now, and have been since the last mentioned date, issued by the chief engineer of the water department. That no such search was ordered or requested in this case. A copy of the form of such search is hereto annexed as part hereof, marked exhibit "D."

That since the passage of the Ordinance of January 29, 1855, it has always been within the power of a purchaser to ascertain by inquiry at the water department whether pipe has been paid for. It has been customary for some years past for attorneys and conveyancers in Philadelphia to make inquiry at the water department to ascertain as to the payment of pipe.

That, as a matter of fact, the water pipe in question has not been paid for, but that the said William R. Matchett was not aware of said fact at the time of the payment of the purchase money of said lot. The admission of the fact that said pipe has not been paid for is not to prejudice the right of the defendant to argue that the plaintiff is estopped from alleging such fact as against him.

That the said William R. Matchett has caused a row of dwelling houses to be erected on said lot, which are now nearly completed, and it became necessary to connect the water pipes of said houses with the said water pipe in the street for the purpose of introducing water into the said houses.

That on the 23d day of November, 1885, the said William R. Matchett applied to Charles H. Russell, the officer at the water department of the said City, duly authorized to issue permits for the introduction of water into buildings, who was duly appointed by William Ludlow, chief engineer of said water department, and that said application was refused, unless the said William R. Matchett would first pay into said department the cost of laying said water pipe in front of said lot, in pursuance of an Ordinance of councils of the 29th day of January, 1855, a copy of which is hereto annexed as part hereof marked exhibit "E."

That the said William R. Matchett on the 28th day of November, 1885, presented his petition to this honorable Court for a writ of *mandamus* to the said William Ludlow, chief engineer, and Charles H. Russell, permit clerk of said water department, commanding them to issue to him a permit to introduce water from said pipe into said houses; whereupon, a writ of alternative *mandamus* was awarded to which the said William Ludlow, chief engineer, made return and an issue was joined thereon and the case argued before this honorable court and held under consideration; and thereupon at the suggestion of said court an agreement between the said plaintiff and the said defendant was entered into, providing that the said plaintiff should grant the said permit, upon the said defendant entering into a covenent to pay the cost of laying said water pipe, if upon a case stated reciting the foregoing facts, the court should be of opinion that the plaintiff was not estopped from alleging that the said pipe had not been paid for, and that defendant was not entitled to use said water pipe without paying the cost of laying the same, which said covenant has been duly signed and delivered to the city solicitor, and thereupon the said permit was duly issued to the said defendant.

If upon the foregoing facts the court should be of opinion that the plaintiff is not estopped as to the defendant from alleging that said water pipe has not been paid for, and that the said defendant is not entitled to introduce water into his said houses from said water pipe, without first paying the cost of laying the same, then judgment to be entered for the plaintiff in the sum of $500; otherwise, judgment to be entered for the defendant, costs to follow the judgment, with right in either party to take a writ of error to the supreme court.

It is further agreed that either party shall have the right to refer to all statutes of the State and ordinances of councils bearing on the creation and organization of the water department for the furnishing of water to citizens, the laying of water pipes, and the remedies for the collection of the charges therefor, with the same force and effect as though the same were incorporated herein at length.

The exhibits referred to in the case stated were as follows:

Exhibit "A."
Copy of Municipal Claim.
C. C. Dkt. March T. 1874.

The City of Philadelphia
v.
The German Hospital.

Dec. 22, 1874. By order of City Solicitor, filed, this claim is satisfied.

Claim for $400 for water pipe against a lot of ground situate on the east side Twentieth Street, extending from Norris Street to Park Avenue, containing in front or breadth on Twentieth Street 500 feet, and extending in length or depth eastward of that width, along Norris Street and Park Avenue, 150 feet.

Filed, March 11, 1874.

Exhibit "B."
Copy of Ordinances 1874, P. G. 389.

Section 1. The Select and Common Councils of the City of Philadelphia do ordain "That the city solicitor be authorized and directed to enter satisfaction on the claims of the City against the German Hospital for water pipe laid in front of their property on Twentieth Street, from Diamond to Norris Street. (D. C., M. T. 1874, No. 12 C. C. D.)

A. Wilson Henszey,
President Common Council.
Attest:—John Eckstien,
Clerk of Common Council.
R. W. Downing,
President Select Council.

Approved this twelfth day December, A. D. 1874.

Wm. S. Stokley,
Mayor of Philadelphia.

Exhibit "C."
Copy of Searches.

All that square of ground bounded on the north by Park Avenue (formerly Diamond Street), on the south by Norris Street, on the east by Nineteenth Street, and on the west by Twentieth Street. Page Fontain.

On searching the Indices of Claims in the City Solicitor's office, I find nothing against the premises as above described.

F. F. Sorver,
May 21, 1885. Assistant Solicitor.

On examining the Locality Indices of the Courts of Common Pleas, I find nothing against the above described premises since May 21, 1880.

S. B. Van Dusen,
May 21, 1885. Pro. Phy.
[SEAL.]

Exhibit "D."

Form of Copy of Searches For Unpaid Water Pipe.

All that certain lot or piece of ground situate.

Please certify whether there are any unpaid charges for water pipe against the above described premises or any part thereof.

Applicant,
Address,

Philadelphia Water Department.

No. Philadelphia, 188
I hereby certify that there is
City Water pipe laid in
and that there are charges against
the above described property.
William Ludlow,
Fee 25 cents. Chief Engineer.
Received Payment,
A. N. Keithler,
Registrar.
By——————
Clerk.
By——————
Clerk.

Exhibit "E."

Copy of Ordinance of Councils.

Section 2. "That no permit for the use of water shall be issued, unless at the time of the application the person or persons shall exhibit the receipt of the proper officer for the amount of assessment, or other satisfactory evidence of payment thereof, for the expense of laying the water pipe on the premises for which the permit is requested."

Judgment was entered for defendant on the case stated, and this was *assigned as error.*

Messrs. **Frank M. Riter** and **Robert Alexander,** *Assistant City Solicitors,* and **Charles F. Warwick,** *City Solicitor,* for plaintiff in error:

It is admitted that the pipe has not been paid for.

The Ordinance of January 29, 1855, provides that "No permit for the use of water shall be issued unless, at the time of the application, the person or persons shall exhibit the receipt of the proper officer for the amount of assessment or other satisfactory evidence of the payment thereof for the expense of laying the pipe on the premises for which the permit is granted.

This ordinance, if valid, must be complied with by the chief of the department.

The supplying of water and gas to a city is not a municipal duty; hence, when the city undertakes to do so it acts not by virtue of any rights of sovereignty, but exercises merely the functions of a private corporation.

Western Saving Fund Society v. *City of Phila.* 31 Pa. 175; *Wheeler* v. *City of Phila.* 77 Pa. 338.

The introduction of water by the city into private houses is not on the footing of a contract but of a license which is paid for.

Smith v. *City of Phila.* 81 Pa. 38.

It may very well be that when a license has been given by the city to the owner of a house to use the water, such license may not be withdrawn arbitrarily or from mere caprice. But it is equally clear that the city may adopt such rules in regard to the use of the water, and the payment therefor, as the municipal authorities shall deem expedient.

Girard Life Ins. Co. v. *Phila.* 88 Pa. 393.

This very ordinance was before the supreme court and sustained in the case of *Philadelphia* v. *Cooke,* 30 Pa. 56.

In the case of *Girard Life Ins. Co.* v. *Philadelphia,* above quoted, a mortgagee of a property purchased at a sheriff's sale. There was nothing upon the court record to show that the water rent was in arrears, yet the court compelled him to pay all arrears at time of sale; otherwise, to submit to the cutting off of water under the Ordinance of March 22, 1862.

In the present case the defendant could have easily ascertained the fact that the pipe was not paid for. To inquire and take searches at the office of the water department is now the settled practice with conveyancers and lawyers in passing titles.

There are miles of unpaid pipe in the City, for which no lien exists. Liens have in some cases expired by limitation and in others been discharged. Every man is bound to know the law. The law is that the City can make its own rules in selling water; and one rule, made and enforced for thirty years past, is that it will not furnish water before the pipe through which the water runs is paid for. Concerning this it is the business of a purchaser of land to inquire. To inquire whether a lien has been discharged, has expired, or has been satisfied, is not sufficient. The regulation of the business being that the pipe must be paid for to the satisfaction of the chief of the department, the inquiry of the purchaser must be: Has the pipe been paid for? And this inquiry must be made at the water department.

The relator, having failed to make this inquiry, has no legal right to say he was misled.

For what reason councils directed the lien to be satisfied is not known to the City.

To make a gift to the hospital was beyond the power of councils. There is no charter right to do it.

Dechert v. *Commonwealth,* 4 Cent. Rep. 754; *Hodges* v. *Buffalo**, 2 Denio, 110; *Bergner* v. *Harrisburg,* 1 Pearson, 291.

The property in front of which the water pipe is laid is a vacant lot not used by the German Hospital, and consequently the lot is not exempt from frontage charges or taxes under the Act of May 12, 1874, exempting hospitals, etc.

If the ground were exempt, the owner must comply with the ordinance. The lien is by force of statute. The collection by lien under the statute is considered by the court as an exercise of the taxing power of the State, and in that way a lien for frontage becomes a tax. The Ordinance of January 29, 1855, is not an exercise of any taxing power of the State, it is simply a business regulation of a corporation.

If extinguishment of lien by judicial sale and payment to sheriff is neither actual nor constructive payment, certainly the satisfaction of claim without payment is no payment of the debt. Hundreds of verdicts have been rendered in the courts against the City on pipe claims, because the property liened was rural; yet it has never been supposed the City could be compelled to furnish water until the pipe was paid for, as required by the ordinance. If such be the case, the City will lose at least $100,000 of pipe debts where liens have been lost by adverse decisions on rural property defenses.

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*See note, Lawyers' edition. [Ed.]

There is no equity in the position of the defendant. He has not paid for the pipe, and seeks to throw on his fellow citizens a burden of $500 which he should bear. He was not deceived. He could have ascertained in a minute whether the pipe had been paid for by inquiring at the proper office. The fact that he got no receipted bill from his vendor should have put him on inquiry. The fact that an ordinance directed the satisfaction was evidence that no money had been paid. When money is paid the city solicitor has full authority to satisfy without an ordinance.

If the City had said to the defendant, This pipe is paid for, and the defendant had acted upon that assertion, of course the City would be estopped from asserting the contrary. All that Matchett alleges is that the City said "This municipal *claim is satisfied.*" The City contends that a satisfaction of a claim is not necessarily a payment of the debt. The City has two remedies, entirely distinct, by which to compel the payment of a claim for pipe, one given by statute, and the other by ordinance.

There is nothing which makes it compulsory upon the City to file a claim. The claim when filed will expire in five years, unless revived. It may be discharged by a sheriff's sale, and in other ways the remedy given by statute may fail; but the remedy provided by ordinance is good until actual payment.

A purchaser of real estate has no right to rely solely upon the lien records. In buying real estate if a man desires to know upon what terms he can get the use of water, he must go to the office of the water department, and there inquire.

It has been decided in the case of *Norris* v. *Brady*, 5 Whart. 541, that the satisfaction of a judgment on a bond accompanying a mortgage does not impair the same debt secured by the mortgage; and it has also been decided in *Fleming* v. *Parry*, 24 Pa. 47, that the satisfaction of a mortgage does not in conclusion of law discharge the bond secured by it. And it is said in the last named case "That there is no magic in an entry of satisfaction, either on a judgment or a mortgage, which can prevail against the truth and equity of the transaction."

See also *Jones* v. *Johnson*, 3 Watts & S. 276.

Mr. **William C. Hannis**, for defendant in error:

While it is now admitted that an inquiry at the water department would have developed the fact that said pipe had not been paid for in the ordinary way in cash to that department, yet it does not follow that the City satisfied said claim without receiving a consideration therefor. It is admitted that the consideration did not pass through the water department; but here is a hospital whose wards are always open to citizens or persons hurt in the employ of the City, and the consideration of this fact doubtless induced the select and common council and the mayor to order the city solicitor to enter satisfaction of record on the claims of the City against the German Hospital for water pipes laid in front of its property; and this the councils had undoubted power to do.

Tagg v. *City*, 18 W. N. C. 79; *Lewis* v. *Lutz*, Sharswood's Orig. MS. Vol. 10, p. 137; *Tatham* v. *Phila.* 2 W. N. C. 564.

This ordinance, declaring that the City was satisfied as to this claim, emanates from the same body; it is of as high authority as, and later in date than the Ordinance of 1855, which provides that a permit shall not be granted unless satisfactory evidences of payment be exhibited.

The City as against the defendant, who is an innocent purchaser, is estopped by its solemn declaration of record from now alleging that said pipe has not been paid for.

By these declarations in the ordinance and on the court record that her claims for water pipe were satisfied, of which facts the defendant had knowledge before he bought, as found by the case stated, the plaintiff misled the defendant from making that inquiry which he otherwise might have made, and thus he was induced to pay over his purchase money, believing the pipe to be paid for, without retaining any part of the purchase money from his vendor, and against whom he has no claim to recover it back; for clearly, the claim being satisfied, there was no liability of either his grantor or of his property for this alleged claim of the City, and even the liability of the hospital was barred more than six years by the Statute of Limitations.

Webster defines satisfaction: "Payment of a legal debt or demand, the discharging or canceling of a judgment or a mortgage by paying the amount of it." Satisfy is defined: "To make payment."

When the councils, the mayor and the city solicitor publicly declared that this claim for water pipe was satisfied, and thus used a word which invariably means payment, what duty was there imposed on the defendant to go further? This word "satisfied" is the common word applied whenever mortgages, judgments and all other claims of record have been paid; and the defendant was justified in believing, from the use of this common word, that the claim had been paid.

The argument that if, after learning of this declaration that the claim had been satisfied, the defendant, instead of relying on it, had inquired of the clerk at the water department he would have found that the declaration was not true, was strongly pressed on this court in *Brooke* v. *New York etc. R. Co.* 16 W. N. C. 514, which was a case of a false bill of lading fraudulently issued by defendant's shipping clerk, for goods which had never been received; and it was urged that if plaintiff had not relied on the declaration contained in bill of lading, but before advancing money on it, had applied to defendants, they would have at once learned that the bill was fraudulent, and that the statement in it, that the goods had been received, was false. The court disregarded this argument and upheld the plaintiff's claim that the defendants were estopped from showing that the statements contained in the bill of lading were false.

So in *Bank* v. *Bank*, 50 N.Y. 575, which was a false certificate of a check, and was pronounced genuine by the teller whose certificate it purported to be, the defendant bank claimed that the plaintiff had ample time and opportunity to catch the thief and recover his money; but the plaintiff showed that he had taken none of those steps, because of his reliance on the teller's statement that the certificate purporting to be signed by him was genuine; and the court upheld the claim of the plaintiff, on the ground of estoppel, holding that he had a right to rely on the declaration of the teller.

So in *Knights* v. *Wiffen*, L. R. 5 Q. B. 660, the person who relied upon the declaration took no active steps to retrieve his position, which he could and would have done had it not been for his reliance on the declaration; and he was damaged. The right of estoppel was upheld, and it was maintained upon the ground of the plaintiff's relying upon the statement and taking no steps further in consequence of the statement.

So in *Casco Bank* v. *Keene*, 53 Maine, 103, the plaintiff held a note purporting to be signed by defendant. Hearing that it was forged, he asked the defendant about it, who, looking at the note, admitted the signature to be genuine. The plaintiff, in reliance on that statement, refrained from all proceedings against the person who passed the note, to secure payment from him, which he would otherwise have taken; it was held that he was entitled to rely on this statement and refrain from further inquiry; and having sustained an injury thereby, the defendant was estopped from denying his signature.

So in *Miller's Appeal*, 84 Pa. 396, an owner of land, ignorant of her title, in good faith induced a party to purchase it from a third person, and afterwards, learning of her title, brought ejectment against the purchaser, and urged that if he had examined the records he would have learned of her title. But the court held that his very reliance on her acts and representations took from him an opportunity of knowledge; and it did not lie in her mouth to reproach him with ignorance of the law, or the maxim *caveat emptor*.

A party relying on a representation and refraining from taking any other steps which would have discovered the truth and, being injured in consequence, may hold the party making the representation estopped from setting up the truth.

Kiefer v. *Rogers*, 19 Minn. 32; *Wannell* v. *Kem*, 57 Mo. 478; *Steele* v. *St. Louis etc. Ins. Co.* 3 Mo. App. 207; *Tobin* v. *Allen*, 53 Miss. 563; *Voorhis* v. *Olmstead*, 66 N. Y. 113.

The records of the water department are not public records, like the court records, and therefore are not constructive notice of anything which may be contained in them. Nor was there any legal duty imposed on the defendant to apply there for information. The resolution of councils of the City of Philadelphia of March 4, 1884, creating a search office in the water department has not the force of a law, is constructive notice to no one, and amounts to no more than the by-laws of a private corporation. Nor does it anywhere appear in the case stated that the defendant or his conveyancer had actual notice of such a search office.

Baldwin v. *Phila.* 99 Pa. 164.

When one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring, against the latter, a different state of things as existing at the same time.

Pickard v. *Sears*, 6 Adol. & Ell. 469; *Freeman* v. *Cooke*, 2 Exch. 654; *Cornish* v. *Abington*, 4 Hurlst. & N. 549; *Bank* v. *Bank*, 50 N.Y. 582; *Pence* v. *Arbuckle*, 22 Minn. 417; *Hawkins* v. *Church*, 23 Minn. 258.

When the conduct of a party has been such as to induce action by another, he shall be precluded from afterwards asserting, to the prejudice of that other, the contrary of that of which his conduct has induced the belief.

Gray's App. 10 W. N. C. 458; *Waters' App.* 35 Pa. 525; *Brooke* v. *R. R. Co.* 16 W. N. C. 514; *Lawrence* v. *City*, 14 W. N. C. 421.

But the City urges that there is no magic in the entry of satisfaction and cites cases to show that when a judgment has been satisfied of record, that the fact does not necessarily extinguish another lien given for the same debt. In all the cases on this point the contention is between the original parties, or their assignees for the benefit of creditors, who are not purchasers, and that there is not a case in the books where the lien of a satisfied judgment has been restored to the prejudice of a purchaser for value who bought in good faith, relying on the record as it was exhibited at the time of his purchase.

Duffey v. *Houtz*, 105 Pa. 96.

This is not a case of mere silence or negligence, on the part of the City, as was *Girard Life Ins. Co.* v. *Phila.* 88 Pa. 393. The City may not be obliged to speak or act, and in such cases *caveat emptor* may prevail; but when it does speak, it must speak the truth or be bound by what it has said, whether it be true or not, as to any person who has been induced to change his position, relying on such declaration.

Philadelphia v. *Cooke*, 30 Pa. 56, has no bearing on the question at issue here. It was a suit against the City to recover back money paid for a water pipe, on the ground that a sheriff's sale of the property produced enough to pay the claim in full, and therefore the City should have collected the money from the sheriff and not from the plaintiff below. The court held that the money paid was not paid under protest, that there was no duress of property, and consequently, it was a voluntary payment which could not be recovered back.

Per Curiam:

The learned judge committed no error in entering judgment in favor of the defendant on the case stated. He purchased with knowledge that the claim in question had been satisfied of record by the city solicitor, and relying thereon he paid over the whole purchase money to his vendor. He took possession and has erected a row of dwelling houses on the lot. To now permit the City to remove that satisfaction would not only be in conflict with the principle of equitable estoppel, but would work great injustice to the defendant.

Judgment affirmed.

Eliza Ann WILDONER'S APPEAL.

DAVENPORT'S ESTATE.

A **grandfather,**—the guardian of the estate of his infant grandchild, who lives in his family from childhood to death, during minority, and is sickly and unable to work,—is **entitled to** reasonable **compensation out of** the **estate, for** the **grandchild's support.**

(Argued April 15, Decided April 25, 1887.)

JANUARY Term, 1887, No. 316, E.D., before Mercur, *Ch. J.*, Gordon, Trunkey, Sterrett, Green and Clark, *JJ.*

Appeal from a decree of the Orphans' Court of Luzerne County, confirming a guardian's account. *Affirmed.*

In the final account of Charles Davenport, guardian of the estate of Charles F. Davenport, a deceased minor, the accountant charged himself with pension money and bounty amounting to $1,674.33, and claimed credit for $4,045.85.

Among the credits claimed were these:

Paid D. L. O'Neill, attorney, for filing partial account	$ 10 00
Paid car fare and expenses, witnesses, etc., on pension case	50 00
Paid board, clothing, mending, washing, medical attendance, medicine and schooling from July 16, 1867, date from which pension was allowed to Oct. 28, 1880, when ward arrived at sixteen years, twelve years, three mos., at $10 per month	1,474 00
Fees of guardian	123 70
Paid justice for executing pension vouchers	9 50
Two years' board of ward from 16 years to 18 years with clothing and medicine	384 00
One year's board, attending, nursing and medicines at $25 per month	300 00
One suit of clothes during nineteen years	16 00
Nursing and other attendance and board during nine months from January 1, 1885, to Oct. 1, 1885, the date of death of ward, at $5 per day	1,350 00
Cash given him to pay Henry Long	10 00
Cash given him to get suit of clothes	50 00
Paid D. L. O'Neill for filing this account	20 00

The exceptions filed by Eliza Ann Wildoner, the mother of the minor, specified, *inter alia*, these items.

Upon dismissing the exceptions the court below delivered the following opinion:

A minor is incapable in law of making either a valid will or an assignment of his estate; so we must dismiss these facts out of the case.

In 1882, when the ward was past seventeen years of age, this guardian, who was also the grandfather of the child, was before this court asking for past and future allowance for the support of the ward. The ward was then a witness, and testified in behalf of the guardian, expressing a willingness that his guardian should be paid for his care and support. On his deathbed, only twenty-nine days before he would have attained his majority, he expressed to his neighbors and former companions a desire to live only until he could according to law, settle with his grandfather, and allow him his entire estate for his kindness toward him.

The mother of the boy married in 1869 and left the child wholly with his grandfather, but now seeks to acquire all of the pension money which was received for the child during his last illness. The entire estate consists of pension money received from 1867 to 1882 at the rate of $10 per month and $100 bounty. When this case was before us in 1882 it presented features entirely different from those presented now. Then the evidence exhibited the ward as a stout, healthy, lazy boy, indulged by his grandparents in idleness, and general vagabondage, and we refused to make any allowance for such care and support. Now, however, the evidence clearly shows that the child, although large, was weak and sickly, unable to work and carrying with him inherited and rapidly developing seeds of consumption, of which he died. Under all the circumstances we cannot now say that the guardian did anything but his duty in smoothing the brief pathway of this youth to the grave.

Perhaps no one who has never had the experience can appreciate the task and burden of nursing the sick, especially with such a disease as this was, and perhaps no one ever desires to use money for any purpose more than to be indulged and favored and watched under such circumstances. The entire fund added up in a column looks large, but when our view of the case is taken $10 per month looks small enough for the care and support of this boy under all the circumstances, during all the years and especially the last two or three of his life.

We do not balance the legal authorities, for they are all based upon a different state of facts. We can only say that in our judgment justice between the parties can only be done according to law by allowing the guardian the entire fund received by him for his ward for support of the child, his expenses in securing the fund, and his settling the account. We, therefore, enter judgment that there is nothing due either the ward's estate or the guardian. The guardian must pay the cost of this proceeding, for not keeping an account and for not having the court adjust the matter of allowance in the start or having some express agreement with the mother.

The assignments of error specified the action of the court in holding generally as matter of fact that the child, although large, was weak and sickly, unable to work and that the guardian did his duty; in holding as matter of law that the guardian was entitled to the entire fund received by him for his ward for support of the child and his expenses in securing the fund and settling the account; in not sustaining the exceptions filed to the said guardian's account before confirmation of the same; and in entering judgment that there is nothing due the ward's estate.

Messrs. **John Lynch,** and **E. A. Lynch,** for appellant:

The guardian stood *in loco parentis* to his ward, and therefore cannot legally charge for his support.

The ward earned his support while living with his guardian, who therefore cannot charge for the same.

In *Seibert's Appeal*, 19 Pa. 49, it is held that "If a testator, by benevolent manifestations, may put himself *in loco parentis*, so as to entitle a stranger to maintenance, much slighter circumstances will bring the case of a grandchild within that rule."

In *Duffey* v. *Duffey*, 44 Pa. 399, a daughter of the plaintiff died leaving children. Three of them, being very young, were taken from the funeral to their grandparent's home. Their father married again and died four years after. The grandparent presented a bill of $690 for boarding and clothing of the children. The court held that he could not recover; that a a grandfather is liable to relieve and maintain his destitute grandchildren when their necessities require it, and that their relationship excludes the implication of a promise to pay him.

In *Douglas' Appeal*, 82 Pa. 169, it was held that where a stepfather takes his stepdaughter to live with him as one of his family, he is not entitled to be repaid for expenditures made for her during her minority.

In *Brown's Appeal*, 8 Cent. Rep. 919, 112 Pa. 18, the guardian received pension money for his ward and paid it, under advice of counsel and a special contract to the stepfather of his ward for support; and it was held that he could not be surcharged with the amount so paid the stepfather. But in the case at bar there was not only no such contract, but such a distinct understanding between the mother and the grandfather as precludes any presumption of compensation.

In *Rickman's Appeal*, 61 Pa, 251, it was held that to recover for maintenance after the death of the ward, the stepfather must prove a contract with the ward's guardian.

In *Horton's Appeal*, 94 Pa. 62, the ward was a niece of the wife of guardian and lived with him. She worked for him, and he boarded, clothed and schooled her as one of his own children. There was no contract, and the court held that the guardian was not entitled to a credit in his account for support.

In *Beam's Appeal*, 96 Pa. 74, the guardian was an uncle (by marriage) of two wards, and charged in his account $2 per week for board, in all $557. The court disallowed the claim, because of the relationship and the fact that they were members of his family.

Suppose the situation were reversed and the mother was a claimant for the services of her boy, against the grandfather, for wages earned as a servant; the court would promptly defeat such a claim.

In the case of *Lantz* v. *Frey*, 14 Pa. 201, it was held that a female living with her stepfather, while in her minority, is not entitled, after arriving at full age, to recover from him wages for services rendered, without proof of a contract express or implied. Such a contract will not be implied as to one standing *in loco parentis*, merely from the fact of such service having been performed.

Patton v. *Conn*, 5 Cent. Rep. 228; *Wall's App.* 2 Cent. Rep. 330; 2 Kent, Com.; *Cummings* v. *Cummings*, 8 Watts, 366; *Defrance* v. *Austin*, 9 Pa. 309; *Candor's App.* 5 Watts & S. 513; *Smith* v. *Milligan*, 43 Pa. 107.

If it was necessary to expend the money for the support and care of the ward, it was the duty of the guardian to follow the Act of Assembly, particularly when he was aided by counsel from the inception of this trust. It matters little to an orphan child whether his interests are sacrificed and his prospects blighted by well meaning ignorance or by willful malice. Either is within the definition of misconduct, a word which applies not to the motive but the act.

Act March 29, 1832, P. L. 192; *Nicholson's App.* 20 Pa. 54; *Wall's App.* 104 Pa. 15; *Pennock's Est.* 32 Legal Int. 169; 2 Rhone, Orphans' Court, Pr. 237, pl. 12, 13, 15.

The attempt to conclude the mother and heir of the ward's estate, because of an alleged assignment and will in favor of the guardian, cannot of course prevail. They were both executed at the same time, and but a few days before the ward's death, when he was not of age, and was weak in mind, and destitute of all information about his estate.

The fact that the ward was induced to execute the papers in question is a strong circumstance, showing that he did not comprehend the condition of the estate according to the guardian's account, and that he at least believed there was something due him.

Act April 8, 1833, P. L. 249, § 3; *Will's App.* 22 Pa. 325; *Eberts* v. *Eberts*, 55 Pa. 110; *Kinter's App.* 62 Pa. 318; *Milligan's App.* 82 Pa. 389.

Acquiescence in, or acknowledgment of the invalid act, cannot be invested with greater vigor than the deed itself by which the act was done. The policy of the law which denies the capacity to do the act as clearly denies the capacity to confirm it, except in the legal mode. If, through the administration of equity, we can produce a result which the law denies *ab initio* on grounds of public policy, then estoppel or compensation, its equitable equivalent, will accomplish what the law and policy have forbidden.

Glidden v. *Strupler*, 52 Pa. 400.

Mr. **G. R. Bedford,** for appellee:

Seibert's Appeal, 19 Pa. 58, only decided that a legacy to a grandchild, payable at twenty-one years, carried interest needed for his support meantime.

Duffey v. *Duffey*, 44 Pa. 399, was a suit by a grandfather against the father for support of the latter's children. No contract or even request on part of the father was shown, and no claim was made until after the father's death.

In *Douglas' Appeal*, 82 Pa. 169, it was shown that the ward performed "a good deal of work," and it did not appear that the guardian stepfather was of insufficient ability.

Brown's Appeal, 8 Cent. Rep. 919, 112 Pa. 18, upon its reasoning, as well as the conclusion reached, is an authority in our favor.

In *Rickman's Appeal*, 61 Pa. 251, it did not appear that the stepfather was unable to afford the support.

In *Horton's Appeal*, 94 Pa. 62, it was shown that the guardian frequently declared that he had taken his ward as one of his own children and would treat her as such, and that he did not want anyone to send her to school. It was also shown that the ward was healthy and performed regular services, and it was further found as a fact by the examiner that the ward was eligible to admission to the school for soldiers' orphans. Added to this the guardian was of sufficient ability.

In *Beam's Appeal*, 96 Pa. 74, it was found as matter of fact that "The services of the ward were the equivalent of the board charged."

In *Nicholson's Appeal*, 20 Pa. 54, the maternal relatives offered to maintain the minors free of all expense.

Wall's Appeal, 104 Pa. 15, is not in point. It only held guardian liable to account notwithstanding lapse of time, etc.

As to the suggestion that "If the situation was reversed and the mother was a claimant for the services of her boy, against the grandfather, the court would promptly defeat such claim," it is sufficient to say that the cases cited on the question were all actions at law dependent on contract, and moreover the support and care of the infant in almost every instance, as in the present, were more than equivalent to the services claimed for. On the other hand the authorities are abundant in favor of the decree appealed from.

In *Harland's Accounts*, 5 Rawle, 323, it is said: chancery will allow even for past maintenance, where the father was not of competent ability.

In *Strawbridge's Appeal*, 5 Whart. 568, a mother was allowed in settlement of her account for support of her minor son during sixteen years.

In *Davies* v. *Howard*, 4 Mass. 97, a father was allowed for support of his children, he being of little property, although he made no charge against them and manifested no intention of doing so.

In *Brown's Appeal*, 8 Cent. Rep. 919, 112 Pa. 18, a stepfather was allowed for support of a minor child in addition to use of real estate, and although the minor did chores, etc. The question was on the reasonableness of the guardian's agreement.

In *Pennock's Estate*, 11 Phila. 75, a mother was allowed for past support, the court saying that it may ratify what it might direct and will authorize a reimbursement for expenses.

In *Longaker's Appeal*, 36 Legal Int. 73, it was said that when the amount paid for maintenance or education of minors is within such limits as ought to have been decreed upon application, it will be allowed on settlement of the account.

In *Simon's Estate*, 42 Legal Int. 445, a guardian was allowed on the settlement of his account for support of his ward, although no previous order for maintenance had been made by the court.

In *Sellick's Appeal*, 42 Legal Int. 456, 16 W. N. C. 320, it was held: 1. The absence of an order of court making an allowance for the support of a ward will not prevent the court from making a proper allowance upon the settlement of the guardian's account when the circumstances require it. 2. The pension when granted related to and was paid from the death of the father. There is no legal objection therefore to making the allowance extend backward to the beginning of the pension, if the real needs of the ward require or justify it.

From these authorities it is manifest that where one even stands *in loco parentis* and is of insufficient means, he will be allowed for the support of his ward whether or not he manifested any previous intention to charge for it, and whether he applied originally to have an allowance fixed by the court in advance or claims the same upon the settlement of his account. Indeed, in a case like the present one it would be impossible to fix in advance a proper allowance, for neither the court nor the guardian could anticipate the prolonged illness of the ward, wearying alike to him and to those who had the care of him.

Per Curiam:

We discover nothing in this record which demands a reversal of the decree. The conclusion of the learned judge is well sustained by authority and by the justice and equity of the case.

Decree affirmed, and appeal dismissed, at the costs of the appellant.

Alfred S. ACUFF'S APPEAL.

1. The **opening of a decree in equity rests in** the sound **discretion of** the **common pleas;** and unless the discretion has been abused, a refusal to open the decree will not be reviewed in the supreme court.
2. Under the Act of April 1, 1874, an **appeal from a decree in equity** cannot be taken after the expiration of two years.

(Argued April 20, Decided May 2, 1887.)

JANUARY Term, 1886, No. 463, E. D., before Mercur, *Ch. J.*, Gordon, Trunkey, Green and Clark, *JJ.*

Appeal from a decree of the Common Pleas of Montgomery County, for the plaintiff in a bill in equity. *Appeal quashed.*

This was a bill in equity filed by Milton Newberry, executor of Eliza Acuff, deceased, against Alfred S. Acuff, to annul an instrument in writing and strike from the record the judgment entered thereon.

The facts as they appeared before H. K. Weand, Esq., the Master appointed by the court, were stated in his report which was as follows:

The undersigned Master appointed in the above case respectfully reports that he met the parties interested in the above case, and after hearing their proofs reports the following conclusions of fact and of law:

Eliza Acuff died on or about May 2, 1882, having first made her last will and testament, dated December 31, 1878, and a codicil thereto dated the third of February, 1881, both duly proven the 8th of May, 1882. The plaintiff was appointed executor of said will. In said will and codicil the testatrix discriminated against her son Alfred S. Acuff. When the will and codicil were offered for probate before the register of wills, Alfred S. Acuff filed exceptions thereto on the 15th of May, 1882. These exceptions were dismissed by the court, and probate granted.

The executor advertised the real estate for sale on the 12th of October, 1882, and on the same day Alfred S. Acuff appeared in the prothonotary's office, at Norristown, and presented a paper for filing, purporting to be a judgment note of Eliza Acuff to the order of Alfred S. Acuff for $6,000, dated July 27, 1881, at one year with interest, witnessed by Thomas F. Tyson. Judgment was entered upon this note in judgment docket H, 1, p. 220. As soon as the fact that this judgment had been entered of record was communicated to Mr. Fox, attorney for Eliza Acuff's estate, proceedings were commenced to have the judgment set aside and the judgment stricken from the record, upon the ground that the name of Eliza Acuff to said note was a forgery and that Alfred S. Acuff knew that it was not her genuine signature.

Afterwards Alfred S. Acuff was indicted and tried in the Court of Quarter Sessions of Montgomery County for the offense of forging, uttering and publishing said forged note.

The testimony given on the trial of said case has been offered before the Master to have the same force and effect as if the witnesses had been produced before him and testified to the same facts.

Pending these proceedings Alfred S. Acuff and wife made a deed of assignment of their property for the benefit of their creditors, to Benj. P. Wertsner as assignee. He was represented before the Master by counsel.

The Master finds from the testimony that the name of Eliza Acuff to the judgment note, dated 12th of October, 1882, upon which judgment was entered in docket H, 1, p. 220, was not the genuine signature of Eliza Acuff, but that the same was a forgery, and that no consideration passed to Eliza Acuff for said note; and further that the entry of said judgment after the death of Eliza Acuff gave it no lien as a judgment.

As a result of this finding, the Master recommends a decree: 1, that said judgment be stricken from the record; 2, that said judgment note be marked canceled by the prothonotary; 3, that Alfred S. Acuff pay the costs of this proceeding.

Subsequently the court entered the following decree:

"And now December 8, 1883, the report of the master having been filed in open court and no exceptions having been filed thereto before him, it is now ordered and decreed as follows: that said report be now confirmed, and 1, that the judgment entered in judgment docket H, 1, p. 220, wherein Alfred S. Acuff is plaintiff, and Eliza Acuff defendant, be stricken from the record; 2, that the note upon which said judgment was entered be marked canceled; 3, that the defendant pay the costs of this proceeding."

On April 30, 1884, the plaintiff filed a bill of costs amounting to $132.50. No further proceedings were had until September 23, 1885, when the defendant filed a petition in which, after setting forth the docket entries, he alleged:

"That at the time the master's report was filed, to wit: December 8, 1883, your petitioner was out of the jurisdiction of the court and was not aware of it; and he is informed and believes that the filing of said master's report was assented to by his family and by Mr. Rogers appearing as counsel for your petitioner, by agreement with the plaintiffs in said bill, and their counsel, Messrs. Hunsicker and Fox, upon consideration that if the defendant, who, September 8, 1883, had been convicted of the forgery of said note, would return into the jurisdiction of the court and consent to the cancellation of said note and judgment, they and the prosecutors, petitioner's sister *et al.*, would recommend no imprisonment, and a decree should be made as above stated and set forth, striking his said judgment from the record and canceling his said judgment note.

"Your petitioner was informed by his family that he should return to the jurisdiction of the court, and the plaintiffs and prosecutors promised that he would receive, and they only would ask, a nominal sentence for the conviction aforesaid. He returned January 5, 1884, and was sentenced by the court of quarter sessions of said county to an imprisonment of ten days and to pay a fine of $500 and costs; the court sentencing first only to pay a fine, when it was found that by law there must also be an imprisonment, when the sentence to ten days' imprisonment was added.

"Your petitioner was convicted September 18, 1883, of the crime of the forgery of said note, and the same day a motion was made by him for a new trial.

"September 21, 1883. Reasons for a new trial were filed. October 8, 1883. Additional reasons for a new trial were filed by permission of the court. Since said trial and conviction your petitioner has found abundant evidence to sustain his defense in said suit; that he did not know the master's report had been filed until after his sentence; that no exceptions were filed to it; and that he was not aware (till after his imprisonment) of the said decree of the court having been made.

"Your petitioner is informed and believes that such consideration for such a report in equity and decree thereon is invalid and void, contrary to public policy, prejudicial to petitioner's right, and against the law.

"Your petitioner therefore prays the court to open said decree in said equity case, and direct the cause to proceed; to reinstate said judgment in said decree mentioned, and that the third paragraph of said decree, 'that the note on which said judgment was entered be canceled,' be annulled and set aside; and that Your Honor grant such other and further relief as to the court shall seem meet."

On the same day the court granted a rule to show cause why the prayer of the petition should not be granted; whereupon, the plaintiff Newberry filed an answer in which he alleged:

"1. The said rule was improvidently granted in the absence, and without the knowledge of this respondent or of his counsel.

"2. The court had no authority to entertain the said petition, the said decree having been entered December 8, 1883, and being final and conclusive.

"3. The estate of the said Eliza Acuff, deceased, was finally settled, and the account of this respondent as her administrator, filed on the first day of February, 1884, and finally confirmed by the court. Distribution of the said estate was made upon the basis and faith of the said decree, and the said Alfred S. Acuff on the 18th day of March, 1885, received his share of the balance of the estate in the hands of this respondent, as administrator aforesaid.

"4. The conviction and sentence of the said petitioner for the forgery of the instrument upon which the judgment was entered is final and conclusive evidence that the said instrument was null and void, and that no order the court could make would restore the dead instrument to life.

"5. It is wholly untrue that this respondent made any promise or interfered in any way for the purpose of screening the petitioner from punishment, or to mitigate his sentence for the crime of which he had been convicted. Respondent is informed and believes it to be true that the petitioner absconded after his conviction, and remained in concealment out of the jurisdiction of the court for a long time, to evade the punishment of his crime. Respondent had nothing to do with inducing him to return, and would not have interfered by any recommendation as to his sentence.

"6. It could do the petitioner no good to open or set aside the decree in equity, inasmuch as the instrument being already dead, no proceeding could be had upon it.

"7. The petitioner was represented in the equity suit by able counsel, who faithfully attended to his interests throughout. The case was heard and decided by an able auditor, upon overwhelming evidence; and it contained nothing to which counsel could have filed exceptions."

Subsequently the court entered this decree: "Now, March 1, 1886, the testimony taken by the defendant in support of the above stated rule being mostly inadmissible and altogether unsatisfactory to establish that any injustice has been done him; and, it being admitted that the executor of the last will and testament has fully accounted for and distributed the estate of Eliza Acuff upon the faith of said decree and in accordance with said will, the petition of the said Alfred S. Acuff is refused and the rule thereupon granted is discharged, at the costs of the petitioner."

The assignments of error specified this decree and the decree of December 8, 1883.

Messrs. **H. B. Dickinson** and **George N. Corson,** for appellant:

The report of the master shows that he received illegal testimony upon which his report is based.

Rule 78 prescribes that the decree of the court shall recite that "This cause came on to be heard at this term and was argued by counsel; and thereupon it is ordered, adjudged and decreed as follows:" then follows the decree, which "shall be drawn by the solicitor of the party in whose favor it is, who shall, unless otherwise herein provided, serve a copy thereof on the solicitor of the adverse party, with notice of the time, which shall not be less than three days thereafter, when the same shall be submitted to court." 79. It nowhere appears that this was done. No exceptions were filed; and the court below seems to have been left under the impression that the defendant did not object; in other words, that he now entered the plea of guilty.

The appellant here was utterly ignorant of this decree in equity. He thought that the case was abandoned, or dropped. If the appellee had petitioned the court in the usual way, to open the judgment, an issue would have been awarded and a trial had, with the right to appeal by the party aggrieved, under the Act of April 4, 1877.

The proceedings in this case were not according to the common law or common practice, in law or equity.

A question of fact in a civil court is carried over to the criminal court, a conviction procured, a sentence of ten days pronounced which had to be fulfilled before it could be reversed or reviewed in the supreme court; and then this conviction with the evidence in the criminal court is carried back to a master in the civil court, as proof upon which the court of common pleas strikes off a $6,000 judgment!

If the witnesses who testified in the former criminal case were dead at the trial of the civil case, their testimony taken when all parties were in full life would be admissible perhaps under the authorities; and documentary evidence in a former trial, as a warrant or survey, is admissible; *Bratton* v. *Mitchell*, 3 Pa. 49; but there is no authority for reading to a master, in a subsequent hearing in an equity suit, the testimony of living witnesses in a prior criminal prosecution.

Forney v. *Hallagher*, 11 S. & R. 203; *Stiles* v. *Bradford*, 4 Rawle, 394.

The Act of March 28, 1814, providing that depositions to be read in a former cause, may be read in a later cause between the same parties upon the same subject, does not apply to this case, or to testimony in a criminal case.

Messrs. **G. R. Fox & Son,** for appellee:

The petition for rehearing was not filed until September 23, 1885, nearly two years after the final decree in equity, and six months after Acuff had received his said share. The rule of court (Rule in Equity 86) provides that "A rehearing may be granted at any time, within the discretion of the court; but when the decree has been executed, parties who have acted on the faith of such decree shall not be prejudiced by such decree being reversed or varied."

Per Curiam:

The appeal from the first decree was not taken in time to authorize as to review it under the statute. The refusal of the court to open the decree rests in the sound discretion of the court, and the record shows no fact which will permit an appeal to lie.

Appeal quashed.

NEW JERSEY.

Court of Chancery.

Alfred J. CLAYPOOL *et al.*, Exrs.,
v.
Joseph NORCROSS *et al.*

A **clause in a will** was as follows: "The residue of my estate to be kept in reserve for further consideration in the way of charitable purposes in a liberal way, not to any particular creed or sect of religion." *Held*, that the **intention** of the **testatrix** was **to give** the **residue** of her estate **to the executors** named in the will, **in trust for** such **charitable purposes** as they may think proper.

(Decided April 28, 1887.)

BILL for construction of will. On final hearing on pleadings.

The case is stated in the opinion.

Mr. **Mark R. Sooy,** for complainants:

The next of kin insist that the testatrix died intestate in respect to the residue on the following grounds: 1, that there is no gift of the residue; 2, that if there is, it is void for uncertainty.

The intent of the testatrix must govern, if it can be effectuated without violating the principles of law.

Den, McMurtrie, v. *McMurtrie,* 3 J. S. Green, 287; *Den, Nelson,* v. *Combs,* 3 Harr. (N. J.) 28; *Hesketh* v. *Murphy,* 9 Stew. Eq. 304; *Wisner* v. *Barnet,* 4 Wash. C. C. 631, 637; *Denise* v. *Denise,* 10 Stew. Eq. 163, 169.

That the testatrix intended to give the residue of her estate to charitable purposes seems to be clear. That intention can be gathered from the language she has used. Her words are: "The residue of my estate to be kept in reserve for further consideration in the way of charitable purposes." This is equivalent to a direction to her executors to keep in trust for charitable purposes the residue of her estate. She does not say that the residue *is kept* in reserve; but it is *to be kept.* Here is more than a statement. It is a direction, a direction to her executors. The executor is a trustee of the estate of the testator. Such a direction is equivalent to a bequest of the residue of testatrix's estate for the purpose mentioned.

"A will speaks only from the death of the testatrix."

Inhabitants of Phillipsburgh v. *Bruch,* 10 Stew. Eq. 485; *Thornal* v. *Force,* 2 Stew. Eq. 220.

Construing this will, as speaking from the death of testatrix, and we have her saying "The residue of my estate to be kept in reserve." By whom? Not by herself, for she was dead, but by her executors. The direction is to them. They are to keep the residue in reserve for their consideration in the way of charitable purposes. This construction is favored by the words immediately following "in a liberal way, not to any particular creed or sect of religion."

These expressions are but suggestions for the guidance of the trustees in the distribution of moneys given to them by this clause. Testatrix's direction is that they shall dispose of the residue for charitable purposes. But, placing implicit reliance on their discretion, she leaves them the sole judges of the particular objects of her bounty, suggesting, however, that the gifts to be made by them be liberal, and be restricted to no particular creed or sect of religion.

In construing this clause some help may be derived from the use of the word "residue."

Johnson v. *Poulson,* 5 Stew. Eq. 390.

The residue of testatrix's estate is what remains after the legacies, debts and charges have been abstracted. It has not yet been precisely ascertained. It is this sum when ascertained that is to be kept in reserve for further consideration in the way of charitable purposes.

Will this residuary clause admit of the construction thus put upon it? If so, it must prevail. It is apparent that she never intended the residue of her estate to fall to her next of kin. It was to be held in reserve for further consideration; but in what way? Not in the way of benefiting her next of kin, but in the way of charitable purposes. By necessary implication therefore she intended to disinherit her next of kin. The court will not adopt, therefore, any construction that will let in the heirs or next of kin, if another construction consistent with her intention to promote charitable objects be possible.

Van Duyne v. *Van Duyne,* 1 McCart. 398; Jarm. Wills, p. 643; *Hesketh* v. *Murphy,* 9 Stew. Eq. 309; Perry, Trusts, § 709.

Doubts should be so construed as to prevent intestacy.

Yawger v. *Yawger,* 10 Stew. Eq. 216; 1 McCart. 124.

Is the bequest void for uncertainty? Courts are slow to hold a charitable bequest void for uncertainty. Where it is possible to give a meaning they will do it, that the will of the testator may be operative. "It has become a settled and I think a reasonable rule of law, that a devise is never to be construed void for uncertainty but from necessity. If there is a possibility of reducing it to a certainty, the devise is good."

Den, Emans, v. *Emans,* 2 Pennington (N. J.) 970.

"It is only when a reasonable construction and the discovery of the intent of the testator are utterly hopeless that all effect should be denied to the will."

Den v. *Crawford,* 3 Halst. Law, 118.

"It must be an extreme case in which the court will decree the will void for uncertainty."

Den, McMurtrie, v. *McMurtrie,* 3 J. S. Green, 276.

"In order to avoid a will for uncertainty, it must be incapable of any clear meaning."

Stewart v *Stewart,* 4 Stew. Eq. 398, 405.

"The court will not hold a devise or bequest to be void for uncertainty, unless it is wholly unable to discover the testator's meaning."

Cleveland v. *Carson,* 10 Stew. Eq. 377, 380.

If an uncertainty exist at all (supposing there was an intention on the part of the testatrix to give something by this clause) it must be an uncertainty in respect either to the subject of the bequest, or to the persons intended to take under it as trustees, or to the objects or beneficiaries of the trust.

1. There is no uncertainty in the subject. It is the residue of the testatrix's estate. That is capable of being precisely ascertained.

2. There is no uncertainty in the persons who are to take as trustees. They are the executors. The direction to keep the residue in reserve is given to them. They are named in a subsequent clause of the will. They are trustees by implication.

Van Duyne v. *Van Duyne*, 1 McCart. 402; *Dorr* v. *Wainwright*, 13 Pick. 328; *Pettingill* v. *Pettingill*, 60 Maine, 411, 423; *Nutter* v. *Vickery*, 64 Maine, 490, 494.

There is no uncertainty in the objects or beneficiaries of the trust. True, the will does not specifically name the persons or institutions that are to receive this charity. It leaves the beneficiaries to be chosen and named by the executors, the persons appointed to distribute the charity.

Perry, Trusts, §§ 709, 732; *DeCamp* v. *Dobbins*, 2 Stew. Eq. 36; *Brown* v. *Pancoast*, 7 Stew. Eq. 321; *Hesketh* v. *Murphy*, 8 Stew. Eq. 23.

The direction given to the executors to hold this residue in reserve for charitable purposes, carries with it by implication the power to select the particular beneficiaries.

Hesketh v. *Murphy*, 9 Stew. Eq. 304.

Mr. **C. E. Hendrickson,** with *Mr.* **B. Gummere,** for defendants:

The testatrix does not make any bequest or disposition of her residuary estate, but expressly reserves the disposition of it for further consideration.

Her exact words are: "The residue of my estate to be kept in reserve for further consideration," etc.

It is a general rule in the construction of wills that the language used shall receive its ordinary interpretation, except where some other is necessarily or clearly indicated.

1 Redf. Wills, par. 16, p. 431.

The ordinary meaning or definition of keep is "to cause to remain in a given position, as within one's grasp or control;" "to maintain hold upon," and of the word "reserve," "the act of reserving or keeping back" or "that which is reserved or kept back," and of the word "consideration" "the act of considering;" "continuous and careful thought;" "contemplation;" "deliberation."

And with these definitions in mind, and in the absence of other expressions of the testatrix, indicating a clear meaning to the contrary, we must infer that the testatrix meant, as to the balance of her estate undisposed of by the legacies previously given in said will, that she was not then prepared to make a disposition of it, that it should be reserved or kept back in her own control until she had further considered and deliberated upon the objects and method of such disposition.

A fair construction of the language it seems to me indicates that this clause of the will speaks from the date of the will and not from the death of the testator. If so, then the clause must be so read.

Thornal v. *Force*, 2 Stew. Eq. 220; 1 Redf. Wills, 425; Jarm. Rule 4.

This view is further strengthened and fortified by the words "further," "to be kept in reserve for further consideration," etc.

This imports that the disposition of the residue had been under consideration by some one, and by whom else could it have been so under consideration than by the testatrix who alone had the power to consider upon and determine what disposition she should make of her property?

This word "further" indicates clearly that the testatrix is speaking at the date of the will and not at her death; it could not apply to anyone else, for no one else had considered it; and she could not further consider after she was dead—the word applies and makes sense in the construction we contend for: that she reserved the residue for her further consideration.

The words "further consideration" thereby clearly point to the testatrix as the one by whom the residue was "to be kept in reserve for further consideration in the way of charitable purposes," etc. They show that she had been considering the propriety of a bequest of the residue of her estate to some object or trust of a charitable nature, not based upon any test of religious creed or sect, but that she had not yet settled the matter in her mind.

Again; in the phrase "in the way of charitable purposes" the words "in the way of" import rather an act of the mind of the testatrix considering the matter of a bequest in the way of or in the discretion of charitable purposes, rather than having fixed upon charitable purposes as the settled object of a bequest.

The vagueness and uncertainty of the words of the clause when claimed to support a bequest are in strange contrast to the certainty and definiteness of the testatrix in all her other bequests, but are in entire harmony with the insistment of the defendants that said clause imports an undefined and unsettled purpose to devote the residue of the estate to charity and a reservation of the disposition of said residue for further consideration.

1 Redf. Wills, § 3, p. 421; § 12, p. 430; Rule 17, note 1, p. 428; *Hall* v. *Warren*, 9 H. L. Cas. 420; *S. C.* 7 Jur. N. S. 1069.

Runyon, *Chancellor*, delivered the following opinion:

Rachel N. Murphy, deceased, by her will, among other bequests, gave to the "Little Sisters of the Poor" and the "Working Girls' Home" (both institutions located in Philadelphia) $500 each and she then provided as follows: "The residue of my estate to be kept in reserve for further consideration in the way of charitable purposes in a liberal way, not to any particular creed or sect of religion," and she appointed the complainants executors. The question presented is whether the gift of the residue is a valid charitable bequest.

That the language of the clause was not used to signify an intention upon the part of the testatrix to withhold the residue for future disposition by herself, or in other words that she did not mean to express an intention not to dispose of it by the will is clear from the consideration of the language of the clause. Had she intended so to withhold it, why should she have designated the manner in which the residue was to be disposed of: "in a liberal way, not to any particular creed or sect of religion"?

It would also seem from the initial clause of the will: "I, Rachel N. Murphy, herewith take my final leave of the world," that she did not contemplate any further testamentary or other disposition of any part of her property. By the words "to be kept in reserve" she meant "to be held in trust;" and by the residuary clause she intended to give the residue to the executors in trust to be disposed of by them for such charitable purposes as they might in their discretion see fit to apply it to; she, at the time, expressing a wish that they should act therein with a liberal spirit so far as religious tenets were concerned, and that they, therefore, should not in the distribution confine their gifts to any particular religious sect or to those who professed belief in any particular religious creed.

It is to be observed that the direction is that the residue is "to be" kept (not is kept) in reserve, etc. That is equivalent to and is intended as a direction to keep the residue in reserve. It is not to be supposed that if the testatrix had intended merely to express an intention to withhold the residue for further disposition, she would have considered it necessary to speak with any particularity as to her design in reference to it. It would have been enough to say that it was withheld for further consideration and disposition. But the language is that it is to be reserved for further consideration "in the way of charitable purposes in a liberal way, and not to any particular creed or sect of religion."

This language is clearly a direction as to the disposition to be made by those charged with the duty of disposing of the residue. It seems to me quite clear that the testatrix intended by the clause under consideration to dispose of the residue, and that in the language she has used she must be regarded as speaking at the time of her death and not at the time of making her will. Courts deal liberally in the construction of bequests for charity, and in some cases sustain such bequests, where if they were to an individual they would not be sustained. The testatrix intended to give the residue to the executors. Although they are not named in the clause, the gift is to them by implication; and it is in trust for such charitable purposes as they may think proper.

John H. SHARP
v.
Alfred HIBBINS and Wife.

1. A **partner,** who, **after** the **dissolution of** the **firm** has disposed of the partnership property, collected debts due the firm and paid debts due from it, can **not** be **excused from accounting to** his **copartner** on the ground that he has paid out more for the firm in paying its debts than he has received from the assets.
2. The **property of** the **wife of a partner can not,** at the suit of his copartner, be **charged with moneys drawn by** her **husband** upon his own account **from** the **firm's funds** in bank and expended by him in improvements upon her land and in the payment of interest on a mortgage upon the property, where there is no proof that it was done surreptitiously or of fraud on her part, and it appears that it was done **with** the **knowledge of** the **other partner.**

(Decided April 28, 1887.)

BILL for an account. On final hearing upon pleadings and proofs. *Dismissed as to Mrs. Hibbins.*

The case is stated in the opinion.

Mr. **James W. Field,** for complainant.

Messrs. **G. P. Kingsley** and **E. M. Colie,** for defendants.

Runyon, *Chancellor,* delivered the following opinion:

Sharp and Hibbins were partners in business in Orange in this State. The copartnership began in 1872 and was dissolved by mutual consent in 1877. Sharp brings this suit against Hibbins and his wife, to obtain from the former an account of the partnership affairs and assets which at the dissolution of the copartnership were left in his hands, and to charge the real estate of Mrs. Hibbins with moneys which (according to the allegations of the bill) were taken by Hibbins from the funds of the firm and expended upon that property in paying interest upon a mortgage thereon and in improving the property with buildings, etc.

That the complainant is entitled to the account which he seeks there can be no question. The proof is that Sharp and Hibbins were copartners from August 1, 1872, to January 20, 1877; that at the dissolution of the copartnership all the assets were, as before stated, left in the hands of Hibbins, upon an agreement on his part with Sharp that he would settle the affairs of the concern. He has acted under that agreement, has disposed of the property, collected the debts due to the firm and has, as he alleges, paid debts due from it, but he has never accounted with Sharp in the matter. It is urged on his behalf that he should not be required to account, because it appears by his testimony that he has paid out much more for the firm in the payment of its debts than he has received from the assets.

Sharp is entitled to an accounting notwithstanding this claim. The court will not in such a case as this take the account at the hearing; the only material evidence on this part of the case is that which bears upon the question whether the complainant is entitled to an account or not. Gresley, Eq. Ev. 240; *Hudson* v. *Trenton Locomotive etc. Co.* 1 C. E. Green, 475.

The claim to a lien upon the separate property of Mrs. Hibbins is not established. There is no proof that the property was not hers *bona fide.* Nor is there any proof of fraud on her part. If her husband expended money drawn by him from the firm's funds, in improvements upon her land and in the payment of interest upon the mortgage upon the property, there is no proof that it was done surreptitiously; but on the contrary it would appear that it was done with the knowledge of the complainant. The expenditure for the green houses built on her land appears to have been made in 1873; and the payments of interest upon the mortgage were made half yearly from November 25, 1872, down to April 10, 1876.

The money drawn for those purposes was drawn by Hibbins upon his own account from the firm's bank account. It is true they were not charged to him, but the reason was that neither the complainant nor Hibbins kept any account of the moneys drawn by them for their own account, except the checks themselves by which they were drawn. There is neither charge nor evidence of fraud in these matters.

The complainant is entitled to no lien upon Mrs. Hibbins' property. As to her the bill should be dismissed, with costs.

Samuel LIPPINCOTT, Exr., of Ann H. Pancoast,
v.
Samuel BARTON *et al.*, Executors of David C. Pancoast.

1. This court has **jurisdiction to compel** an **account for waste** done only as **incidental to** relief by **injunction** to stay the commission of further waste, and that only to prevent a multiplicity of suits.
2. A **suit in equity** can **not** be **maintained by** an **executor to recover** the **value of trees cut from** the **realty** belonging to the estate of his testatrix; if he is entitled to recover, he can do so by an action at law for the proceeds, as for money had and received, or for the trespass in cutting or trover in converting.

(Filed ——— — 1886.)

BILL to recover value of trees cut by tenant by the curtesy. *Dismissed.*

The case is stated in the opinion.

Mr. **W. T. Hilliard,** for complainant.

Mr. **E. S. Fogg,** for defendants.

Bird, *V. C.*, filed the following opinion:

This bill is filed by the executor of Ann H. Pancoast, deceased, to recover the value of trees cut by her husband David C. Pancoast, who continued in possession as tenant by the curtesy of her lands after her death. The defendants, against whom the suit is instituted, are the executors of the tenant for life.

It is claimed that this suit may be maintained in this court, for the waste committed, on the ground of equitable conversion, and upon the ground of injustice to Clement G. Lippincott, one of the grandsons of David C. Pancoast, by whose will he has but $100 bequeathed him, while by the will of Ann H. Pancoast he has an equal interest with the other legatees.

Neither of these alleged grounds brings the case within the jurisdiction of this court. I have examined a number of authorities, and none of them goes so far as to sustain the complainant's insistment.

In *Ware* v. *Ware*, 2 Halst. Ch. 117, the doctrine, which is expressed in all the other authorities, is that an account for waste done is only incidental to relief by injunction against further waste. 1 White & T. Lead. Cas. Eq. part 2, p. 1024; *Jesus College* v. *Bloom*, 3 Atk. 262; *Winship* v. *Pitts*, 3 Paige, 259; Story, Eq. §§ 515, 518.

From these and other cases it appears that this court only has jurisdiction to compel an account as incidental to the right of an injunction to stay the commission of further waste, and that only in order to prevent a multiplicity of suits. *Grierson* v. *Eyre*, 9 Ves. 341, 346; *Watson* v. *Hunter*, 5 Johns. Ch. 169; 1 Add. Torts, 319.

Nor can I conceive of any principle upon which this complainant can stand in this court for the recovery of these moneys. If he is entitled to them, he can recover them by an action at law for money had and received, or for the trespass in cutting, or trover in converting. Rev. p. 396, § 5.

UNITED NEW JERSEY R. R. & CANAL CO.,
v.
LONG DOCK CO. *et al.**

1. A **mortgage upon after acquired property** attaches to such property, subject to existing equitable liens thereon, although it is prior to them in point of time.
2. Where a **mortgage** is **given by a part owner** of land **during proceedings in partition** to which he is a party, and at the sale in such proceedings the land is purchased by and conveyed to trustees for the beneficial owners of the property, *held*, that the **legal title of** the **mortgagor** was **extinguished** and the **mortgage attached,** but in equity only, **to the equitable interest of** the **mortgagor** in the property, and that when on the division thereof, such part owner obtained title to the part allotted to him, such mortgage cannot be maintained beyond the extent of the mortgagor's interest in the property, and that a **lien for purchase money** of such part owing by him was **paramount to** the **mortgage.**
3. When the **master's report** follows the direction of the decree, an exception to it will be overruled.

(Decided April 30, 1887.)

BILL for relief. On exceptions to Master's report. *Overruled.*

The case is stated in the opinion.

Messrs. **Cortlandt & Wayne Parker,** for the exceptions.

Messrs. **J. R. Vredenburgh,** and **J. D. Bedle,** *contra.*

Runyon, *Chancellor*, delivered the following opinion:

By the decree in this cause it was decreed (11 Stew. Eq. 142) that the Long Dock Company should bear its proportion (with interest) of a certain payment of $500,000 made by the complainants to extinguish the outstanding title of the State in certain lands assigned and conveyed to the New Jersey Railroad & Transportation Company, under a certain agreement made between the last named Company and the Long Dock Company, in a partition of lands by and between them; that the sum so to be paid was to be in proportion to the interest of the Long Dock Company in the whole property and was, therefore, $\frac{188}{800}$ thereof; that the Long Dock Company should, under the before mentioned agreement, pay to the complainants the like proportion of the costs of the defense of the latter in a suit brought in the Circuit Court of the United States by Garret E. Winants against them, with interest from the time of the payment of those costs; that the Long Dock Company should also pay the costs of this suit; and that the complainants were entitled, under that agreement, to a lien for those moneys upon the lands conveyed under the agreement to the Long Dock Company.

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*See United New Jersey R. R. & Canal Co. v. Long Dock Co. 4 Cent. Rep. 56.

It was referred to a master to ascertain and report the amount of those moneys, and also what equities, if any, the other defendants in this suit have in the last mentioned property, or any part thereof, superior to those of the complainants as adjudged by that decree; and if any such equities exist, to ascertain and report the owner, amount and order thereof. The master reported that the proportion of the money expended to extinguish the State's title, to be paid to the complainants by the Long Dock Company, was, with the interest thereon, $286,037.71, and that the amount due the complainants for the Long Dock Company's proportion of the costs of the defense of the Winants' suit, was $131.66, and that the complainants are entitled to interest thereon from November 1, 1870, and that none of the other defendants have any lien superior to that of the complainants under the agreement.

Exceptions were filed by Fisher Ames Baker and William D. Shipman, trustees for the holders of mortgage bonds of the Long Dock Company under a mortgage given by that Company in 1865, and exceptions were filed by other defendants also. The questions discussed and submitted upon the hearing of the exceptions were as to whether the complainants' lien under the agreement is superior to the lien of the mortgage held by Baker and Shipman, trustees, and whether the complainants are entitled to interest upon the money reported to be due to them in respect of the costs of defense of the Winants suit, from the time of payment of such costs by the complainants or only from the time of demand by them upon the Long Dock Company of payment of that Company's proportion thereof; which demand, it is alleged, was not made earlier than one year before the commencement of this suit.

The above mentioned mortgage of 1863 (it is dated May 25, 1863) was given by the Long Dock Company, pending proceedings in this court for partition of the property known as Harsimus Cove. Those proceedings were begun August 15, 1857, and the Long Dock Company was a party thereto. There was a decree for sale of the property made September 21, 1862, under which it was sold, and it was purchased by Peter Bentley and Moses Taylor, as trustees in trust for the beneficial owners of the property; and the premises were conveyed to them, accordingly, by deed dated August 24, 1863.

The trustees conveyed away part of the property before the 10th of September, 1867, the date of the before mentioned agreement; and at that date, by that agreement, which was made by and between the trustees, the parties who were beneficially interested as owners in the property at the time of the partition sale and the New Jersey Railroad & Transportation Company, which company appears to have acquired all the interests of those owners except the Long Dock Company, it was agreed that the remaining property should be divided in a specified way between the New Jersey Railroad & Transportation Company and the Long Dock Company, and should be conveyed to them accordingly. Conveyances were made in pursuance of the agreement, by deeds dated October 1, 1867.

By the agreement it was declared that the title of the whole tract divided between the two companies should, for the sake of convenience of division, be deemed equally good and valid, and that if at any time afterwards either of the companies should be dispossessed of any portion of the tract conveyed to it or its assigns by virtue of the agreement, or should be put to any cost or expense in defending its title thereto, or in extinguishing any outstanding title or claim against such portion, the other company should bear its proportion of such loss and expense, according to its proportion of interest in the entire property; which proportion of loss and expense should be a lien upon the part set off and conveyed to it. As already stated, the money which has been declared to be a lien upon the property set off and conveyed to the Long Dock Company was paid to extinguish the outstanding title of the State to land set off and conveyed under the agreement to the New Jersey Railroad & Transportation Company, and to defend its title to part of that property against the claim of Garret E. Winants.

The lien of the complainants is superior to the mortgage of 1863. That mortgage, as already appears, was taken pending the proceedings in partition. When the property was sold under the decree in that suit and bought in by the trustees, the legal title of the mortgagor was extinguished and the mortgage attached (but in equity only) to the interest of the mortgagor in the property, which interest was then merely equitable.

In the division under the agreement all the land allotted and conveyed was, for convenience of partition, regarded as being held by good title; and an equitable provision was made by mutual arrangement to secure the parties against loss by reason of such assumption. Without such arrangement, of course, the partition which was made would not have been made. In that partition the Long Dock Company obtained its share in property of good title; while on the other hand the other party received its share in land with a title so defective that it required a large expenditure of money to perfect it. The Long Dock Company, therefore, but for the provisions of the agreement, would have had so much the advantage of the Railroad Company in the partition. In order to prevent such injustice on either side, and to protect each party in the premises, it was necessary in such a partition to make the arrangement which was made in the agreement in that behalf or some such provision. The proceedings in partition were conducted in good faith, and the agreement also was made and carried out in good faith. Under the circumstances the interest of the Long Dock Company to which, in equity, the lien of the mortgage of 1863 attached itself was the land obtained in the partition under the agreement, subject to the lien for the payment to perfect the title of the land assigned and conveyed to the Railroad Company.

In *Westervelt* v. *Haff*, 2 Sandf. Ch. 98, where a mortgage was executed by a tenant in common, upon his interest in land pending suit for partition of the premises, and he became the purchaser of part of the property at the sale, and the amount of his share of the proceeds was allowed to him upon his bid, it held that although if a stranger had bought the property, the lien of the mortgage would have been cut off, yet since the mortgagor had bought it the lien still subsisted in equity upon the land so purchased, but only to the extent of the mortgagor's interest in the proceeds of the sale of the whole of the lands held in common and sold under the decree. The liens of mortgages given upon the property by the purchaser to other tenants in common, for their shares of the proceeds of the sale, were held to be of course prior to the lien of that mortgage. A voluntary partition of land between the owners thereof is not binding upon the holders of the existing liens upon the property, unless they consent thereto. *Emson* v. *Polhemus*, 1 Stew. Eq. 439.

But in the case under consideration, the lien of the mortgage of 1863 was extinguished (except in equity) by the sale under the decree in partition. The lien being a creature of equity it will not be so maintained as to effect any injustice. It should not be maintained beyond the extent of the mortgagor's interest in the property; that is, it should be held to be subject to the lien in favor of the complainants. The mortgagor acquired the property under the agreement and it took it subject to that lien. The lien is, in effect, a lien for purchase money and is paramount to the mortgage. The obvious principle upon which in *U. S.* v. *New Orleans Railroad*, 12 Wall. 362 [79 U. S. bk. 20, L. ed. 434]; *Williamson* v. *N. J. etc. R. R. Co.* 1 Stew. Eq. 277, and *Coe* v. *N. J. Midland R. Co.* 4 Stew. Eq. 105, and other like cases it has been held that a mortgage upon after acquired property attaches to such property, subject to existing equitable liens thereon, although it is prior in point of time to them, is applicable here. To give to the mortgage of 1863 the benefit of the allotment and conveyance to the Long Dock Company, free from the lien under the agreement, would give to the mortgagees an advantage by increasing their security at the expense of the complainants. The principle of the maxim *Nemo debet locupletari ex alterius incommodo* is evidently applicable.

There is another consideration not without weight in this matter, viz.: the fact that the agreement was made and acted upon twenty years ago, and that, upon the faith of it, the complainants expended the large sum of money, to secure the payment of which (to them) this suit was brought. In all the twenty years the mortgagees have accepted and have had the benefit of the arrangement. Had the claim for compensation been upon the side of the Long Dock Company, those mortgagees would have been entitled to and could have claimed the benefit of it and of the lien given by the agreement.

In order to dispose of the exception based upon the allowance of interest upon the proportion of the costs of the defense in the Winants suit, which, under the agreement, the Long Dock Company was bound to pay—the exceptants insisting that it should not have been allowed from any period earlier than the time of demanding payment of such proportion from the Long Dock Company—it is enough to say that the master followed the plain and explicit direction of the decree.

The exceptions will be overruled, with costs.

NEW YORK.

COURT OF APPEALS.

Re Petition of Lewis H. CLARK, a Taxpayer, etc., *Appt.*,
v.
Andrew F. SHELDON, as County Treasurer, etc., *Respt.*

1. **Section 4 of chapter 907 of Laws of 1869,** as amended by chapter 288 of Laws of 1871, **providing for** the **appropriation of** all **taxes,** except school and road taxes, collected from railroads, **to the payment of municipal bonds issued to aid** in the construction of such **railroads,** is applicable to any municipality which has bonds outstanding issued under any Act in aid of the construction of any railroad within its borders.
2. It makes no difference as to the duty of the county treasurer under said section 4, that the **taxes to constitute** the **sinking fund for** the **payment of** such **municipal bonds** were not expressly collected or paid over to him for that purpose.
3. The provisions of said **section 4** are **not in conflict with** the **Constitution;** their meaning is reasonably plain, and it is practicable to execute them.
4. It is no defense to a **proceeding** under said section 4 **by a taxpayer to compel** the **county treasurer to apply taxes towards** the **payment of municipal bonds** as provided by said section, that the petition does not put the amount of taxes claimed to be applicable to that purpose high enough; notwithstanding this, the **county treasurer** may, upon a hearing by the county judge, **be compelled to set aside** for a sinking fund **all the taxes** which may appear to have been paid to him and devoted by the statute to that purpose.
5. Nor is it an answer to such proceeding that if the county treasurer should set aside the taxes for a sinking fund to pay such municipal bonds, there would be a **deficiency in other funds.**

(Decided June 7, 1887.)

APPEAL from an order of the Supreme Court at General Term in the Fifth Department, affirming an order of the County Court of Wayne County dismissing a petition under the Laws of 1871, chapter 288. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. **J. Welling,** for appellant:

The county treasurer has the duty put on him by the act of ascertaining the amount of taxes received by him from the railroad companies, and can do so by the statement received by him from the board of supervisors and by the examination and return of the town collector.

Section 4, of chapter 907, Laws 1869, as amended by chapters 283 and 925 of Laws of 1871, says: "It shall be the duty of said treasurer with the money arising from taxes, levied and collected as aforesaid, to purchase bonds," etc.; and the same section authorizes any taxpayer of a town bonded in aid of a railroad "to apply to the county judge, on petition, for an order directing said county treasurer to execute the provisions of this Act."

And it is the duty of the county judge, upon a proper case being made, to issue an order directing said county treasurer to execute the provisions of the Act.

This sum of $427.69, admitted by defendant's answer, belonged to the Town of Sodus. As soon as received by the collector or treasurer, it was to be applied by the defendant, as Treasurer, in purchasing its bonds, or by him set apart as a sinking fund for the redemption and payment of them.

Bridges v. *Supervisors*, 92 N. Y. 577–8; *People, Martin,* v. *Brown*, 55 N. Y. 186 and cases cited; *Ross* v. *Curtiss*, 31 N. Y. 606.

The defendant, having received the money, $427.69, applicable to the redemption and payment of the bonds and interest thereon, cannot justify his refusal to invest it as required by this Act, upon the ground that the law devoting it to that purpose is unconstitutional.

People, Martin, v. *Brown*, 55 N. Y. 180–196.

The *onus* of pointing out the precise amount the treasurer should invest or set apart should not be thrown upon a taxpayer, especially in a case when the officer "has made no attempt" to comply with the requirements of the statute. Neither has the taxpayer the means of accurately ascertaining the amount, while the treasurer has.

Phelps v. *Williams*, 5 Alb. L. J. 204.

The Act of 1869, § 4, applies to "any town, village or city * * * which has issued, or shall issue bonds to aid in the construction of" a railroad assessed in said town, city or village. "Every town" here means "all towns."

Heaton v. *Wright*, 10 How. Pr. 79–83; Crabbe's Synonyms, ed. 1879, pp. 761–2, title, "*Some-Any.*"

The devotion of these taxes to the redemption of the bonds, is a benefit to the towns which have aided in creating the property from which the taxes are received, and which is a public use for and benefit to the whole people of the State.

Duanesburgh v. *Jenkins*, 57 N. Y. 188–9; *Bank of Rome* v. *Rome*, 18 N. Y. 38; *People* v. *Mitchell*, 35 N. Y. 551; *Starin* v. *Genoa*, 23 N. Y. 439; *Clarke* v. *Rochester*, 28 N. Y. 605; *Bridges* v. *Supervisors of Sullivan Co.* 92 N. Y. 579.

The Legislature could properly and did, by section 4, donate these taxes in aid of towns which had bonded to aid railroads, to lighten, the burden of taxation necessary to pay their obligations entered into in aid of a public benefit.

People, Williams, v. *Dayton*, 55 N.Y. 380,381; *Town of Guilford* v. *Supervisors*, 13 N. Y. 149; *People, Griffin,* v. *Mayor of Brooklyn*, 4 N. Y 419; *Brewster* v. *Syracuse*, 19 N. Y. 116–118.

That these taxes were ostensibly raised for specific purposes, to which they were appropriated by other statutes than that invoked by the petitioner, afforded no excuse or defense to the Treasurer for not investing or holding them, as required by the Act of 1869.

People, McConnell, v. *Baker*, 29 Barb. 81, 84, 87; *Bridges* v. *Supervisors of Sullivan Co.* and *People, Griffin*, v. *Mayor of Brooklyn, supra; Gordon* v. *Cornes*, 47 N. Y. 608; *Monroe Co. Sav. Bank* v. *Rochester*, 37 N. Y. 365; *Litchfield* v. *Vernon*, 41 N. Y. 124; *People* v. *Home Ins. Co.* 92 N. Y. 328, 340.

The Legislature, in respect to taxation, being the representative of the people or in effect the people themselves (and having uncontrollable power over the whole subject of taxation, its object and purposes, exemption therefrom and details) must necessarily have absolute control over the product of taxation or taxes.

The Legislature possesses almost unlimited power of taxation, and it may appropriate public money for improper purposes, or give it away, by the requisite vote; yet we cannot deny the power, however unwisely used. The duty of courts ends with determining the question of power. The Legislature possesses the power to donate public funds to private use.

People, Williams, v. *Dayton*, 55 N. Y. 380, 381.

Independently of express constitutional restrictions it, the Legislature, can make appropriations of money whenever the public well being requires or will be promoted by it; and it is the judge of what is for the public good.

Town of Guilford v. *Supervisors*; *People, Griffin*, v. *Mayor of Brooklyn*, and *Brewster* v. *Syracuse*, *supra*.

The further ground upon which these Acts were held unconstitutional in *Phelps* v. *Williams*, 4 Alb. L. J. 204, viz.: that the Acts did not distinctly state the tax and the object to which it is to be applied, and the sum appropriated, is untenable, as shown by the case of *Bridges* v. *Supervisors of Sullivan Co.* 27 Hun, 175, 177; 92 N. Y. 570.

Mr. **C. H. Roys,** for respondent:

The respondent, the County Treasurer, owed no duty to the petitioner or to his town, because the taxes, less the school and road taxes, or so much thereof as was necessary, had not been collected from the two railroads mentioned in the petition, and paid over to him, to be invested as a sinking fund.

The excepted school and road taxes must first be ascertained and separated from the total tax.

It is not the duty of the county treasurer to ascertain the precise amount of the school and road taxes collected from the railroads, which is a part of and is mingled with the total.

Presumptively the town officers or board of supervisors should ascertain the amount of the school and road taxes, because they assess the valuations of the railroads and levy and apportion the various taxes, and have the information that will enable them to determine such amount. But they have not done it. The petition does not state, nor do the proofs or appeal book show, how much of the total taxes of $2,602.09 paid by said railroads is made up of the school and road taxes, nor what amount would remain after excepting and deducting therefrom the school and road taxes.

But the separation of these school and road taxes from the total taxes collected from the railroads is a fact antecedent to any duty by the treasurer; and as it must be conceded that such separation had not been made or attempted, the proceedings and petitions were properly dismissed.

After the school and road taxes are ascertained and separated from the total $2,602.09 and the balance struck, another fact must then be found before the treasurer is set in motion by the statute, viz.: How much out of this balance is it necessary, according to the statute, to set aside as a sinking fund? Who shall determine how much is necessary? The statute does not require the treasurer to make this determination, and he could not make it if it did require him to. The sources of information are elsewhere, and not under his control.

Laws, 1869, § 6, chap. 907.

The Sinking Fund Act further provides that after the school and road taxes are excluded, and after it is ascertained by somebody how much of the balance is necessary for sinking fund purposes, then, and not until then, shall this last determined amount be paid over to the county treasurer, to be by him invested.

The petition and proceedings were properly dismissed by the county judge, because they are not authorized by the Act under which they are presented and prosecuted.

The prayer of the petitioner is for an order directing and compelling the Treasurer to take and set apart as a sinking fund the sum of $427.69 for payment of the bonds of the Town of Sodus.

The petition does not inform us what this sum of $427.69 represents, or what taxes make it up. The petition tells what it is not, by describing it as "other than school and road taxes."

The sum of $427.69 is made up of two sums: $149.97, representing the state tax, and $277.72, representing the county tax.

This state tax of $149.97 was imposed by chapter 453 of the Laws of 1881 (and by other appropriation and supply bills of the Legislature for that year) for specified purposes other than a town bond sinking fund. As this appropriation Act is contradictory to and irreconcilable with the Acts of 1869 and 1871, under which the petitioner would seize the state tax, these last mentioned Acts must be held to be repealed as to such part.

Excelsior Petroleum Co. v. *Embury*, 67 Barb. 261; *People, Navano*, v. *Van Nort*, 64 Barb. 205; *Hartman* v. *Mayor of N. Y.* 51 How. Pr. 351.

This state and county tax of $427.69 cannot be taken and used as a sinking fund as required by the petitioner, under the Acts of 1869 and 1871, because that money has been imposed and collected as taxes and paid over to the County Treasurer by and in pursuance of other statutes and for other and entirely different purposes.

People, Fiedler, v. *Mead*, 24 N. Y. 114; *People, Martin*, v. *Brown*, 55 N. Y. 180.

The prayer of the petition was properly denied, because to grant it would be taking so much money out of the County Treasurer's hands that is there for other persons and objects, and would create a deficiency; and those creditors and objects not yet paid would be short of what belongs to them; and because the law itself is impracticable and impossible of execution.

The order of the county judge and of the general term will be affirmed, because the provisions of the Acts of 1869 and 1871, relating to the sinking fund in question, are unconstitutional and void, depriving persons of property without due process of law.

Every taxpayer in Wayne County will, if the petitioner is right and the county judge wrong, be obliged to pay and contribute something toward the satisfaction and payment of the town bonds of Sodus.

No taxpayer outside of the Town of Sodus is benefited by either railroad in the Town of Sodus, for which the town is bonded: therefore the law, and this proceeding, that seeks to impose taxes upon taxpayers in Wayne County outside of the Town of Sodus, deprives persons of property without due process of law, violates both State and Federal Constitutions, and falls under the condemnation of our highest court, as expressed in the case of *Stuart* v. *Palmer*, 74 N. Y. 183.

It is not competent for the Legislature, by any law, to compel taxpayers outside of the Town of Sodus to pay any part of the bonded private indebtedness of that town.

Weismer v. *Village of Douglas*, 64 N.Y. 91.

Said sinking fund provisions violate section 8, article 7 of our State Constitution, in omitting to distinctly specify the sum appropriated for such fund.

These Sinking Fund Acts, so far as they affect taxes not imposed by law for a sinking fund purpose, violate section 20 of article 3 of the Constitution, which provides that "Every law which imposes, continues or revives a tax shall distinctly state the tax and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object."

Earl, *J.*, delivered the opinion of the court:

This is a special proceeding instituted by a taxpayer of the Town of Sodus, Wayne County, in this State, to compel the County Treasurer of that county to execute the provisions of section 4 of chapter 907 of the Laws of 1869, as amended by chapter 283 of the Laws of 1871. The material portions of that section are as follows:

"All taxes, except school and road taxes, collected for the next thirty years, or so much thereof as may be necessary, in any town, village or city, on the assessed valuation of any railroad in said town, village or city, for which said town, village or city has issued or shall issue bonds to aid in the construction of said railroad, shall be paid over to the treasurer of the county in which said town, city or village lies. It shall be the duty of said treasurer, with the money arising from taxes levied and collected as aforesaid, which has heretofore been or shall hereafter be paid to him (including the interest thereon) to purchase" bonds mentioned, to "be held by said county treasurer as a sinking fund, for the redemption and payment of the bonds issued or to be issued by said town, village or city to aid in the construction of said railroad or railroads. In case any county treasurer shall unreasonably refuse or neglect to comply with the provisions of this Act, any taxpayer in any town, village or city theretofore having issued bonds in aid of the construction of any railroad or railroads, is hereby authorized to apply to the county judge, on petition, for an order compelling said treasurer to execute the provisions of this Act. And it shall be the duty of said county judge, upon a proper case being made, to issue an order directing said county treasurer to execute the provisions of this Act."

Our main duty upon this appeal is to construe this section. It has several times been under consideration in the courts, and the views of judges in reference to it have not been in entire harmony.

All taxes except school and road taxes imposed upon the railroads mentioned are required to be paid over to the county treasurer; and this obviously means all the taxes of every description, including town, village, city, county and state taxes, except school and road taxes. The sums thus paid to the county treasurer are to constitute a sinking fund for the payment and redemption of the municipal bonds. There is nothing impracticable in the scheme of this section. It is easy for the officers imposing the taxes to ascertain their amount after deducting school and road taxes; and the amount to be paid to the county treasurer and held by him for a sinking fund can be specified in the warrant issued to the collector. *People, Martin*, v. *Brown*, 55 N. Y. 180.

But if not so specified, it must always be easy for the collector to make the proper deduction of school and road taxes and then, in obedience to the command of the statute, to pay the balance to the county treasurer. If the duty of making the separation of the school and road taxes from the other taxes has not been discharged before payment of the taxes to the county treasurer, it will rarely, if ever, be difficult for him to make such separation; and it will be his duty to make it and invest the proper amount as directed by the statute.

The authorities of towns, villages, cities and counties have no right to divert or appropriate these taxes for other purposes. *Bridges* v. *Supervisors of Sullivan Co.* 92 N. Y. 570. They never came into the hands of the county treasurer for any other purpose than that mentioned in the section, and they are devoted by law to the benefit of the municipality in which they are collected, and must be held and invested in the mode directed for its benefit. The taxes which are to be paid into and constitute the sinking fund need not be specially levied, but they are to be levied in the same way as other taxes, and all the taxes thus levied are to be devoted to the purposes mentioned. It is quite true that a deficiency may thus be caused in funds required for town, village, city, county and state purposes; but the local authorities must in some way make provision for such deficiency, and there is ample power in the statutes to do so.

The provisions of this section are applicable to any municipality which has bonds outstanding issued under any Act in aid of the construction of any railroad within its borders. The statute speaks of taxes upon the assessed valuation of any railroad for which the municipality has issued or shall issue bonds to aid in the construction of such road. And it authorizes any taxpayer in any town, village or city which has issued bonds in aid of the construction of any railroad or railroads to petition to the county judge for an order compelling the county treasurer to execute the provisions of the Act. It is not correct, therefore, to say that these provisions are to be executed only in the case of railroads constructed under the Act of 1869, and the amendments thereto. The provisions are broad, comprehensive and general, and were intended for the benefit of all municipalities bonded in aid of railroads constructed in or through them.

It makes no difference as to the duty of the County Treasurer that the taxes thus to constitute the sinking fund were not expressly collected or paid over to him for that purpose. The statute appropriates the taxes and makes it his duty to separate and set them apart for the sinking fund.

We do not perceive that these provisions of section 4 are in conflict with any constitutional provision. They do not impose a tax on property in other towns of the County of Wayne, as claimed by the respondent, for the benefit of the Town of Sodus. They simply deprive other portions of the county of the benefit to be derived from the taxation of the railroad property within the Town of Sodus. As to other portions of the county it is practically the same as if the railroad property was exempt from taxation. It would be perfectly competent for the Legislature to exempt all the railroads from taxation in the towns bonded to aid in their construction; and in making such exemption no constitutional provision would be violated. So, too, the Legislature could devote all the taxes imposed upon such railroads to town, village or city purposes; and this is what it has done. These provisions cannot even be charged with any great injustice. The railroad property thus to be taxed was in the main created by the municipalities bonded for their construction; and until they have either been reimbursed for their expenses which they have thus incurred, or have been able otherwise to pay their bonds, it is certainly not very unjust that they should have the benefit of the taxes imposed upon the property which they have thus created.

These provisions are not in conflict with section 8 of article 7 of the Constitution, which provides that "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation Act; and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum." This fund was not in the treasury of the State and never belonged to the State or to any fund under its management; hence, that section of the Constitution has no application to this case.

It is also clear that these provisions do not violate section 20 of article 3 of the Constitution, which provides that "Every law which imposes, continues or revives a tax, shall distinctly state the tax and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object." The law we are considering simply specifies what may be done with a tax which has been legally imposed. The constitutional provision referred to can have no application to such a case as this. *Succession Tax Case*, 6 Cent. Rep. 781, 104 N. Y. 306.

We are, therefore, of opinion that the provisions of section 4 are not in conflict with the Constitution, that their meaning is reasonably plain, and that it is practicable to execute them. It, therefore, only remains for us to inquire whether there is anything peculiar to this case which justifies the County Treasurer in his refusal to execute these provisions.

What we have already said is a sufficient answer to most of the other objections made. It appears quite clearly from the petition and answer and the evidence upon the hearing before the county judge that the taxes imposed upon these two roads for the year 1881, after making deductions for school and road taxes, were much more than $427.69. But the petition alleges that that was the sum over and above school and road taxes, which was paid to the County Treasurer as the railroad taxes of that year; and upon the hearing before the county judge the County Treasurer admitted that the amount of all taxes collected upon the assessed valuation of the railroads in the Town of Sodus for the year 1881, and paid to him, was the sum of $2,602.09, of which sum $427.69 was the portion of the railroad taxes other than school and road taxes. And it was that sum which the petitioner prayed that the County Treasurer be compelled to pay, invest or set apart as a sinking fund under the fourth section.

It is probably true, upon all the facts appearing in the case, that the County Treasurer ought to have set aside a larger sum in the execution of his duties under the Act. But it is no defense that the petitioner has not prayed for a sufficient amount, and that possibly the County Treasurer could be vexed with further proceedings requiring him to set aside a further amount. It is his duty to set aside and invest as a sinking fund all the taxes paid to him and appropriated by section 4 for that purpose. But if the county judge should make an order requiring him to set aside a less sum than he ought to, certainly he cannot complain of such an order. Upon a hearing of this case before the county judge, notwithstanding the prayer of the petition, the County Treasurer could be compelled to set aside for a sinking fund all the taxes which may appear to have been paid to him and were devoted by the statute to that purpose; and there is ample power conferred upon the county judge to ascertain the amount and make an order accordingly.

It is no answer for the Treasurer to say that if he should set aside these taxes for a sinking fund there would be a deficiency in other funds, and that he may not have money enough to pay the obligations of the county to the State and to the county officials and county creditors. He has no right to use the money produced by these taxes to discharge any of these obligations. The law has appropriated it for a specific purpose, and it is his duty to apply it to that purpose.

There are no subsequent statutes which in any way interfere with these provisions of section 4. The general laws of the State for the imposition and collection of taxes do not interfere, and were not intended to interfere with this section. These taxes were devoted to a special purpose by section 4, and all prior laws in conflict with that section, or requiring a different disposition of taxes thus collected, are so far modified or repealed; and our attention has been called to no subsequent statute which has any bearing whatever upon the questions here involved.

We are, therefore, of opinion that the orders of the General Term and of the county judge should be reversed, and the proceedings remitted to the county judge for a further hearing upon the petition, and that the appellant recover costs against the respondent in this court and in the Supreme Court.

All concur.

PEOPLE, *ex rel.* Robert FAIRCHILD,
v.
COMMISSIONERS OF Department of Fire & Buildings of BROOKLYN.

The court of appeals has **power to substitute** the **administratrix of a deceased relator,** in a proceeding by *certiorari* to reviw the action of municipal authorities in removing the relator from office, where, in the relator's lifetime, the proceeding sought to be reiewed was affirmed and the writ of *certiorari* quashed at special term, with costs, and the order of special term was affirmed at general term, with costs, and the relator's estate is liable for such costs.

(Decided May 10, 1887.)

MOTION on behalf of the administratrix of deceased relator to be substituted in his place and stead as appellant from an order of the Supreme Court at General Term in the Second Department, affirming an order of Special Term, affirming proceedings sought to be reviewed by *certiorari* and quashing the writ. *Granted.*

The facts in relation to the motion are stated in the opinion.

Mr. **Edward F. O'Dwyer,** for the motion.

Mr **Almet F. Jenks,** *contra.*

Per Curiam:

At the special term the proceedings of the Commissioners in removing the relator from his office were affirmed and the writ of *certiorari* was quashed, with $10 costs. At the general term the order of the special term was affirmed, w ith $10 costs and disbursements. By virtue of these two orders the relator became liable to pay upwards of $20. and payment of that sum can now be enforced against his estate.

If the decisions below were wrong, and the relator was improperly removed from office, and the orders below should be reversed, then upon their reversal the administratrix of the relator would be entitled to recover his salary during the time he was excluded from his office, or damages for such exclusion; hence, both on account of such costs and the salary, she is interested in the appeal pending in this court. Until the decisions below have been reversed, she cannot enforce payment of any salary, or resist the payment of the costs which have been adjudged against her husband. *People, Hatzel,* v. *Hall,* 80 N. Y. 117, 127; *Nichols* v. *MacLean,* 2 Cent. Rep. 500, 101 N. Y. 526.

In such a case we have no doubt of the power of the court to substitute the administratrix of the deceased relator. *People, Keenholts,* v. *Robinson,* 29 Barb. 77; *Hastings* v. *McKinley,* 8 How. Pr. 175.

The motion should be granted.

All concur.

Josie TEETS, *Respt.,*
v.
Village of MIDDLETOWN, *Appt.*

1. It is always competent to inquire what **relations** exist **between a party and** his **witness,** for the purpose of showing the motive and influence under which the evidence is given and the existence of any bias or prejudice on the part of the witness.
2. Such evidence, however, affects the **credibility of** the **witness** only; and where no material question of fact was controverted on the trial, and the evidence of the witness could have been wholly stricken from the minutes without affecting the result in the least degree, an erroneous **ruling upon** such **question** furnishes **no** valid **reason for reversing** the **judgment.**

(Decided June 7, 1887.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Orange Circuit on a verdict for plaintiff for $3,000 damages in an action to recover for personal injuries. *Affirmed.*

The plaintiff, while riding in the streets of Middletown, on the evening of June 30, 1883, was suddenly thrown from the carriage and severely injured. The defendant's employees and servants had placed a heap of gravel and bricks in the street. It was dark and the street was very much shaded by trees. The horse was thrown down by contact with the obstruction; and the sudden stoppage of the wagon thereby threw the plaintiff out. One Dusenberry was the driver of the plaintiff's vehicle.

At the trial plaintiff was called as a witness, and testified to the circumstances of the accident, which were not denied by defendant. Said Dusenberry was also called by plaintiff as a witness, and also testified to the same effect.

On cross examination defendant's counsel asked him whether he was engaged to the plaintiff or not. This was objected to by plaintiff, and the objection was sustained and an exception noted.

As to plaintiff's injuries, one of her witnesses testified "That there seemed to have been an injury to the spine and an inflamed and shattered condition of the nervous system as a whole; that there was an uneasy, writhing, worm-like motion of muscular tissue;" and that in his opinion "The plaintiff was rather unlikely ever entirely to recover."

The jury returned a verdict for plaintiff. On appeal to the general term and judgment thereon the same was affirmed and defendant appealed to this court.

Mr. **Wm. F. O'Neil,** for appellant.

Mr. **Wm. Vanamee,** for respondent.

Per Curiam:

The exception taken by the defendant's counsel to the ruling of the trial court excluding an answer to his question, on cross examination, to the plaintiff's witness as to whether he was engaged to the plaintiff or not, was undoubtedly well taken. It is always competent to inquire what relations exist between a party and his witness, for the purpose of showing the motive and influence under which the evidence is given and the existence of any bias or prejudice on the part of the witness. Such evidence, however, affects the credibility of the witness only; and if his evidence is wholly immaterial upon all the material issues of the case, an erroneous ruling upon such question furnished no valid reason for reversing the judgment.

That was the case here. No material question of fact was controverted on the trial, and the evidence of the witness could have been wholly stricken from the minutes without affecting the result in the least degree.

The defendant was not prejudiced by the ruling, and the judgment should, therefore, be affirmed.

All concur.

END OF CASES.

INDEX.

The **points decided are** denoted by the **name of** the **case** appended or "*Id.;*" **other points** indexed **as "authorities cited"** are such as are found in the decisions, either as *dicta* or argument, references to statutes, or in dissenting opinions.

Indexes to Notes and Briefs, found in preceding volumes in a supplement, have been found so generally approved as to entitle them henceforth to be incorporated into this general alphabetical arrangement under proper subheads.

ABANDONMENT. See Landlord and Tenant, 12.

ABSCONDING DEBTOR. See Attachment, II.

ACCOMPLICE. See Criminal Law.

ACCORD AND SATISFACTION. See Settlement.

ACCOUNT. See Equity, III.; Executors and Administrators, V.; Partnership, 2; Trusts, II. b.

1. The court of chancery may compel an account **for waste** done only as **incidental to** relief by **injunction** to stay the commission of further waste, and that only to prevent a multiplicity of suits.
Lippincott v. *Barton* (N. J.) 920

2. A **bill of particulars,** specifying items of damage, does **not** constitute an account.
Untermeyer v. *Bernhauer* (N. Y.) 709

3. Where, upon a bill for an account, the master recommends a **decree** for the plaintiff, and his report is confirmed by the court below, the fact that he disregarded considerable **vague testimony** is not ground for reversing the decree at the instance of the defendant.
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2. The **State** can only be sued with its own **consent,** and for liabilities which it chooses to assume.
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3. **Parties.** Where a party in control of goods contracts for their transportation, and is both consignor and consignee, it will be assumed that he had sufficient **title to maintain** an action for damages for **negligence** in **transportation.**
Swift v. *Pacific Mail Steamship Co.* (N. Y.) 811

4. Evidence that certain **seamen** are interested in oil will **not** make them **necessary parties,** where parties, having control of the oil, taken from whaling vessels, delivered it to carriers for transportation, and thereafter sued the carriers for **negligence in transportation.** *Id.*

5. A **mortgagor** cannot maintain a bill to **interplead** against one who claims, as agent of the **owner of** the **mortgage** under a power of attorney, to be entitled to the money due thereon, and against a daughter of such owner, who forbids the mortgagor to pay the money to such agent on the ground of the mental incapacity of the owner when she executed

the power of attorney, without **joining** such owner as a party to the bill.
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6. To a **bill** filed **for the construction of a will,** testator's heirs at law are necessary parties.
Lomerson v. *Vroom* (N. J.) 866

7. The **court of appeals** may **substitute** an **administratrix** in *certiorari* to review the action of municipal authorities in removing the relator from office, where, in the relator's lifetime, the proceeding was affirmed and *certiorari* quashed at special term, with costs, and the order of special term was affirmed at general term, with costs, and the relator's estate is liable for such costs.
People v. *Brooklyn* (N. Y.) 927

8. Where the executrix sold testator's property and put a portion of the proceeds into the hands of an agent, the **administrator de bonis non,** appointed after her death, may sue **in** his **own name.**
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9. Only such causes of action accruing during lifetime need be prosecuted by his **executors** or administrators **in** their **representative capacity.** *Id.*

10. If an injury to the property of a decedent, or its conversion, happens after his death, the **executor** or administrator may sue **in** his **own name.** *Id.*

11. Where the complaint by one as executor shows a cause of action in favor of the plaintiff in his individual character, **descriptive words** therein, such **as "executor,"** etc., may be **rejected, leaving** the action to stand as one in the **individual capacity** of the plaintiff.
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12. Under the Act of March 30, 1875, a **change of venue** in civil cases, on the ground that the defendant cannot have an impartial trial, is within the **discretion** of the court below; and a refusal to grant the change will not be reversed, unless the discretion has been abused.
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13. An **action for slander** for calling an attorney a blackmailer is not a case where a large number of the inhabitants of the county are interested adversely to the defendant so as to make it obligatory on the court to grant a **change** of **venue,** under the Act of 1875. *Id.*

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1. **Laws 1885,** chap. 183, § 7, to "Prevent Deception in the Sale of Dairy Products," etc., is not in violation of the Constitution of New York, nor subversive of the **constitutional** rights of liberty or the enjoyment of property.
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2. Producers of **oleomargarine** have no constitutional right to resort to devices for the purpose of making their product resemble dairy butter; and the **Legislature** has power to **prevent** such deception. *Id.*

3. Dealers in **oleomargarine** may be legally required to **sell** it **for what it** really **is** and upon its own merits. *Id.*

4. The statutory prohibition **is aimed** at a designed and intentional **imitation of** dairy **butter.** *Id.*

5. The **artificial coloring** of oleomargarine to make it resemble dairy butter, and thereby enhance its price, comes **within** the statutory prohibition against imitation. *Id.*

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1. **In assumpsit** on a book account **an affidavit** of defense alleging that plaintiff had, by agreement under seal, accepted the promise of a third person in payment of the debt, must **set forth** the **contract in full.**
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2. **In** an **action on** an **insolvent's bond** an affidavit of defense is sufficient, if it alleges that the bond was not forfeited on the day the insolvent's petition was dismissed; that the hearing was fixed not for that day but for a subsequent one, and had been continued by a rule, not yet disposed of, to show cause why the order dismissing the petition should not be rescinded, and that, on the day the petition was dismissed, the insolvent surrendered himself to the keeper of the county prison.
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I. WHEN LIES.

1. In **constitutional questions** the rule of *stare decisis* is obligatory upon itself.
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3. Said section 22 was not intended to include the **marine court of** the City of **New York.** *Id.*

4. An **order of general term affirming** an **order of special term** discharging a defendant from the jail limits and from arrest under a preliminary order of arrest, upon the ground that he was entitled to discharge under Laws 1886, chap. 672, is appealable to the court of appeals.
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6. Under Act April 1, 1874, an appeal **in equity** must be **taken within two years.**
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7. The courts have jurisdiction of an appeal **from** the **decision of a register of voters,** after the November election, when the appeal has been taken before such election.
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8. **Jurisdiction** having attached will **not** be **ousted by lapse of time,** except by the unmistakable intent of the Act that it should not continue beyond the day of the election. *Id.*

9. Under the Constitution, art. 4, § 22, when a trial is conducted by less than the whole number of the judges of a circuit court, a party may have the **question reserved for** the three **judges in banc;** and this decision will be conclusive.
Costigin v. *Bond* (Md.) 895

10. The motion for a **reservation** must be **entered during** the **sitting** at which the decision is made. *Id.*

11. Where the motion is **not so entered,** the court in banc has **no jurisdiction.** *Id.*

12. The word "**sitting**" does not **mean** the term, but only the time until the court adjourns for the day. *Id.*

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13. When the record does not show the precise ground upon which the case was decided, **parol evidence** may be given.
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14. The **theory** on which a **case was tried** in the lower court will prevail on appeal.
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15. **Objections** that copy of a judgment roll of a district court of Utah was not properly exemplified, not considered in the court of appeals, because **not raised at** the **trial.**
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16. Both parties having consented to litigate, it is **too late** on appeal **to object** to improper joining of parties.
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17. The court of appeals cannot grant relief, however unjust the verdict may be, unless the **question** is properly **presented by** an **exception.**
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18. Unless the **discretion** of the common pleas in refusing a decree in equity has been abused, it will **not** be **reviewed.**
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20. The appellate court has no power, in a common-law action, to review **conflicting evidence.**
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21. If the **evidence** is not so impossible that, as a matter of law, the jury cannot believe and rely upon it, the court of appeals has no power to **weigh** it.
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22. The court of appeals cannot regard a **reversal below** as having been made **on the facts,** unless this appears from the order of reversal.
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23. In the **absence of testimony,** the supreme court will **not assume** the sum allowed an auditor to be excessive.
McCann's Appeal (Pa.) 847

24. The court of appeals will **not correct informalities** upon a mere appeal from the judgment.
Syms v. *New York* (N. Y.) 225

25. Where there is a traverse of a plea, and on the trial the jury finds for plaintiff, the appellate court, if it **finds** that **plaintiff** was **not entitled** under the evidence to recover, **cannot render** a final judgment **for** the **defendant.**
Bradley v. *Galt* (D. C.) 846

26. Where a **default** has been regularly taken, and the case contains no exception worthy of consideration, the motion to **open** the default will be **denied,** with costs.
Schenck v. *Ringler* (N. Y.) 696

V. Reversal; Remittitur.

27. When the **court** is **divided** and the majority concur simply for reversal, it is not safe to treat anything as adjudicated, except the precise point.
Clews v. *Bank of N. Y. Nat. Bkg. Asso.* (N. Y.) 275

28. The court of appeals has no right to **amend** the **remittitur** by putting in some other condition than that imposed by the supreme court.
Symson v. *Selheimer* (N. Y.) 685

VI. Probate.

29. Upon an appeal from the orphans' court, the **record** must be shown in appellant's paper book, or the appeal will be dismissed.
Schultz's Appeal (Pa.) 867

30. The power of the **orphans' court** to **set aside a sale** of real estate, made in pursuance of its own order, will not be reviewed unless its **discretion** is grossly abused.
Frey's Appeal (Pa.) 154

VII. Costs.

31. Where, upon appeal to the general term **from** an **order denying** a motion for a **new trial, and also from** the **judgment** in a suit, and the general term affirms both the order and the judgment, and awards **costs** upon the appeal **from** the **judgment,** it has **no power** to **award costs** upon the appeal **from** the **order;** but such error should be corrected in that court.
Syms v. *New York* (N. Y.) 225

Briefs and Notes.

Lies upon question of costs. (N. Y.) 758

Finality of judgment. (N. Y.) 836, 765; (Pa.) 498

Order affecting substantial right. (N. Y.) 703, 783

Entered without special *allocatur* should be **quashed.** (Pa.) 155

Unauthorized appeal may be treated as a nullity. (Pa.) 655

Time. (N. Y.) 738

Questions open; conflicting evidence. (Pa.) 168

Theory of case. (N. Y.) 744, 780

Objections not taken below. (N. Y.) 278

Nonprejudicial errors. (Md.) 436; (N. Y.) 215, 796

Matters of discretion. (Pa.) 155, 895

Findings of fact. (N. Y.) 73, 278, 765, 782, 822; (Pa.) 200

Conclusiveness of findings by master. (Pa.) 558

Appellate court cannot interfere upon the ground of excessive damages. (N. Y.) 772

Presumption; as to jurisdiction of lower court. (N. Y.) 317

That plaintiffs would have proved what counsel in opening offered to prove. (N. Y.) 276

Affirmation of judgment as to one defendant and reversal as to another. (N. Y.) 814

Second appeal; law of the case. (N. Y.) 276, 329

Costs. (N. Y.) 226

ARBITRATION AND REFERENCE.

1. An action against a builder for the breach of a contract to erect a house within the stipulated time, is an **action for unliquidated damages,** in which the court cannot order a reference against objection.
Untermeyer v. *Bernhauer* (N. Y.) 709

2. A **bill of particulars,** specifying items of damage, does **not** constitute an **account.** *Id.*

3. If a **counterclaim** requires the examination of a long account, this will **not make** the action **referable.** *Id.*

4. Should the counterclaim ever require examination, a reference can be ordered as to it, **after trial of** the **issues.** *Id.*

5. When the motion for a reference is made upon an affidavit of plaintiff's attorney, also upon the pleadings and the bills of particulars, the **court** can **judge whether** any **account** will be **involved,** and no opposing affidavit is necessary. *Id.*

6. Where there is **no account** between the parties, the cause is **not referable.** Authorities cited. *Id.* 710

7. If an action is **nonreferable,** a counterclaim set up in the answer cannot **make** it so. Authorities cited. *Id.* 711

8. A written stipulation by the **attorneys** for the respective parties declared that **the compensation** of the **referee** should **be $20** "for every hearing." *Held,* that the word "hearing" could not include days **appointed for** a

hearing but on which no hearing in fact was had.
Mead v. *Tuckerman* (N. Y.) 753

9. A writ of **error** to a reference, under the Act of April 22, 1874, **brings up** only questions of law arising on bills of exception to the rulings of the judge; and his conclusions on the facts of the case must be regarded as the verdict of the jury.
Gonser v. *Smith* (Pa.) 187

BRIEFS AND NOTES.

Reference of **account.** (N. Y.) 710

On **motion** for reference, pleadings will control as to character of action. (N. Y.) 709

Withdrawal from referee, and submission to legal tribunal. (N. Y.) 754

Disregard of **admissions,** by referee; effect. (N. Y.) 779

Findings of fact by referee. (N. Y.) 679, 788

Omission. (N. Y.) 765

Fees of referee. (N. Y.) 753, 754

ARREST. See FALSE IMPRISONMENT; FALSE PRETENSES.

1. **Laws** 1886, chap. 672, **limiting period of imprisonment** within the jail liberties, upon execution against the person, does **not apply to** an order of **arrest** issued before a recovery has been obtained.
Levy v. *Salomon* (N. Y.) 783

2. An **order** of general term, affirming an order of special term, **discharging** a defendant **from** the **jail limits** and from arrest under a preliminary order of arrest, upon the ground that he was entitled to discharge under Laws 1886, chap. 672, is **appealable** to the court of appeals. *Id.*

ASSAULT AND BATTERY.

BRIEFS AND NOTES.

Attempt to **rape;** evidence of prior attempts. (N. Y.) 56

ASSESSMENTS. See MUNICIPAL CORPORATIONS, V.b; TAXES, III.

ASSIGNMENT. See JUDGMENT, 9; PATENTS.

1 The **mere possibility** of a subsequent acquisition of property cannot be transferred by assignment.
Lehigh Valley R. R. Co. v. *Woodring* (Pa.) 206

2. An assignment **of wages to be earned** in the future, executed when the assignor was not in employment, is void. *Id.*

BRIEFS AND NOTES.

Consideration. (Pa.) 209

Assignability of mere **expectancy,** or estate to arise in future. (Pa.) 209, 210

Of future earnings; validity. (Pa.) 209, 210

ASSIGNMENT FOR BENEFIT OF CREDITORS.

I. FORM; VALIDITY; CONSTRUCTION.
II. ASSIGNEE.
III. BY PARTNERSHIP.
BRIEFS AND NOTES.

See BANKRUPTCY; INSOLVENCY.

I. FORM; VALIDITY; CONSTRUCTION.

1. Under Act 1877, chap. 466, a general assignment for the benefit of creditors **takes effect from** the time of its acknowledgment and **delivery,** and not from the time of its record in the proper county.
Nicoll v. *Spowers* (N. Y.) 95

2. A general assignment **by a person living in one county and having** his **place of business in another** was acknowledged and delivered, and recorded only in the county in which assignor resided; subsequently a receiver was appointed in supplementary proceedings against the assignor, in the county wherein was his place of business, and thereafter the assignment was recorded in that county also; and not until after such **recording** was a copy of the order appointing the receiver filed in the county where the assignor resided. *Held,* that assignee's title related back to the delivery of the assignment, and gave the assignee **priority** over the receiver,—no rights of *bona fide* purchasers being affected. *Id.*

3. A general assignment for the benefit of creditors is not void because it **confers power** upon the assignee **to compound,** compromise, and release debts, nor because it confers power upon him to execute (in assignor's name, for such consideration in money or other thing, as he may deem sufficient) all such conveyances in writing and all such other instruments as, in his discretion, may from time to time be necessary to carry into effect the intent of the instrument.
Bagley v. *Bowe* (N. Y.) 253

4. Such latter power, construed with the whole context, does not confer **authority to sell** the assigned **property** on credit or to exchange it for other property. *Id.*

5. Although an assignment transferred all the property of the assignor, it may have been a **fraudulent contrivance** to embarrass or delay creditors; but this was a question for the jury. *Id.*

6. An authority to **sell** assigned property **on "credit,"** or "for cash or upon credit," as in assignee's judgment may appear best, or to convert the property into "money or available means," **renders** the assignment **void.** Authorities cited. *Id.*

7. A **trust creditor** is not entitled to a **preference** over general creditors of the insolvent.
Cavin v. *Gleason* (N. Y.) 285

8. The equitable doctrine that, as between **creditors, equality** is equity, admits of no exception founded on the greater supposed sacredness of one debt, unless it appears there

is some specific recognized equity which entitles claimant to preferential payment.
Cavin v. *Gleason* (N. Y.) 285

9. The court may order **trust property** to be **restored to** the **trust.** But to follow trust funds they must be identified. *Id.*

10. Where a **trust fund was misappropriated** by a trustee before his assignment as an insolvent debtor, it is **not entitled** to **preference** in payment from funds in assignee's hands. *Id.*

11. The **burden** is upon a judgment creditor **to set aside** an assignment made by his debtor for fraud.
Crook v. *Rindskopf* (N. Y.) 727

12. **Doubtful** and ambiguous **phrases** are to be **construed** so as to authorize a lawful disposition of the property only. *Id.*

13. Such **construction** should be given as is **consistent with innocence.** Authorities cited. *Id.* 731

14. **Assignors** are **estopped** from controverting the existence of the conditions which they have provided for. Authorities cited. *Id.* 729

II. ASSIGNEE.

15. It is not necessary, in order to enable the assignee **to sue,** that he **should aver** in his bill that he has given bond and filed an inventory as required by the Assignment Act.
Grant v. *Crowell* (N. J.) 122

16. The assignee may bring suit to **recover property fraudulently conveyed** by assignor, if such property is required to satisfy the debts of the creditors. *Id.*

17. The assignee **cannot recover money lawfully paid by** the **assignor** to the defendant, and which the latter lawfully received. *Id.*

18. If the **creditors have an equity** against the defendant, in respect to the matters set up in the bill, they are the proper ones **to enforce** it. *Id.*

III. BY PARTNERSHIP.

19. An insolvent partner may devote his **individual property to firm debts.**
Crook v. *Rindskopf* (N. Y.) 727

20. In an **assignment** by a firm of two persons, after the payment of the firm debts, the residue shall be divided into **two funds** for the payment of **individual creditors.** *Id.*

21. Upon satisfaction of firm debts it is the legal duty of the assignee to determine the **interest of** the **individual partners in** the **surplus.** *Id.*

22. Until **creditors of** the firm are aggrieved they have no cause of **action.** *Id.*

23. It may be shown in **rebuttal** of an inference **of fraudulent intent,** arising from provisions for individual debts, that there were in fact no such debts to be affected by such provisions. Authorities cited. *Id.* 729

BRIEFS AND NOTES.

Power of corporation to **make.** (N. Y.) 96; (Pa.) 528

Validity; fraudulent intent. (N. Y.) 254, 255

Fraudulent preference avoids. (N. Y.) 255, 728, 729

Fictitious debt avoids. (N. Y.) 728

Execution; record. (N. Y.) 97

Place of **record.** (N. Y.) 97

Manner of **administering** estate. (N. Y.) 96

Assignee; title. (N. Y.) 96, 254

Illegal act of assignee; effect. (N. Y.) 254

ASSUMPSIT. See CORPORATIONS, 13.

1. Assumpsit lies, where the contract is not under seal, against an assessment life insurance corporation **for assessments** upon members **of** the **corporation,** due to a deceased member's widow.
Passenger Conductors L. Ins. Co. v. *Birnbaum* (Pa.) 635

2. In **assumpsit** on a book account, an **affidavit of defense** alleging that plaintiff had, by agreement under seal, accepted the promise of a third person in payment of the debt, must set forth the contract in full.
Lucas Coal Co. v. *Hunt* (Pa.) 147

3. The **purchaser** of iron ore, under a contract by which he **retains part** of the price **and promises** vendor to **pay** it to a **third person,** not a party to the contract, if such third person owned the land from which the ore was taken, but if not then to have nothing to pay, is **not estopped** from **setting up** his own **title** to the land **as a defense** to assumpsit by the third person for the sum so retained.
Grim v. *Thomas Iron Co.* (Pa.) 506

4. If one delivers money to another under **promise** of latter **to deliver it to a third person,** who has a beneficial interest therein, the latter may maintain an **action** therefor against promisor. Authorities cited. *Id.* 508

5. In assumpsit by an executor **for purchase money** of land conveyed by testator to his son, the **question** whether the son was to have the land partly as a gift is **for the jury.**
Horn v. *Buck* (Pa.) 509

BRIEFS AND NOTES.

If one person makes a **promise for** the benefit of a **third,** the latter may **maintain an action** upon it. (Pa.) 640

Assumpsit **for purchase money** due on parol contract for sale of real estate cannot be maintained. (Pa.) 153

Plaintiff cannot abandon the fraud and recover as on contract for **money had and received.** (N. Y.) 269

ASSUMPTION OF RISK. See MASTER AND SERVANT, I.

ATTACHMENT.

I. WHAT SUBJECT TO.
II. NONRESIDENT OR ABSCONDING DEBTOR; FOREIGN.
III. VACATION; LIABILITY OF OFFICER.
BRIEFS AND NOTES.
See GARNISHMENT.

I. WHAT SUBJECT TO.

1. **A fund held in trust** under a will, and directed by a decree of the orphans' court "to be paid to defendant, to be applied to his personal support and maintenance, or in his discretion to the support and education of any children he may have, so as the same shall not be in any manner assignable or anticipated, nor liable to his debts or liabilities, or that the trustee may, if thought needful by him, apply the fund in like manner for the benefit of the said defendant and any of his children," is **not attachable.**
Prentice v. *Pleasonton* (Pa.) 484

2. **Chattels in a mortgagor's possession** may be attached for his debts.
Blauvelt v. *Fechtman* (N. J.) 107

3. Where by the mortgage, mortgagor is entitled to possession until default, the **chattels** do **not, before default, belong to mortgagee,** within "Act for Trial of Small Causes," § 60, Rev. 550. *Id.*

4. **Pension money** is subject to attachment in the hands of a depositary, under Act of June 16, 1836.
Rozelle v. *Rhodes* (Pa.) 656

5. **Money due** or about to become due is not attachable. Authorities cited. *Id.* 658

6. **Commercial paper** cannot be attached **before** it becomes **due.** Authorities cited.
Fitch v. *Brower* (N. J.) 372

7. A share of a judgment defendant as **legatee** in the estate of a decedent, in the hands of an executor, may be attached by service upon the garnishee of a writ of attachment issued on the judgment, in the **manner** provided for the service of a writ of summons in a personal action.
Purves v. *Lex* (Pa.) 891

II. NONRESIDENT OR ABSCONDING DEBTOR; FOREIGN.

8. In attachment against a nonresident or **absconding debtor, compliance with** the **statute** is essential.
Randle v. *Mellen* (Md.) 392

9. If the attachment be **quashed,** the whole **proceeding,** including the summons and short note, **falls.** *Id.*

10. **When** an attachment has been so **quashed,** the subsequent **return** of **non est to** an **alias** summons will be of **no avail.** *Id.*

11. When an attachment issued against an absconding debtor has been quashed, the creditor cannot obtain **successive attachments upon** two **returns of non est** to writs of summons issued in the same attachment proceeding. *Id.*

12. An **affidavit of cause** of action **in foreign** attachment, stating that a partnership had been formed between D and T, to manufacture a certain patented article; that D was to be a silent partner; that they granted the patent-right to the garnishee for a royalty, recited "to be paid to T;" but that the grant was in consideration that the royalties should be paid to D, and that T received them for their joint benefit,—*Held,* to be sufficient, in connection with the agreements of partnership and grant of the patent right.
Davis v. *Tingley* (Pa.) 889

13. One having possession of goods or effects may **surrender** them in obedience to a judgment in a foreign attachment, although he may happen to be **in a foreign jurisdiction** at the time the writ issued. Authorities cited.
Fitch v. *Brower* (N. J.) 372

14. A **judgment** in attachment **against a nonresident, not personally served,** is good as a personal judgment against him, where the record shows a general appearance by his attorneys; and such judgment is sufficient upon which to enter judgment against a garnishee.
Donoghue v. *Hanley* (Pa.) 604

III. VACATION; LIABILITY OF OFFICER.

15. **Upon vacation,** it is the **sheriff's duty** to deliver the property to defendant or the person entitled thereto.
Bowe v. *Wilkins* (N. Y.) 784

16. **A bond of indemnity** to the sheriff does **not cover** a **detention** after vacation of attachment. *Id.*

17. Where, upon vacation, the **sheriff** has **refused on demand** to deliver the property, and a recovery has been had against him, the **sureties** on the bond **of indemnity** are **not liable** to the sheriff on the amount of such recovery. *Id.*

18. Where the sole ground of recovery against such **sheriff** was the demand and refusal, he **cannot allege,** in an action on the indemnity bond, that he had a **right to retain** the property. *Id.*

19. Where the sheriff **levied** the **execution against himself** on the goods which he had attached and kept in his hands, and sold them on the execution, and turned over the money to the attorney for the plaintiff in the execution,—*Held,* the knowledge of such attorney as to where the money came from would be no **ratification** by the plaintiff in the execution of his prior **illegal act** in refusing to surrender the goods. *Id.*

20. An **attempt to defend** the sheriff is **not a ratification** by obligors in the indemnity bond of such act, when sued by the sheriff on their bond. *Id.*

BRIEFS AND NOTES.

Of **debt not** yet **due.** (Pa.) 892, 893

Manner of attaching debt. (Pa.) 894

Manner of attaching **legacies.** (Pa.) 893-894

Of money in hands of **depositary.** (Pa.) 656

Compliance with **statute.** (Md.) 393

Against nonresident or **absconding debtor;** proceedings regular by statute. (Md.) 392, 393

Summons and entire case fall on quashing for errors on face of proceedings. (Md.) 392, 393

Foreign attachment; action of account render. (Pa.) 890

Foreign attachment; affidavit of cause of action; sufficiency. (Pa.) 890

Judgment *in rem*. (Pa.) 608

Liability of sheriff and sureties on indemnity **bond,** for detention of property after attachment **vacated.** (N. Y.) 735, 736

ATTORNEY AND CLIENT. See LIBEL AND SLANDER, 1, 2; TRIAL, II.

1. **Notice** of an unrecorded deed **to an attorney** or agent is equivalent to notice to principal.
Dickerson v. *Bowers* (N. J.) 872

2. A **general guardian may employ** an attorney to obtain possession of the ward's lands, **and** make an agreement to **pay** such attorney a certain portion of the property recovered.
Re Hynes (N. Y.) 682

3. An **agreement** by a general guardian **to pay** an attorney, in consideration of his services in attempting to recover possession of the ward's lands, one **third** of the value of all property **recovered** held valid. Ruger, *Ch. J.*, and Earl, *J.*, dissent. *Id.*

4. Under said agreement, the attorney was entitled to his stipulated **funds** arising **from** the **sale of lands** of the deceased father of the infants in another State, for which notes were given. *Id.*

5. The **fee of counsel employed** by a third person **to assist** such attorney, in litigation to recover said real estate, should **not** be **deducted** from the amount to be paid to said attorney under said agreement. *Id.*

6. The **compensation** of an attorney is not, in the absence of an agreement, necessarily coextensive with the taxable costs for conducting a number of similar cases, involving only the most simple questions of fact; and the attorney is only entitled to what his **services** are **reasonably worth.**
Starin v. *New York* (N. Y.) 787

BRIEFS AND NOTES.

Liability for false imprisonment. (Pa.) 503

Appearance by; effect. (Pa.) 607

Fees; amount. (N. Y.) 788

AUCTION.

BRIEFS AND NOTES.

Purchase of number of articles at different prices at auction constitutes entire **contract.** (Pa.) 181

AUDITOR.

In the absence of testimony, the supreme court will not assume the **sum allowed** an auditor to be excessive.
McCann's Appeal (Pa.) 847

BRIEFS AND NOTES.

A mere **ministerial** officer. (Md.) 407

Report; conclusiveness of. (Pa.) 202

Findings of fact. (Pa.) 849

BAILMENT.

1. It seems that a **contract** expressly "of renting only and not a sale, conditional or otherwise," **by which a sewing machine** "valued at **$50**" is **"rented"** for fourteen months for the sum of **$10**, and the further sum of **$3** per month upon certain conditions, the machine to be delivered to lessor at the expiration of the time for which it is rented, with the "option" on lessee's part to "purchase" it within ten days thereafter for **$1**——, is a bailment.
Wheeler & W. Mfg. Co. v. *Heil* (Pa.) 179

2. A **bailee** for safe keeping must return the thing bailed to the bailor, or according to the bailor's directions. He **cannot require proof** that the **bailor is** also the **owner.**
McCafferty v. *Brady* (Pa.) 597

3. It is **no defense** to **assumpsit** by the bailor **against** the bailee to allege that the thing bailed **belonged to a third** person. *Id.*

4. The **Statute of Limitations is** not a bar to the obligation of a bailee of money to hold or invest, where there is no stipulation as to the length of time he should **hold it,** and there has been no demand.
Rusling v. *Rusling's Exrs.* (N. J.) 139

BRIEFS AND NOTES.

Deposit defined. (Pa.) 657

Bailee cannot dispute bailor's title. (Pa.) 599

Liability to bailor for conversion. (Pa.) 181

BANKRUPTCY. See ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. A judgment founded upon a **debt** which existed when bankruptcy proceedings were commenced, and was provable **therein,** is **discharged** by the discharge **in bankruptcy.**
McDonald v. *Davis* (N. Y.) 754

2. It is competent to interpose **the discharge** to any proceeding to enforce the judgment by asking for a **perpetual stay** upon the execution. *Id.*

3. An **order** in the bankruptcy court **vacating** the **stay** has **no effect** by way of limiting the subsequent discharge of defendant; and such **discharge** is a perfect defense in an action upon the judgment. *Id.*

BRIEFS AND NOTES.

Discharge; effect. (N. Y.) 755

Discharge of judgment; defense in action upon judgment. (N. Y.) 755, 756

Effect of laches by bankrupt. (N. Y.) 756

BANKS AND BANKING.

1. **An** action to recover **penalties** imposed by **Laws** 1870, **chap.** 163, for **taking discount in excess of 7 per cent,** could not be maintained after the Act of 1880, **chap.** 567, **fixing** bank discount at 6 per cent.
Nash v. *White's Bank of Buffalo* (N. Y.) 690

2. By the **system of exchanges among** the **banks of Rochester,** defendant bank,—

receiving a certified draft with notice that it represented an item merely in the exchange account between the certifying bank and plaintiff bank, and that it was certified for the purpose of being used in the settlement of that account at the close of the day, and with notice that the certifying bank was diverting it from the purpose for which it had been certified by plaintiff bank,—did not become a holder in good faith.
Flour City Nat. Bank v. *Traders Nat. Bank* (N. Y.) 757

3. In an action to make defendant bank **responsible for** the amount of a **draft, on** the **ground** that the **teller** of defendant had, **on inquiry** of him **if** the **certification** was **good, answered** in the **affirmative,**—*Held*, that the plaintiff had a **right,** under the circumstances offered to be proved, **to go to** the **jury** on the question whether such inquiry was understood by the parties as referring to the validity of the certification when exhibited to the teller, or only to the genuineness of the marks of certification; and also whether it was culpable negligence to answer the question without referring to the books.
Clews v. *Bank of N. Y. Nat. Bkg. Asso.* (N. Y.) 275

4. An **action** by a stockholder of a bank against its **directors,** to call them **to account** as trustees, is **triable by** the **court.**
Brinckerhoff v. *Bostwick* (N. Y.) 711

5. An agreement by a **savings bank** to make **deposits** in an incorporated bank is permissible, where the deposit does not exceed the limit prescribed by Laws 1875, chap. 371, § 27; and an agreement by the bank of deposit to pay **interest** does not convert the deposit into an unauthorized loan.
Erie County Sav. Bank v. *Coit* (N. Y.) 89

BRIEFS AND NOTES.

Power of **directors** to assign property to **trustee** to pay debts. (Pa.) 528

Relation between directors and shareholders. (N. Y.) 711, 713

System of **exchanges** among. (N. Y.) 758

Presentation of **check;** refusal by bank; liability. (Pa.) 210

Relation of debtor and creditor. (N. Y.) 36

National; circulation of notes as money. (N. Y.) 758

Savings; powers and duties of trustees, in management of. (N. Y.) 89

Must always keep large sums of money on hand to meet sudden calls and emergencies. (N. Y.) 40

BASTARDY.

BRIEFS AND NOTES.

Form of **verdict.** (N. J.) 111

BENEFIT SOCIETIES.

1. The **by-laws** of a beneficial corporation provided that $1,000 should, at the death of each member, be paid to the person designated by deceased; and if no designation made, then to his widow; if no widow survives, then to his child or children, etc. A member having a wife and children, borrowed $1,000 from his sister who was designated **as beneficiary** on the books of the lodge. She paid his dues until his death. *Held*, that she was entitled to recover the amount of his interest from the corporation.
Manealy v. *Knights of Birmingham* (Pa.) 633

2. Where an Act provides that in an action for the recovery of an **assessment a certificate** of a mutual insurance company shall be **evidence** to prove the claim to the assessment, **unless** the **party** sued will **make** a certain **affidavit,** if such party makes the affidavit, the company must prove its claim.
Susquehanna Mut. F. Ins. Co. v. *Gackenbach* (Pa.) 588

3. The amount of the **assessment** rests in the **discretion of** the board of **directors.** *Id.*

4. A reasonable amount may be included in the assessment for **expenses and losses** by reason of **insolvent members.** *Id.*

5. The directors have no right to make an **assessment** on another **basis** from that provided **by** the **by-laws** of the company. *Id.*

6. The **burden** of **showing fraud** of officers is on defendant. *Id.*

7. **Assumpsit lies,** where the contract is not under seal, against an assessment life insurance corporation **for assessments** on members, due to a deceased member's widow.
Passenger Conductors L. Ins. Co. v. *Birnbaum* (Pa.) 635

BRIEFS AND NOTES.

Designation of beneficiary. (Pa.) 634

BILLS AND NOTES. See CHARTER PARTY; GUARANTY.

1. A note **by a married woman** to a firm of which her husband is a member is **void** at law.
Nat. Bank of Rahway v. *Brewster* (N. J.) 482

2. Where **notes** of a company have been unlawfully **converted by** its **president,** the **company may recover** possession of them from the holder by replevin, unless he is a *bona fide* purchaser for value, without notice.
Davis Sewing Mach. Co. v. *Best* (N. Y.) 63

3. In an action of **replevin** for **notes not enforceable** as the pecuniary obligations of a corporation, by reason of their defective execution, **only nominal damages** can be **recovered** for their detention. *Id.*

4. The **burden** of **proving** a purchase in **good faith** and for value devolved upon defendant, after it was established that the notes had surreptitiously been put in circulation. *Id.*

5. Where **notes** purporting to be those **of** a **company** were **not properly executed** because not signed by its president, and this defect was apparent upon the face of the paper, it **deprived** the notes of the **character of commercial paper.** *Id.*

6. The transferee of such notes, by paying value for them, is not a **bona fide purchaser.** *Id.*

7. One drawing the form of a promissory note, which is unsigned, and which falls into the hands of another, does **not** thereby **authorize** the holder **to attach** the **maker's signature.**
Davis Sewing Mach. Co. v. *Best* (N. Y.) 63

8. One buying commercial paper which remains in some essential particular **incompleted** and imperfect, is not a *bona fide* holder. *Id.*

9. **Authority** given by a resolution of a company **to its treasurer to have** its **notes signed** only authorizes him to have them signed by the officers who had theretofore been authorized to sign such instruments for the corporation. *Id.*

10. A negotiable instrument **must be a complete** and perfect instrument **when it is issued,** or there must be authority reposed in some one afterwards to supply anything needed to make it perfect. Authorities cited. *Id.*

11. Where an indorser of a note has transferred it, but is still liable thereon as indorser, and makes an **agreement** for a valuable consideration **with a third person to pay** the **note,** the transferee and holder of the note may maintain an action against such third person to enforce payment of the note.
Litchfield v. *Flint* (N. Y.) 41

12. The legal obligation of the promisee to the holder of the note creates a **privity by substitution** with the promisor. *Id.*

13. Where such note is subsequently retransferred to the **indorser,** the latter, having fulfilled such agreement on his part, may maintain an **action** thereon **against** such **third person** to enforce payment. *Id.*

14. The **burden of proving** the **indorsement and delivery** of a **note** by the maker, who is also the first indorser, to a second indorser, and its indorsement and delivery by the latter to indorsee is on the indorsee in an action by him against the maker.
Long Island Bank v. *Boynton* (N. Y.) 738

15. As a defense to a past due promissory note, signed by the defendant and payable to the plaintiff's testator; the defendant alleged that the note was given for the **accommodation** of the testator, evidence in support of such allegation that the date of the note was written with ink different from that used in the rest of the note, and that when the note was protested he had sent notice to the testator, complaining that the testator did not attend to his business, to which the testator replied that it was the defendant who did not attend to his business,—*Held,* properly submitted to the jury, and that a comment upon its **inadequacy** was not error.
Potteiger v. *Potteiger* (Pa.) 530

16. Where a maker of a note desires to pay it, but two persons claim to be entitled to such **payment,** he is entitled to a bill of **interpleader.**
Fitch v. *Brower* (N. J.) 371

17. Commercial paper cannot be **attached before** it becomes **due.** Authorities cited.
Id. 372

18. A note can be **attached in the hands of** a commercial **agent before maturity,** subject to the rights of the *bona fide* holder before such maturity. Authorities cited. *Id.*

BRIEFS AND NOTES.

Formalities as regards negotiable paper of corporation. (N. Y.) 64

Recollections of attesting witness as to circumstances attending **signature.** (Pa.) 203, 204

Debtor's note for existing indebtedness does not **merge** indebtedness. (N. Y.) 264

Negotiability; bona fide purchaser; rights. (N. Y.) 823, 824

Bona fide holder; notice. (N. Y.) 64, 758

Issue of note with name of payee in blank will not destroy negotiability. (N. Y.) 64

Contract of **indorsement** is independent of note. (N. Y.) 788

Drafts; acceptance. (N. Y.) 808

Action on; evidence of **consideration.** (N. Y.) 788; (Pa.) 531

Burden of proving want of consideration is on defendant. (Pa.) 531

Action upon note made by individual to a firm of which he is a member. (N. J.) 482

BILLS OF CREDIT. See STATE AND STATE OFFICER, 1.

BILLS OF LADING. See CARRIERS, 7-10.

BILLS OF PARTICULARS. See PLEADING, II.

BOARD OF HEALTH. See HEALTH.

BODY-STEALING.

1. Penal Code, § 311, against body stealing, does not apply to **exhumations by public authorities** for ascertaining whether a crime had been committed.
People v. *Fitzgerald* (N. Y.) 227

2. Where the **exhumation** is made publicly, on open application to the officer of justice charged with the duty of inquiring into the cause of such death, the statute cannot be used to impose punishment upon the persons concerned in the exhumation, **in case of irregular proceedings.** *Id.*

3. Where the affidavits furnished by the defendant to the coroner made a strong case to lead the latter to believe that a murder had been committed, and that an examination of the body, which was within his jurisdiction, would disclose the fact, and defendant **sought** such **examination and asked** the **coroner to make it,** although her motive was some **pecuniary advantage** for herself by making defamatory charges, and she committed a wrong, it was **not** the **crime of body-stealing.** *Id.*

BRIEFS AND NOTES.

Elements of crime. (N. Y.) 229

BONA FIDE PURCHASER. See BILLS AND NOTES, 6, 8.

BONDS. See EXECUTORS AND ADMINISTRATORS, VIII.; MUNICIPAL CORPORATIONS, 7; PRINCIPAL AND SURETY; SHERIFF.

1. Laws 1869, chap. 909, § 4, amended by Laws 1871, chap. 283, providing for the **appropriation of taxes** to payment of **municipal bonds** in **aid of railroads,** applies to any municipality which has such bonds outstanding.
Clark v. *Sheldon* (N. Y.) 923

2. It makes no difference as to the **duty of** the **county treasurer** that the taxes were not expressly collected or paid over to him for said purpose. *Id.*

3. Section 4 is **not** in conflict with the Constitution. *Id.*

4. It is no defense to a proceeding by a taxpayer, to compel such application, that the petition does not put the amount of taxes claimed to be applicable to that purpose high enough; the county treasurer may be compelled to set aside for **a sinking fund** all the taxes which may appear to have been paid to him for that purpose. *Id.*

5. Nor is it an answer to such proceeding that if the county treasurer should do so, there would be a **deficiency in other funds.** *Id.*

6. An undertaking given on the removal of an action for claim and delivery from the District Court of New York City to the common pleas, **not** being made **under** any **statutory authority,** is **void.**
Mittnacht v. *Kellermann* (N. Y.) 714

7. **Sureties** are **not estopped by** any **recital** in the undertaking **from availing** themselves **of** the **invalidity** of the instrument, when sued thereon. *Id.*

8. Bonds taken by public officers, purporting to be **taken under statutory authority, but** which are **not actually authorized** by the statute or do not conform with its provisions, are **void.** Authorities cited. *Id.* 717

9. The **condition** of a bond is **not** to be **limited to** the language of the **recital,** where the language of the condition clearly shows an intention to incur a liability not in terms referred to in the recital. Authorities cited.
People v. *Lee* (N. Y.) 88

BRIEFS AND NOTES.

Construed strictly in favor of obligors. (N. Y.) 735

Recitals; estoppel. (N. Y.) 716

When recital limits application of general words in contract, part of instrument. (N. Y.) 86

BOUNDARY.

A division fence established by owners of adjoining lands and **acquiesced in** by them and their successors for twenty-one years is conclusive upon them and those holding under them.
Grove v. *McAlevy* (Pa.) 143

BRIEFS AND NOTES.

Division **fence;** limitation of actions. (Pa.) 145

Fence will not be taken as monument unless named in description. (Pa.) 574

Courses and distances yield to **monuments.** (Pa.) 573

BROKERS. See PRINCIPAL AND AGENT, II.

BURDEN OF PROOF. See EVIDENCE, I.; WILL, 4, 5.

BURGLARY.

Where the "breaking," which constitutes the essential element of burglary, stands as an uncontradicted fact, the court may decline to charge the jury that they may **convict of a misdemeanor,** under Penal Code, § 505.
People v. *Meegan* (N. Y.) 77

BURIAL GROUNDS. See CEMETERIES.

CANALS.

1. Act of 1870, chap. 321, permitting claims for damages sustained from state canals, does not extend to **damages from** their **navigation.**
Rexford v. *State* (N. Y.) 762

2. Where the **master of a canal boat,** on the way to his boat, in **climbing** up a **bridge** by irons fixed therein, furnished by the State and serving as the rungs of a ladder, was **injured** through a loose stone falling from the wall,—*Held,* that the **board of claims** had **jurisdiction** of the claim for the damages. *Id.*

3. Until Laws 1870, chap. 321, **canal appraisers** had **no jurisdiction over injuries** from neglect, or which were **temporary** in their character.
Heacock v. *State* (N. Y.) 330

4. Where, in raising the banks of a state canal, the **banks** are built of loose earth, so that **leakage** occasioning injury results, this is, on its face, a **negligent** act. *Id.*

5. **A coffer dam,** built by the State for restraining waters of a river while enlarging a canal, a portion of which was permitted to remain in the shape of an island, after its purpose was accomplished, is a **temporary obstruction** merely, with which the Act of 1830 had nothing to do. *Id.*

6. The **Act of 1870** does **not confer** new **jurisdiction** to hear claims **for taking** of **land** in fee, or for the appropriation of a continuous and permanent easement by the State.
Stewart v. *State* (N. Y.) 333

7. For a **claim for a permanent easement taken by** the **State** for the use of the canals, and corresponding damages, claimant has **no remedy under Act** of 1870. Such claim must be presented in one year. *Id.*

8. Under Acts February 25, 1826, and April 9, 1827, the board of **canal commissioners** had **power to purchase lands** through which the Pennsylvania Canal was intended to pass, without limitation either as to amount or quality.
Harris v. *P. & N. Y. Canal & R. R. Co.* (Pa.) 901

9. Land so purchased became *ipso facto* **canal land,** and appurtenant to the canal. *Id.*

10. Until Act of April 9, 1827, the board received **authority to sell the remainder not occupied by** the **canal** in their discretion.
Harris v. *Pa. & N. Y. Canal & R. R. Co.* (Pa.) 901

11. **Land so purchased** and not sold by the board, although only **partially occupied** by the **canal, passed** by a **sale,** under the Act of April 21, 1858. *Id.*

BRIEFS AND NOTES.

Pennsylvania Canal; purchase and sale of **lands.** (Pa.) 903

Jurisdiction of canal appraisers. (N. Y.) 330, 331

Damages for destruction of property by building of dam; time of presenting claim. (N. Y.) 335, 334

Liability of State for damages for personal injuries received through defective bridge over canal. (N. Y.) 763

Liability of State for permanent and temporary injuries from defective construction of state canal bank. (N. Y.) 330

CARRIERS.

I. OF GOODS.
II. OF PASSENGERS.
BRIEFS AND NOTES.

See SHIPS AND SHIPPING.

I. OF GOODS.

1. Where a **party in control of goods** contracts for their transportation, and is both consignor and consignee, it will be assumed he had sufficient **title to maintain** an **action for** damages for **negligence** in transportation.
Swift v. *Pacific Mail Steamship Co.* (N. Y.) 811

2. Evidence that certain seamen are interested in oil will **not** make them **necessary parties,** where parties, having control of the oil taken from whaling vessels, delivered it to carriers for transportation and thereafter sued the carriers for negligence in transportation. *Id.*

3. A carrier over a portion of a continuous line may **contract to carry from beyond** its own **terminus** to its terminus, as well as beyond its terminus. *Id.*

4. **Connecting** carriers are competent to make a joint contract for transportation and become **jointly liable** for loss or damage. *Id.*

5. An **action** against a common carrier for breach of contract, or of his duty to carry, must be **brought in** the **name of** the **owner** of the goods. Authorities cited. *Id.* 814

6. Where, by the terms of a contract, **freight** is not to be **paid** until **after delivery** of goods, the carrier cannot claim a **lien.** Authorities cited.
Wiles Laundry Co. v. *Hahlo* (N. Y.) 283

7. A carrier is **estopped from denying** the **acts of its local freight agent,** with power to issue bills of lading only upon actual receipt of property for transportation, **in fraudulently issuing bills of lading** whereby third persons suffer damages by advances thereon.
Bank of Batavia v. *New York, L. E. & W. R. R. Co.* (N. Y.) 823

8. **A special contract** for transportation of goods can **not** be **abrogated** or altered **by** the **subsequent** signing and mailing of **bills of lading** by the carriers, which did not reach the consignor,—who was also the consignee—until after the loss occurred.
Swift v. *Pacific Mail Steamship Co.* (N. Y.) 811

9. A **bill of lading protects** all persons becoming the owners or custodians of the goods.
Woodruff v. *Havemeyer* (N. Y.) 776

10. A carrier, desiring to limit its responsibility on bills of lading to a delivery to the named consignee alone, must stamp its **bills "non-negotiable."**
Bank of Batavia v. *New York, L. E. & W. R. R. Co.* (N. Y.) 823

11. Whether a **deck load** on a canal boat was **properly covered,** so as to protect it from rain, is not a subject for expert testimony; it is a **question for** the **jury.**
Schwinger v. *Raymond* (N. Y.) 747

II. OF PASSENGERS.

12. It is the duty of a **passenger** to **go inside** the **car** when requested so to do by the conductor, although there may be no unoccupied seats.
Graville v. *Manhattan R. Co.* (N. Y.) 772

13. A woman in **alighting** from a railroad car at a station, in the night-time, fell and **was injured,** and sued the company for negligence in that the station **platform was too far from** the **car.** The platform had been in use for several years, and no one had ever before been injured or inconvenienced on account of its distance from the cars. *Held*, the **company** was **not** legally **responsible.**
Laflin v. *Buffalo etc. R. R. Co.* (N. Y.) 793

14. When a **structure** has uniformly **proved safe,** its **use** may be **continued** without the imputation of carelessness. *Id.*

BRIEFS AND NOTES.

Right of action for negligence in transportation **of goods.** (N. Y.) 814

Contract to carry beyond own terminus. (N. Y.) 812–814

Bills of lading. (N. Y.) 813

Negotiability. (N. Y.) 823

Rights of holder. (N. Y.) 824

Construction. (N. Y.) 776–778

Presumption that goods transported under. (N. Y.) 812

Connecting; liability of. (N. Y.) 812–814

Duty of, to **passengers** standing on platform. (N. Y.) 772

Limitation of liability. (N. Y.) 778

CEMETERIES.

1. The City of **Newark** has no **title to** the land known as "the **old burying ground,**" except such as it may have under

the Act of 1804 and its charter; if the Indian title is valid, the city has no title under it.
Stockton v. *Newark* (N. J.) 458

2. If title to land was held by the township under Act of 1804, in **trust for a burial ground,** the city holds it upon the same trust. *Id.*

3. A **trust** for a burying place **devotes** the ground **to** the perpetual repose of the remains of the dead. *Id.*

4. If the **Act of 1886** gives the city the power to destroy the trust, such Act is **unconstitutional.** *Id.*

5. The Act of 1886 is not an exercise of the **police power** of the Legislature. *Id.*

6. The fact that the place in question has **become a nuisance,** from the neglect by the city to take proper care of it, is **no reason** why the city should be permitted **to** go still further and **destroy** the **use** altogether. *Id.*

BRIEFS AND NOTES.

Charitable uses. (N. J.) 458

CERTIORARI.

1. *Certiorari* to review a decree confirming a report of viewers, **laying out** a public **road, taken** more than **two years** after final confirmation of the report, will be quashed.
Supers. of Saucon Township v. *Brodhead* (Pa.) 496

2. In the absence of notice of the completion of the **tax assessment** roll, the fifteen **days** during which *certiorari* may be **applied for** will not be set running.
People v. *Hicks* (N. Y.) 789

3. On *certiorari* to review alleged erroneous assessment, where the question of **value of property assessed** is purely one of fact, it is **not open** to review by the court of appeals.
People v. *Assessors of Wilson* (N. Y.) 51

4. Where *certiorari* **to** the **commissioners of** a department of a **city,** reciting **that** a detailed **fireman** was **removed,** and commanding them to make return, and the affidavit states that he was removed without cause, and the commissioners **return** thereto only their resolution that "inspector of kerosene oil be dismissed," such return is an admission that, while the fireman occupied such position, he was summarily dismissed by such resolution.
People v. *Comrs. of Brooklyn* (N. Y.) 770

5. But where the **return admits** the **facts** stated in the writ, or is silent as to them, such **facts** become important, and must be **considered,** and have effect upon the hearing. *Id.*

6. Under the Code, § 2188, where the return traverses the facts, the **hearing** must be **confined to the facts** stated **in** the **return.** *Id.*

BRIEFS AND NOTES.

Statute of **Limitations.** (Pa.) 498
Questions open. (Pa.) 638
Objections not taken below. (Pa.) 498

CHANGE OF VENUE. See ACTION, 12, 13.

CHARGE OF COURT. See CRIMINAL LAW, III.; HOMICIDE, 12; TRIAL, IV.

CHARITIES AND CHARITABLE USES. See DEVISE AND LEGACY, IV., 10.

A will provided the residue of the estate was "to be kept in reserve for further consideration in the way of charitable purposes in a liberal way, not to any particular creed or sect of religion." *Held*, that testator's intention was to give the **residue to the executors** in trust for such charitable **purposes as** they may **think proper.**
Claypool v. *Norcross* (N. J.) 917

BRIEFS AND NOTES.

Burial grounds. (N. J.) 458
Devise in trust for. (N. J.) 917
Devise for charitable uses. (Pa.) 663

CHARTER-PARTY.

Defendants chartered a vessel, of which plaintiff was master and agent, **for a voyage** from New York **to Cadiz and return;** the charter-party provided that defendants should pay plaintiff a stipulated sum for the round trip, of which a **certain amount** was made **payable at Cadiz,** in gold coin, without credit, discount or commission. Plaintiff was instructed to consign himself to a certain firm in Cadiz, who "had full instructions to serve the master in any manner concerning his vessel." At Cadiz, plaintiff received from said consignees in cash a portion of the amount due him, and was informed by them that they had purchased a bill of exchange for the balance, and had remitted the same to plaintiff's principals; and plaintiff **settled with** the **consignees** in reliance upon such statements, and sailed from Cadiz. It appeared that said consignees had not purchased or remitted a bill as they had represented, but that they had drawn their own draft on defendants at New York, payable sixty days after sight, and had transmitted the same. Acceptance and payment of this draft were refused by defendants; and plaintiff brought this action for the balance of the charter money due at Cadiz, not paid there in cash. *Held*, that the facts connected with the draft did not constitute a **payment of** the defendants' **debt,** and that plaintiff was entitled to recover.
Holdsworth v. *Belamzaran* (N. Y.) 807

BRIEFS AND NOTES.

Stipulations for payment at particular place and in particular manner. (N. Y.) 808

CHARTERS. See MUNICIPAL CORPORATIONS, VIII.

CHATTEL MORTGAGE. See MORTGAGE, V.

CHECK.

BRIEFS AND NOTES.

Right of **holder** of check to sue if payment be refused. (Pa.) 210

CITIES. See MUNICIPAL CORPORATIONS.

CLAIM AND DELIVERY. See REPLEVIN.

CLAIMS AGAINST THE UNITED STATES.

1. The **distribution** of money due claimants under joint Mexican and American Commission is, by Act of June 18, 1878, a purely **ministerial duty** by the secretary of state, enforceable by *mandamus.*
United States v. *Bayard* (D. C.) 341

2. Where money is in the custody of the department of state to which the petitioner has a clear legal right, and by an Act of Congress the secretary is directed to pay it over to him, **mandamus** will lie to **compel** its **payment.** *Id.*

CLIENT. See ATTORNEY AND CLIENT.

CLOUD ON TITLE.

When an **issue** as to the title was **framed** and tried by a jury, the **decree** will be **in accordance with** the **verdict.**
Wilson v. *Wilson* (N. J.) 456

BRIEFS AND NOTES.

Right to maintain action to **remove.** (N. Y.) 745

COAL MINES. See MINES AND MINING.

CODICIL. See WILL, 7, 8.

COLLATERAL IMPEACHMENT. See JUDGMENT, 16; WAYS, 12.

COLLATERAL SECURITY. See PLEDGE AND COLLATERAL SECURITY.

COMMERCE. See CONSTITUTIONAL LAW, III.

COMMON CARRIERS. See CARRIERS.

COMPLAINT. See PLEADING, I.

COMPROMISE. See ASSIGNMENT FOR BENEFIT OF CREDITORS, 8.

CONDEMNATION PROCEEDINGS. See MUNICIPAL CORPORATIONS, V., a; RAILROAD COMPANIES, 6–15; WAYS, II.; WHARVES.

CONDITIONS. See CONTRACT, II., b.

CONDONATION. See HUSBAND AND WIFE, 45.

CONFESSION. See CRIMINAL LAW, 10, 12; EVIDENCE, VII.; JUDGMENT, I.

CONFLICT OF LAWS.

1. The **insolvent laws** of a State have **no extraterritorial effect.**
Glenn v. *Clabaugh* (Md.) 391

2. A **discharge under** the **insolvent laws** of this State is **no defense** to an action for an assessment on the stock of a corporation of Virginia. *Id.*

3. A contract of **subscription to a corporation** of Virginia is governed by the laws of that State, and is to be performed there. *Id.*

4. Where testator was domiciled in New York and his **will** was proved there, and it does **not** appear that it was ever **proved in New Jersey,** the **executors** can **not** be required to come to an **account** in the latter State.
Cocks v. *Varney* (N. J.) 457

5. The appointment of a **guardian** over a child whose legal domicil is in another State, who has a guardian appointed under the laws of that State, does not deprive the court of the power in its discretion to **decree the custody of** the **child to a foreign guardian.** Authorities cited.
People v. *Allen* (N. Y.) 81

6. Courts of other States are bound to give a **judgment of a sister State** the **same force and effect** that would be given to it by the courts of the State where it was rendered. Authorities cited. *Id.* 80, 81

7. A **judgment** in attachment **against a nonresident, not personally served,** is good as a personal judgment against him, where the record shows a general appearance by his attorneys; and such judgment is sufficient upon which to enter judgment **against** a garnishee.
Donoghue v. *Hanley* (Pa.) 604

8. The rate of **interest** upon a **judgment** must be measured by the laws of the State in which the action upon the judgment was brought.
Wells, Fargo & Co. v. *Davis* (N. Y.) 686

BRIEFS AND NOTES.

Lex fori. (N. Y.) 687

CONSIDERATION. See FRAUD AND FRAUDULENT CONVEYANCE, 4; GUARANTY, 1, 2.

CONSPIRACY.

If, without serving the decree of the common pleas establishing his rights, an **expelled member** of a corporation insists upon **participating in corporate proceedings,** he cannot maintain trespass on the case for conspiracy against the **members ejecting** him without using more force than is necessary.
McLafferty v. *Sweeney* (Pa.) 895

BRIEFS AND NOTES.

In an action to recover damages, criminal **intent** must be proved. (Pa.) 897

CONSTITUTIONAL LAW.

I. LEGISLATIVE AND JUDICIAL POWER.
II. EX POST FACTO AND RETROSPECTIVE STATUTES.
III. COMMERCE; POLICE POWER.
IV. PROTECTION TO LIBERTY.
BRIEFS AND NOTES.

See ADULTERATION; STATUTES.

I. LEGISLATIVE AND JUDICIAL POWER.

1. The Act of May 18, 1876, in so far as it

prescribes the procedure for the **division** of townships, wards of cities, and boroughs **into election districts,** is unconstitutional, such procedure being entirely within the **discretion** of the court of **quarter sessions,** under the Constitution, art. 8, § 2.
Re Bern Township (Pa.) 182

2. The **Legislature** has **no power** to **extend** the jurisdiction of a **city court** so as to deprive it **of** its **local character.** Authorities cited.
Hutkoff v. *Demorest* (N. Y.) 83

II. EX POST FACTO AND RETROSPECTIVE STATUTES.

3. **Act** of May 24, 1878, providing **for damages** to property owners, occasioned **by** the **change of grade** of streets in boroughs, **is not retroactive** so as to give damages for injuries prior to the Constitution of 1874.
Folkenson v. *Easton Borough* (Pa.) 211

4. **Ex post facto** laws **relate** to criminal and penal proceedings. Authorities cited. *Id.*

5. Pub. Laws **1884,** p. 269, supplementary to the Act to Regulate Practice of Courts of Law, limiting allowance of **certiorari** to **review tax assessment,** to recover which any sale has been made by virtue of any special or local law, to six years from such sale, is **not retroactive.**
Hunt v. *State* (N. J.) 114

6. Statutes of **Limitation** affecting existing rights and remedies shall allow a reasonable time after they take effect for the **commencement of suits** on such cause of action. *Id.*

7. A law **limiting** the time within which an action shall be brought does not apply to a **suit** which was **begun** after it was passed but **before** it **took effect.** Authorities cited.
Id. 115

8. Every reasonable **endeavor** shall be made to interpret the statutory context as to **give** the law a **prospective** and not a retroactive **effect.** Authorities cited. *Id.*

III. COMMERCE; POLICE POWER.

9. The Act of August 23, 1871, § 21, of the District of Columbia, imposing a **license** tax **upon commercial agents,** whose business it is, as agents for nonresident manufacturers, to offer merchandise for sale, is unconstitutional as a **restriction upon interstate commerce.**
Re Hennick (D. C.) 357

10. **Interstate commerce cannot be taxed** at all even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. Authorities cited. *Id.* 360

11. **Laws 1885,** chap. 183, § 7, to **prevent deception in** the sale of **dairy products,** etc., is not in violation of the Constitution of this State, nor subversive of the constitutional rights of liberty or the enjoyment of property.
People v. *Arensberg* (N. Y.) 247

IV. PROTECTION TO LIBERTY.

12. Act 1872, chap. 329, providing that if any **collector** shall **willfully detain taxes** collected for six months, etc., he shall, upon conviction, be imprisoned, etc., is not in conflict with the Constitution of this State which abolishes imprisonment for debt.
State v. *Nicholson* (Md.) 415

BRIEFS AND NOTES.

Entitling statutes. (Pa.) 184

Constitutionality of statute favored. (Pa.) 184

Local statutes. (N. J.) 459

Legislative power. (Pa.) 184

Laws impairing **obligation** of **contracts.** (N. J.) 459; (Pa.) 214

Retrospective effect of statutes. (Pa.) 214

Commerce; exclusive power of Congress to regulate. (D. C.) 358, 359

Interstate commerce; state regulation void. (D. C.) 357–359

Police power; extent of. (N. Y.) 248

Preservation of public health. (N. Y.) 248

Preventing deception in sale of dairy products. (N. Y.) 248

Right to **trial** by **jury.** (Pa.) 890

CONSTRUCTION. See ASSIGNMENT FOR BENEFIT OF CREDITORS, I.; CONTRACTS, II.; DEED, IV.; DEVISE AND LEGACY, I.; GUARANTY, 4; LANDLORD AND TENANT, 10; STATUTES, I.

CONTRACT.

I. VALIDITY; MISTAKE.
II. CONSTRUCTION.
  a. *In General.*
  b. *Conditions, Stipulations, etc.*
  c. *Particular Contracts.*
III. RESCISSION.
IV. ACTIONS.
  BRIEFS AND NOTES.

See BAILMENT; CHARTER-PARTY; DAMAGES, I.; EQUITY, II.; GUARANTY; HUSBAND AND WIFE, I., III., IV.; INFANTS, 1, 2; LANDLORD AND TENANT; LICENSE; LIEN; MUNICIPAL CORPORATIONS, IV.; PATENTS; SALE; SCHOOLS AND SCHOOL DISTRICTS; SPECIFIC PERFORMANCE; USURY.

I. VALIDITY; MISTAKE.

1. Contracts **by a minor,** of a personal nature, may be **avoided** before or after his majority.
Adams v. *Beall* (Md.) 430

2. A contract signed by competent parties is **admissible** in evidence, **notwithstanding** it is also **signed by incompetent parties.**
Kulp v. *Bird* (Pa.) 576

3. In an action to **reform** a written contract **for mistake,** the plaintiff cannot insist that its **true meaning** is precisely what it would have been if the instrument were reformed as asked.
Oakville Co. v. *Double-Pointed Tack Co.* (N. Y.) 720

II. CONSTRUCTION.

a. *In General.*

4. It is the **duty of** the **court** to interpret **a** contract, and of the jury to determine whether it is established by proof.
Folsom v. *Cook* (Pa.) 585

5. If a **verdict** does **not establish** a contract, the **construction** of it is **immaterial.** *Id.*

6. Error in **submitting to** the **jury** the **construction** of a written instrument may be cured by a verdict in accordance with the construction that the court should have declared in the charge.
Jones v. *Kroll* (Pa.) 877

7. The practical construction given to an agreement **by** the **parties** is controlling as to their real intention in making it.
Nearpass v. *Newman* (N. Y.) 764

8. A contract will have a **retroactive effect** where by express words or necessary implication it appears to be the intention of the parties to embrace past transactions.
People v. *Lee* (N. Y.) 85

9. An **executory** contract for sale of goods creates no debt against which there can be a **set-off.**
McLachlin v. *Brett* (N. Y.) 696

10. In an action by a stone mason for erecting a building according to contract, which does not specify the **kind of stone** to be used, the kind intended may be **shown by parol** evidence, and also that defendant furnished a harder kind.
Centenary M. E. Church v. *Cline* (Pa.) 886

11. For **extra labor** in working the harder stone, plaintiff is entitled to extra compensation. *Id.*

12. In an action for damages for the breach of a contract to **furnish cold storage for eggs,** it is error to instruct the jury that by removing the eggs to the warehouse the owner of them **impliedly warranted** them to be **sound.**
Boswell v. *Collins* (Pa.) 487

b. *Conditions, Stipulations, etc.*

13. Where one **sold out** his butcher **business,** and **covenanted** with the purchaser that he would **"not carry on** the retail butcher business on his own account, or operate any butcher business, except a wholesale butcher business, within the limits of the city,"—*Held,* that his engaging with another as an assistant in the retail butcher business in such city, at a salary, was a **violation** of his **covenant.**
Finger v. *Hahn* (N. J.) 117

14. In a contract an elevator was **"warranted satisfactory** in every respect;" a **bona fide objection** by contracting party to its working is a defense to an action for price. Authorities cited.
Krum v. *Mersher* (Pa.) 885

15. Where it is **stipulated** that an article to be furnished shall be **satisfactory** to party to whom supplied, the party's own **determination is conclusive.**
Baltimore & O. R. R. Co. v. *Brydon* (Md.) 396

16. Where the article is to be **approved by a third person,** the party prejudiced by the partiality of such third person **may** recover for **nonacceptance.** *Id.*

17. In the absence of **fraud in** such **third person,** his judgment is conclusive. *Id.*

18. In order that a party may recover under such a contract for articles **rejected by an agent,** he must show a want of **good faith** on the part of the agent. *Id.*

19. Where there is evidence on **this** point, it is the duty of the court to **submit** the same **to** the **jury.** *Id.*

20. **Evidence of** the knowledge and **experience of** the **agent** designated to accept the article is admissible to **show** the **good faith** of the agent in rejecting it. Evidence of a decline of the price of the **article** is **also** admissible on that point. *Id.*

21. Where appellant had sought to show **unfitness of** appellee's **coal for** the **use contemplated** by the contract, by showing that it contained red or rusty coal, it was competent for the appellee to show that the rust did not affect its steam generating power, and that the appellant in its subsequent purchase of coal for its engines, did not reject coal similarly affected. *Id.*

22. **Declarations of** the **president** of the appellant, authorized to bind the corporation by contracts in the ordinary business, **recognizing** the **contract** as subsisting, and as to what should be done in the matter, are **admissible.** *Id.*

23. Where **work done** upon **another's** building in no respect fulfills the purpose contracted for, no **acceptance** thereof will be **implied** from the fact of its being permitted to remain.
Presby. Church v. *Hoopes A. S. C. & P. Co.* (Md.) 432

24. A contracting party is **not obliged to accept** anything in place of what was contracted for. *Id.*

25. If **imperfect work** is **accepted,** the contractor is entitled to **recover what it is** reasonably **worth.** *Id.*

c. *Particular Contracts.*

26. T. was under a contract to **deliver** to a company in Pennsylvania certain quantities of **ore** each month, and received monthly payments. A suit having arisen, the court of chancery, during its pendency, by consent of the parties, placed a manager in charge of the business to deliver ore and receive payments. **Attachment** was issued in Pennsylvania by a creditor of T.; and the money due for ore was attached in the hands of the company, who thereupon refrained from making a monthly payment,—on account of which the manager **stopped shipments** for three months. *Held,* that a decree ordering that the company should, after the expiration of this time, receive in addition to its regular monthly quotas parts of the ore which had been detained by the manager, is erroneous.
Lehigh Zinc & I. Co. v. *Trotter* (N. J.) 479

27. A **default** in payment **of** one **installment** of ore does **not excuse** the **nondeliv-**

ery of the subsequent portion, unless the conduct of the defaulting party was such as to evince an intention to abandon the contract. Authorities cited.
Lehigh Zinc & I. Co. v. *Trotter* (N. J.) 479

28. Zinc **ore was** to be delivered upon the cars at F., New Jersey, and was to be **paid for at** a price to be determined by the **percentage of zinc oxide** which it contained when delivered. The vendee was to make the necessary assay. The vendee transported the ore on open cars to B., Pennsylvania, a distance of sixty-two miles, and then endeavored to ascertain the amount of moisture which the ore contained. The results varied, from month to month, between 0.36 and 3.04 per cent. *Held*, that these **results** were **not safe indications of** the **amount of moisture in** the **ore** when delivered at F. *Id.* 481

29. Under a contract made in New York, February 2, 1881, for "**prompt shipment** by sail from Europe, for **delivery** at New York," dangers of the sea excepted, precedent to payment, rails were, on February 3, placed **on board a ship at** a river **port** in Germany, then **closed by ice** and not open for navigation until April 2 or 3, on which day the ship sailed for New York, and the rails were tendered to the buyer on June 14. *Held*, that the **buyer** was **entitled** to such **timely delivery** as would follow an effective shipment, and was not bound to receive the rails.
Tobias v. *Lissberger* (N. Y.) 723

30. The **buyer** was **not estopped** from refusing to accept the rails, by the fact that he had made no objection until the tender, June 14. *Id.*

III. RESCISSION.

31. **Equity** will **not rescind** an executed contract when the parties have a full and complete **remedy at law.**
Travis v. *Lowry* (Pa.) 553

32. In an action to recover back the price paid for certain **shares** of stock on the ground of misrepresentations, the question **whether plaintiff rescinded** by tendering back the stock without conditions is **for** the **jury.**
Bridge v. *Penniman* (N. Y.) 732

33. The referee having found as a fact that plaintiff did not make an **unconditional tender,** the judgment dismissing the complaint will be affirmed. *Id.*

IV. ACTIONS.

34. In an **action by** a **stranger** to a contract **for work** necessary **for** the **completion of** a **building,** claimed by plaintiff to have been done by direction of the architect and for the defendant's benefit, but which the defendant denied having authorized,—*Held*, the court of appeals was without jurisdiction to weigh the **evidence,** it being sufficient to make out plaintiff's case.
Mooney v. *Loughlin* (N. Y.) 718

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See DEVISE AND LEGACY, V.; TROVER AND CONVERSION.

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See DEED; FRAUD AND FRAUDULENT CONVEYANCE; HUSBAND AND WIFE, IV.

CORONER.

1. Penal Code, § 311, against **body-stealing,** does not apply to **exhumations** by public authorities for ascertaining whether a crime has been committed.
People v. *Fitzgerald* (N. Y.) 227

2. Where the **exhumation** is made public

ly, **on open application to an officer of justice** charged with the duty of inquiring into the cause of such death, the statute cannot be used to impose punishment upon the persons concerned in the exhumation in case of **irregular proceedings.** *Id.*

3. It is debatable whether a **post mortem examination** should be made before the coroner has empaneled a jury; but it should not be made in the presence of the jury. The decision by order of the coroner is expressly authorized. Penal Code, § 308. *Id.*

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CORPORATIONS.

I. CREATION.
II. MEMBERS AND STOCKHOLDERS; RIGHTS.
III. STOCK; LIABILITY OF STOCKHOLDERS.
IV. OFFICERS.
V. DISSOLUTION AND FORFEITURE.
VI. MANUFACTURING COMPANIES.
BRIEFS AND NOTES.

See BANKS AND BANKING; BENEFIT SOCIETIES; CARRIERS; COUNTIES; CRIMINAL LAW, 1-4, 16; INSURANCE; MUNICIPAL CORPORATIONS; PARTNERSHIP; RAILROAD COMPANIES; SCHOOLS AND SCHOOL DISTRICTS; STREET RAILWAYS; TAXES, II.; TURNPIKE COMPANIES.

I. CREATION.

1. Act of April 9, 1886, Pub. Laws 776, directing that certain fines, etc., shall be paid to a committee to be appointed by the court of common pleas and subject to its control, for the establishment and maintenance of a **law library,** does **not** create a **corporation.**
Craig v. *Lilly* (Pa.) 659

2. A **bequest** to such a law library is **void.** *Id.*

II. MEMBERS AND STOCKHOLDERS; RIGHTS.

3. The action of a corporation, in **expelling a member** is conclusive until reversed by the common pleas.
McLafferty v. *Sweeney* (Pa.) 895

4. It is the **duty of** the expelled **member** to **serve** on the officers, before attempting again to participate in the proceedings of the corporation, a **decree** of the common pleas **establishing** his **rights.** *Id.*

5. If, without serving such a decree, he insists on participating in the proceedings, after he has been requested by vote to retire, he may be **ejected by force,** and cannot maintain against the members, who eject him without using more force than is necessary, an action of trespass on the case for conspiracy. *Id.*

6. It is **immaterial** that **one of the officers of** the corporation **knows of** the decree **of** the common pleas **reinstating** the member. *Id.*

7. In an action to **compel a company to recognize** plaintiff as a **stockholder,** an **answer** by a defendant, who is president of the company, that plaintiff agreed that his subscription should be for the use and benefit of said defendant, and that he would **transfer** the same to him, and that plaintiff **was never** the real owner of any shares, is **responsive to the bill.**
Rowley's Appeal (Pa.) 512

8. An **affidavit** by such defendant that the statements made in the charter of the company was true, **annexed to** such **charter** which contained plaintiff's name as a subscriber, and stated the number of shares subscribed for by him, is sufficient **corroboration** of plaintiff's **testimony** to overcome the answer. *Id.*

9. The **charter** itself, as against him who made oath that the statements therein are true, is written **evidence** of a high character to repel an allegation which is irreconcilable with those statements. *Id.*

III. STOCK; LIABILITY OF STOCKHOLDERS.

10. A contract of **subscription** to a corporation of Virginia is governed by the **laws of** that **State,** and is to be performed there.
Glenn v. *Clabaugh* (Md.) 391

11. A **discharge under** the **insolvent laws** of Maryland is **no defense** to an action for an assessment on the stock of a corporation of Virginia. *Id.*

12. Where the unpaid subscriptions to the stock of an insolvent corporation are required to pay the creditors, an **assessment is not prerequisite to an action by the assignee** of the corporation **against a stockholder;** but it is otherwise where the whole amount is not required.
Citizens & M. Sav. Bank v. *Gillespie* (Pa.) 523

13. In **assumpsit** to recover the **amount due** by a subscriber it is error to **permit** the defendant to prove the financial **responsibility of another stockholder** without first proving the amount of the latter's subscription. *Id.*

14. A **transferee** of stock, who at the transfer signs the subscription book, **assumes** the **liabilities** of any original subscriber to the stock. *Id.*

15. Where an Act provides that in an action for the recovery of an assessment a **certificate of** a **mutual** insurance **company** shall be **evidence** to prove the claim to the **assessment, unless** the party sued will **make** a certain affidavit, if such party **makes the affidavit,** the company must prove its claim.
Susquehanna Mut. F. Ins. Co. v. *Gackenbach* (Pa.) 588

16. The directors have **no right to make an assessment** on another **basis from that** provided **by** the **by-laws** of the **company.** *Id.*

17. A reasonable amount may be included in the assessment for **expenses and losses** by reason of **insolvent members.** *Id.*

18. The **amount** of the **assessment** rests in the **discretion** of the board of directors.
Susquehanna Mut. F. Ins. Co. v. *Gackenbach* (Pa.) 588

19. The **burden** of **showing fraud of officers** is on defendant. *Id.*

IV. OFFICERS.

20. **Authority** given by a resolution of a company to its treasurer, to have its **notes signed,** only authorizes him to have them signed **by** the **officers** who had theretofore been authorized to sign such instruments for the corporation.
Davis Sewing Mach. Co. v. *Best* (N. Y.) 68

21. Where **notes** of a company have been **unlawfully converted by** its **president,** the company may recover possession of them from the holder by **replevin,** unless he is a *bona fide* purchaser for value, without notice. *Id.*

22. The **burden** of **proving** a **purchase in good faith,** and for value, devolved upon the defendant after it was established that the notes had surreptitiously been put in circulation. *Id.*

23. Where **notes** purporting to be those of a company were **not properly executed** because not signed by its president, and this defect was apparent upon the face of the paper, it deprived the notes of the character of commercial paper. *Id.*

24. The **transferee** of such notes, by paying value for them, is **not a bona fide purchaser.** *Id.*

25. In **replevin** for **notes not enforceable** as the pecuniary obligations of a corporation by reason of their defective execution, only **nominal damages** can be recovered for their detention. *Id.*

26. **Declarations of** the **president of** railroad authorized to bind the corporation by contracts in the ordinary business, **recognizing** the **contract as** subsisting, and as to what should be done in the matter, are **admissible.**
Baltimore, etc. R. R. Co. v. *Brydon* (Md.) 896

27. An action by a stockholder of a bank against its **directors,** to call them to **account as trustees,** is triable by the court.
Brinckerhoff v. *Bostwick* (N. Y.) 711

V. DISSOLUTION AND FORFEITURE.

28. In May, 1875, the attorney-general, in the name of the People, commenced an **action** in equity against the Erie Railway Co., **for** its **dissolution as** an **insolvent** corporation, and J. was appointed temporary **receiver.** In June, 1875, two **mortgages** upon the railway were **foreclosed,** and J. was appointed receiver of the mortgaged property. The Erie Co., at the commencement of these actions, owned **bonds and stocks in other corporations;** and the judgment in the foreclosure action recited that they were held by the receiver as part of the mortgaged property, and authorized the referee appointed to sell the mortgaged premises to sell them as a portion thereof, and they passed with the mortgaged premises under such sale to the New York, L. E. & W. R. R. Co., a corporation formed on reorganization of the Erie Co., —the order for such transfer providing that it was subject to all rights of the People, as the same might be ascertained in the People's action. A reference as to the property subject to said mortgage was had in the People's action, and judgment entered therein upon the referee's report to the effect that said stock and bonds were properly sold with mortgaged premises, and adjudging the Erie Co. to be dissolved. Thereafter this suit was commenced to subject said bonds and stocks to the payment of the unsecured obligations held against the Erie Co., on the ground that said bonds and stocks were not covered by said mortgage, and that the court never acquired jurisdiction of the same or of the rights of the unsecured creditors, they not having been made parties to said foreclosure suit nor to the People's action. *Held,* (*a*) the court could determine what property was actually indorsed within the mortgages foreclosed; (*b*) the **unsecured creditors** were not proper **parties** to the foreclosure action; (*c*) the **pendency of** the people's **action** did not prohibit foreclosure action; (*d*) the judgment in the foreclosure action was not, within 2 Rev. Stat. p. 462, § 71, void as against the receiver and creditors; (*e*) the **rights** which the statute secures **to creditors** in case of a **statutory final receiver** of an insolvent corporation are such only as pertain to the property which comes to the receiver to be administered by him and distributed to the creditors; (*f*) that there was nothing which required a receiver to consult the general creditors; (*g*) there is no provision of law requiring general corporation **creditors** to be made **parties to the People's action;** (*h*) the proceeding in equity under the Revised Statutes, p. 463, § 88, was unaffected by the Code of Procedure.
Herring v. *New York, L. E. & W. R. R. Co.* (N. Y.) 308

29. The **forfeiture** to the county supervisors of the corporate rights of a company, organized under Act of 1875, **for noncompletion** within time fixed, is not worked by the default, without the intervention of the courts or action on the part of the State or of the county.
Kings Co. v. *Elevated R. Co.* (N. Y.) 232

VI. MANUFACTURING COMPANIES.

30. Under Act of 1881, § 3, it is not sufficient **to exempt** a corporation from taxation that it is a manufacturing corporation, but it **must** also carry on **manufacturing within** the **State.**
People v. *Horn Silver Mining Co.* (N. Y.) 220

31. Where the principal officers of the corporation have their offices in New York city, its directors' meetings being held and its dividends declared and paid there; and, as in this case, in addition thereto, a substantial part of the regular business of the corporation is continuously carried on there during the whole year, the corporation is brought within the Act of 1881, as **"doing business within** the **State."** *Id.*

82. By **Laws** 1885, chap. 501, the **basis of computing a tax** under Act of 1881, § 3, to be paid by a corporation, was fixed at the amount of capital stock employed within the State.
People v. *Horn Silver Mining Co.* (N. Y.) 220

83. In computing the taxes to be paid by a manufacturing company, its entire **capital stock** was properly taken as the basis of taxation. *Id.*

84. Where a **judgment** was entered for the tax **before** the passage of the **Act** of **1885,** defendant can have no benefit from its provisions authorizing the comptroller to **adjust** all **accounts** against a corporation for all taxes and penalties **under** the **Act** of **1881.** *Id.*

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Charter; rule of construction. (N. Y.) 234; (Pa.) 908

Stock; dividends. (N. Y.) 92

Options to subscribe to and take at par shares of stock. (N. Y.) 92

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The day when a dividend is declared determines its ownership. (N. Y.) 92

Unpaid subscriptions; liability of stockholders. (Pa.) 514, 528, 529

Unpaid subscriptions; creditors' bill. (Pa.) 529

Liability of transferee of stock for unpaid subscriptions. (Pa.) 529

Stockholder's remedy against corporations for illegal acts of directors. (Pa.) 897

Power; ultra vires. (N. Y.) 814

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Power to make general assignment for benefit of creditors. (Pa.) 528

Liability of **directors** for losses from misconduct or negligence. (N. Y.) 712, 713

Relation between directors and shareholders. (N. Y.) 711, 713

Liability for acts of agent. (N. Y.) 825

Express **malice imputable** to. (Md.) 436

Dissolution of railroad company; superior court jurisdiction. (N. Y.) 814

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CORROBORATION. See WITNESS, 7–10.

COSERVANTS. See MASTER AND SERVANT, II.

COSTS. See EXECUTORS AND ADMINISTRATORS, VII.; JUDGMENT, 1.

1. Under Code, § 3246, **in an action by** an **executor in his representative capacity,** costs may be awarded **against** him as executor.
Syms v. *New York* (N. Y.) 225

2. A **judgment** for costs **against** an executor in his **representative capacity** should not contain a provision that **execution** issue for such costs. *Id.*

3. Where a plaintiff sues as an **administrator,** but might have sued in his own name, he is **personally liable** to pay **costs.**
Buckland v. *Gallup* (N. Y.) 703

4. Merely **describing** himself **as administrator** will **not relieve** him from costs. *Id.*

5. Where the **auditor** appointed to audit the **account of a trustee** refuses, for lack of vouchers, to allow certain credits claimed, finds numerous evidences of mismanagement through lack of business qualifications on the part of the trustee, but not through dishonesty, and accordingly reduces the trustee's commissions to the amount due upon the business properly done, some of the exceptions to the account being dismissed and some sustained,—it is not error to decree as to **costs** that they be **divided** between the estate and the accountant.
Kilgore's Appeal (Pa.) 201

6. It is not essential to the **recovery** of costs by plaintiff **in an action against a municipal corporation** for damages for injuries sustained through the negligence of its servants,—commenced before the Code of Civil Procedure went into effect, and therefore governed by Laws 1859, chap. 262,—that the claim should have been presented to the chief fiscal officer of the corporation before suit brought.
Taylor v. *Cohoes* (N. Y.) 76

7. Courts of **equity** exercise **discretionary** power as to costs.
Owings v. *Rhodes* (Md.) 407

8. Where upon **appeal** to the general term from an order denying a motion for a new trial, and also from the judgment in a suit, the general term affirms both the order and the judgment, and awards costs upon the appeal from the judgment, it has no power to award costs upon the appeal from the order; but such error should be corrected in that court.
Syms v. *New York* (N. Y.) 225

9. Under Act of March 31, 1860, and the local Act of May 1, 1861, a **county** to which the latter Act applies is **liable to a justice** of the peace **for** all the costs, except those of prosecutor and defendant of a **criminal proceeding** before him.
Codding v. *Bradford Co.* (Pa.) 869

10. A **county** is not liable for costs of **criminal proceedings** unless made so by statute. Authorities cited. *Id.*

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On **appeal.** (N. Y.) 226

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ipality for damages for injuries sustained through negligence of servants. (N. Y.) 76

County is not liable for costs of **criminal** proceedings where it is not so expressed in statutes. (Pa.) 870

Attorney's fees; amount. (N. Y.) 788

Taxation; appeal. (N. Y.) 753

COTENANTS. See JOINT TENANTS AND TENANTS IN COMMON.

COUNSEL. See ATTORNEY AND CLIENT.

COUNTERCLAIM. See SET-OFF AND COUNTERCLAIM.

COUNTIES. See MUNICIPAL CORPORATIONS, 7.

1. Laws 1869, chap. 909, § 4, amended by Laws 1871, chap. 283, providing for the **appropriation of taxes to** payment of **municipal bonds** in **aid** of **railroads,** applies to any municipality which has such bonds outstanding.
Clark v. *Sheldon* (N. Y.) 923

2. It makes no difference as to the **duty of** the **county treasurer** that the taxes were not expressly collected or paid over to him for said purpose. *Id.*

3. Section 4 is not in conflict with the Constitution. *Id.*

4. It is no defense to a proceeding by a taxpayer to compel such application that the petition does not put the amount of taxes claimed to be applicable to that purpose high enough; the county **treasurer** may be **compelled to set aside** for a **sinking fund** all the taxes which may appear to have been paid to him for that purpose. *Id.*

5. Nor is it an answer to such proceeding that if the county treasurer should do so, there would be a **deficiency in other funds.** *Id.*

6. Under Act of March 8, 1860, and the local Act of May 1, 1861, a county to which the latter Act applies is **liable to a justice** of the peace **for** all the **costs,** except those of prosecutor and defendant of a **criminal proceeding** before him.
Codding v. *Bradford Co.* (Pa.) 869

7. A county is not liable for **costs of criminal proceedings** unless made so by statute. Authorities cited. *Id.* 871

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Commissioners; acts *ultra vires.* (Pa.) 602

Fees of county **treasurer** on **tax** sales. (N. Y.) 768, 769

Not liable for **costs** of **criminal** proceedings, where it is not so expressed in statutes. (Pa.) 870

COURTS. See APPEAL; JUSTICES OF THE PEACE; RECEIVER; TRIAL.

1. An undertaking given on the **removal** of an action for **claim and delivery from** the **District Court of New York City** to the common pleas, not being made under any statutory authority, is void.
Mittnacht v. *Kellermann* (N. Y.) 714

2. The Legislature has no power to **extend** the **jurisdiction** of a **city court** so as to **deprive** it of its **local character.** Authorities cited.
Hutkoff v. *Demorest* (N. Y.) 83

3. Under the Constitution art. 8, § 2, the **division** of townships, wards of cities, and boroughs **into election districts,** is entirely within the discretion of the **court** of **quarter sessions.**
Re Bern Township (Pa.) 182

4. The **Act** of May 18, 1876, in so far as it prescribes the procedure by which the division shall be made, is **unconstitutional.** *Id.*

5. The **orphans' court** has power to determine the **fairness** of **inventories.** One method is by filing exceptions to them.
Pickel v. *Alpaugh* (N. J.) 471

6. The power of the **orphans' court** to **set aside** a **sale** of real estate, made in pursuance of its own order, rests within the sound discretion of the court; and will not be reviewed unless the record shows palpable and gross abuse.
Frey's Appeal (Pa.) 154

7. The court of **common pleas** may entertain a bill to establish a **trust** in **lands situate** in **another county,** when the parties are within its jurisdiction.
Jackson's Appeal (Pa.) 850

BRIEFS AND NOTES.

Jurisdiction; by consent. (N. Y.) 744

Presumption. (Pa.) 502

Distinction between courts of general and limited jurisdiction. (Pa.) 503

Courts of co-ordinate jurisdiction cannot set aside judgments of each other. (Pa.) 606

Jurisdiction of **superior** court in actions by the People for dissolution of railroad companies. (N. Y.) 814

Territorial courts are not United States Courts. (N. Y.) 687

Common pleas is court of general jurisdiction. (N. J.) 110

Authority of **orphans'** court to determine title of contesting parties as an incident of distribution. (Pa.) 509

Power of court of **quarter sessions** in the division of election districts. (Pa.) 183, 184

Inferior jurisdictional facts must be established. (N. Y.) 817

Special tribunal; jurisdictional facts must be shown. (Md.) 889

Preliminaries giving authority to act must appear on face of proceedings. (N. J.) 110

COVENANT. See CONTRACT, 18; DEED, 15; LANDLORD AND TENANT, 4, 8.

CREDITORS' BILL.

1. Where a creditors' bill was filed and the complainant in the suit was appointed a **re-**

ceiver, he may file his bill for the collection of money held in trust for the debtor in the original suit, without first obtaining another judgment at law.
Terhune v. *Bell* (N. J.) 469

2. That there is a **remedy at law** is no objection to such suit. *Id.*

BRIEFS AND NOTES.

Inadequate **remedy at law.** (N. Y.) 818
Unpaid **subscriptions** to corporation. (Pa.) 529

CRIMINAL LAW.

I. ACCOMPLICE.
II. INDICTMENT.
III. EVIDENCE; CHARGE OF COURT.
IV. SENTENCE.
V. APPEAL OR ERROR.
VI. COSTS.
BRIEFS AND NOTES.

See BODY-STEALING; BURGLARY; CORONER; DISTRICT AND PROSECUTING ATTORNEY; FORCIBLE ENTRY AND DETAINER; FORGERY; HABEAS CORPUS; HOMICIDE; RAPE.

I. ACCOMPLICE.

1. The rule as to **corroboration of** an accomplice only requires a corroboration as to some material fact going to prove that the prisoner was connected with the crime. Code Crim. Proc. § 399.
People v. *Ogle* (N. Y.) 49
People v. *Everhardt* (N. Y.) 53

2. Whether the **evidence is sufficient** corroboration is **for** the **jury.** *Id.* 53

3. The law is complied with if there is some other **evidence** fairly tending to **connect** the **defendant with** the commission of the **crime** so that his conviction will not rest entirely upon the evidence of the accomplice. *Id.*

4. The court may refuse to charge the jury in relation to the **acts necessary for** the **corroboration** of an accomplice, "that they must be inconsistent with the innocence of the defendant, and exclude every hypothesis but that of guilt."
People v. *Ogle* (N. Y.) 49

5. One who had **no knowledge** that a crime was to be committed, and who neither aided nor abetted in its commission, is **not** an **accomplice.** *Id.*

II. INDICTMENT.

6. When defendant was described in the indictment by his known **alias,** it is not error for the clerk **in administering** the **oath to** the **jurors** challenged, and to the witnesses, **to repeat** such names, after defendant's true name is discovered.
People v. *Everhardt* (N. Y.) 53

7. It is not necessary to aver in the indictment **against a defaulting tax collector,** under Act 1872, chap. 329, that the money is still detained. The indictment is sufficient if it avers that defendant was collector of the state and county taxes for the county, and as such collected the taxes for the year.
State v. *Nicholson* (Md.) 415

8. Every indictment must **bring** defendant **within** all the descriptions mentioned in the body of the **Act,** except they are such as carry with them the bare denial of a matter, the affirmation whereof is a proper and natural plea for defendant. Authorities cited. *Id.* 416

9. The court will **presume** in **favor** of the **pleader** every proposition which by reasonable intendment is impliedly included in the pleading. Authorities cited. *Id.*

III. EVIDENCE; CHARGE OF COURT.

10. Where a **magistrate tells a prisoner** that it would be better for him **to tell** the **truth** and have no more trouble about it, the **confession** thus obtained **is inadmissible** in evidence, although he was told at the same time that the magistrate could make no promises.
Biscoe v. *State* (Md.) 416

11. Where the prisoner, before the confession is received, offers to prove that the **magistrate held out inducements** to him **to confess,** the court should permit him to do so. *Id.*

12. The preliminary question as to the **admissibility of a confession** should **be decided by** the **court** before it is permitted to go to the jury. *Id.*

13. It is never irrelevant to give **in evidence** any **circumstance** which tends to make the proposition at issue more or less probable.
Johnson v. *Commonwealth* (Pa.) 608

14. As a general rule it is improper upon the trial of a prisoner for one offense to **prove** that he has been **guilty of another.**
People v. *O'Sullivan* (N. Y.) 58

15. Yet upon the trial of a particular crime it is competent to prove that defendant had made the attempt at some prior time, not too distant, to commit the same offense. *Id.*

16. As a general rule, the **evidence** of a witness cannot be **corroborated** or confirmed by proof that he stated the same facts on some occasion when **not under oath.** *Id.*

17. On an indictment for stealing a **bill,** no obligatory proof of its **contents** may be given without **notice to produce.** Authorities cited.
De Baril v. *Campoy y Pardo* (Pa.) 644

18. Where the **prisoner's doings are accounted for except** during a few hours before and after the murder, it is not error to say to the jury: "He has not been able to tell us where he was that night; that is the unfortunate part of his case."
Johnson v. *Commonwealth* (Pa.) 608

19. A mere expression of **opinion as to** the prisoner's **guilt, by** the **judge** in his charge to the jury, is not, if warranted by the evidence, ground for reversal. *Id.*

IV. SENTENCE.

20. Under Act of 1861, the **sentence by** the

justice has the full **force and effect** of a sentence by the court of quarter sessions.
Codding v. *Bradford Co.* (Pa.) 869

V. APPEAL OR ERROR.

21. Rule 28, requiring an appeal or writ of error to be **taken without delay,** makes no distinction between an appeal or writ of error taken by the State and one taken by the accused.
State v. *Bowers* (Md.) 406

22. **What** will **amount to delay** must be determined by the character of each case as it arises. A delay of twenty-one days in a simple case where the petition could easily be prepared in less than an hour, *held*, an infraction of the rule, and the appeal dismissed. *Id.*

23. Where a **judgment** sustaining a demurrer to an indictment was **given March 10,** and a writ of **error** was **applied for** by the State on the **17th** of **April** following, *held*, that a **longer period** intervened between the judgment and the application for the writ than is allowed by Rule 28.
State v. *Long* (Md.) 406

24. Where the term of the court at which defendant was convicted was adjourned without day, no judgment having been rendered, and defendant not having applied for or assented to any delay except to the Tuesday following the day on which the verdict was rendered, and at the next term of the same court, the same judge presiding, the defendant was sentenced, *held*, that defendant, not objecting to the delay, but moving for a new trial for errors committed on the trial, **waived** the **delay,** and was not prejudiced thereby.
People v. *Everhardt* (N. Y.) 53

25. A **mistake** of the clerk, in consequence of which the **record** does not show that the prisoner was present when the jury was sworn or the verdict was entered, may be **corrected** during the term at which the motion for a new trial is overruled.
Johnson v. *Commonwealth* (Pa.) 608

26. The right of the supreme court to **review** proceedings on an indictment for murder is limited to **matters of record.** *Id.*

VI. COSTS.

27. Under Act of March 31, 1860, and the Local Act of May 1, 1861, a **county** to which the latter Act applies is **liable to a justice** of the peace **for** all the **costs,** except those of prosecutor and defendant, of a criminal proceeding before him.
Codding v. *Bradford Co.* (Pa.) 869

28. A **county is not liable** for costs of criminal proceedings, **unless** made so **by statute.** Authorities cited. *Id.* 871

BRIEFS AND NOTES.

Accomplice; corroboration. (N. Y.) 50, 53
Alibi; burden of proof. (Pa.) 618
Identity of prisoner; evidence. (Pa.) 616–618
One criminal act is **evidence** of another. (Pa.) 616
Admissibility of dying declarations. (N. Y.) 215
Res gestæ. (Pa.) 617
Accused as witness. (Pa.) 616–618
Calling upon prisoner to stand up and speak for the purpose of identification. (Pa.) 617
Charge; misleading jury. (Pa.) 617
Misstatement of evidence. (Pa.) 617
Commenting on evidence. (Pa.) 618
Considered as a whole. (Pa.) 618
Time of rendition of **judgment.** (N. Y.) 53, 54
Delay in entering judgment; waiver by defendant. (N. Y.) 54
Arrest of judgment; ground for. (N. Y.) 54
Appeal; matters of discretion. (N. Y.) 56
Error; questions open. (Pa.) 618
Admission of evidence. (Pa.) 618
County not liable for **costs** of criminal proceedings where it is not so expressed in statutes. (Pa.) 870

CURTESY.

When a tenant by the curtesy dies, nothing descends to his **heirs.**
Kulp v. *Bird* (Pa.) 576

CURTILAGE. See LIEN, 11,

CUSTOM AND USAGE.

BRIEFS AND NOTES.

Mining custom; judicial notice. (Pa.) 552
Evidence of **trade** custom. (N. Y.) 724

DAMAGES.

I. BREACH OF CONTRACT.
II. INJURIES TO PROPERTY.
III. INJURIES TO PERSON.
BRIEFS AND NOTES.

See BILLS AND NOTES, 3; LIBEL AND SLANDER, 3, 4; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, VI.; PHYSICIAN AND SURGEON; RAILROAD COMPANIES, 13; SPECIFIC PERFORMANCE, 4–6; SEDUCTION; TRESPASS, 2, 5; TURNPIKE COMPANIES; WATERS AND WATERCOURSES; WAYS; WHARVES.

I. BREACH OF CONTRACT.

1. An action against a builder for the breach of a **contract** to **erect a house** within the stipulated time, is an action for **unliquidated damages,** in which the court cannot order a **reference** against objection.
Untermeyer v. *Bernhauer* (N. Y.) 709

2. If the **counterclaim** requires the examination of a long account, this will **not make** the **action referable.** *Id.*

3. Should the **counterclaim** ever require examination, a **reference** can be ordered as to it, after trial of the issues. *Id.*

4. A **bill of particulars,** specifying items of damage, does **not** constitute an **account.**
Untermeyer v. *Bernhauer* (N. Y.) 709

5. Where the former **receiver** of a railroad company made a contract that complainant should for a year keep the ash pit clean where the engines of the company emptied their ashes, and for his compensation should have the cinders and coal from such pit, *held,* that complainant is entitled to **damages** for **breach** of the contract by the receiver.
Kerr v. *Little* (N. J.) 125

6. In an action for damages for the breach of a **contract** to **furnish cold storage** for eggs, it is error to instruct the jury that by removing the eggs to the warehouse the owner **impliedly warranted** them to be sound.
Boswell v. *Collins* (Pa.) 487

7. The rule of damages, in an action for **not accepting articles** agreed to be **delivered,** is the profit which would have made.
Baltimore, etc. R. R. Co. v. *Brydon* (Md.) 396

II. INJURIES TO PROPERTY.

8. Where plaintiff's **lands** were **used for a railroad track** for some time, the proper **measure** of damages is the fair rental value of such lands, for the time they were so used, in absence of special damage.
Baltimore & O. R. R. Co. v. *Boyd* (Md.) 435

9. **Declarations** made **by counsel on a former occasion** in the course of a trial, while urging the question of the damages before a jury of condemnation of the property in question, are **not admissible** to prove malice on the part of defendant in order to enhance the damages. *Id.*

10. For mere **interference with prospect,** it not being an incident of the estate, no remedy lies apart from contract.
Garrett v. *Janes* (Md.) 403

11. Act of May 24, 1878, providing for damages to property owners, occasioned **by** the **change of grade of streets** in boroughs, is not retroactive so as to give damages for injuries prior to the Constitution of 1874.
Folkenson v. *Easton Borough* (Pa.) 211

12. The **measure** of damages **for change of grade of street** is the difference in the market value of the property before the change, in the immediately adjoining property, and the market value after the change of grade in front of the property, with interest on the principal sum to date.
Freemansburg v. *Rodgers* (Pa.) 828

13. The **right** to damages for land taken for a street does **not accrue until street** is **opened.**
Easton Borough v. *Rinek* (Pa.) 192

14. In trespass for **cutting standing timber,** contrary to the Act of March 29, 1884, the court may **double** the single **damages** given by the jury.
Kulp v. *Bird* (Pa.) 576

15. The natural **flow of water from a higher to a lower lot** cannot, as a general rule, **give a cause of action to one injured** thereby.
Sowers v. *Lowe* (Pa.) 145

16. Plaintiff and defendant owned **adjacent** lots. Plaintiff's house was close to the line: defendant's thirty-two feet from it. The intervening space was sandy, and sloped from defendant's house to plaintiff's. Plaintiff's cellar was always dry until defendant changed the spouting which had formerly discharged into the street the water from his house, and turned the spouts upon the space between the houses. The water then percolated through the sand, and plaintiff's cellar became damp and the house was damaged. *Held,* plaintiff had no right of action against defendant for the damage thus caused. *Id.*

III. INJURIES TO PERSON.

17. In the absence of malice, compensation is the **measure** of damages in action of **slander.** If words were uttered with special malice, punitive damages may be awarded, and defendant's means may be taken into account.
Healy v. *Dettra* (Pa.) 168

BRIEFS AND NOTES.

Liability of upper riparian owner for detention of water. (Pa.) 552
Damnum absque injuria. (Pa.) 552
Every violation of a right imparts some damage. (Md.) 436
Apportionment of damages occasioned by different *tort feasors.* (Pa.) 552
Nominal. (Md.) 436; (Pa.) 153
Nominal; breach of warranty. (N. Y.) 786
Punitive. (Md.) 436
Exemplary. (Md.) 378
Measure for **breach of contract.** (Pa.) 490
For breach of parol agreement. (Pa.) 153
Injuries to **property.** (Pa.) 551
From flowage of land by water. (Pa.) 146
Measure of damages for appropriation of land for opening way. (Pa.) 333
Measure in **slander.** (Pa.) 178
Measure for breach of **promise** of **marriage.** (Md.) 377, 378
Measure in **seduction.** (Md.) 377, 378

DEBTOR AND CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; ATTACHMENT; BANKRUPTCY; CORPORATIONS, 28; CREDITORS' BILL; CRIMINAL LAW, I.; FRAUD AND FRAUDULENT CONVEYANCE, II.; GARNISHMENT; INSOLVENCY; INSURANCE, 7, 8; SETTLEMENT; SUBROGATION.

DECEDENTS' ESTATES.

See CURTESY; DESCENT AND DISTRIBUTION; DEVISE AND LEGACY; DOWER; EXECUTORS AND ADMINISTRATORS; WILL; WITNESS, I.

DECEIT. See FRAUD AND FRAUDULENT CONVEYANCE.

DECLARATIONS. See EVIDENCE, V.

DECREE. See EQUITY, V.; INTERPLEADER, 5–7.

DEDICATION. See MUNICIPAL CORPORATIONS, V. a; WAYS, I.

DEED.

I. VALIDITY; ACKNOWLEDGMENT.
II. DELIVERY.
III. RECORD; NOTICE.
IV. CONSTRUCTION.
V. DEFEASANCE.
VI. WARRANTY.
BRIEFS AND NOTES.

See BOUNDARIES; EASEMENT; EJECTMENT; FRAUD AND FRAUDULENT CONVEYANCE, I.; HUSBAND AND WIFE, 7, IV.; MORTGAGE; TAXES, V. c; VENDOR AND PURCHASER.

I. VALIDITY; ACKNOWLEDGMENT.

1. Whenever there is a great **weakness of mind in grantor,** although not amounting to absolute disqualification, and the consideration given is grossly inadequate, equity will set aside the conveyance. Authorities cited.
Travis' Appeal (Pa.) 556

2. Where one of the **joint owners** of land obtains the **signature** of the other owners to a deed thereof **by fraud,** and also by misrepresentations induced grantee to believe that he represented the other owners, the deed will be set aside.
Dunnington v. *Hubbard* (Md.) 887

3. A **promise** by one **to** his **intended wife,** that all he had or might have was to be hers, is **not sufficient consideration** for a deed to her **fourteen years after** marriage and after he had failed.
Neilson v. *Williams* (N. J.) 869

4. **Equity** will **not aid an imperfect voluntary conveyance,** even when by accident the deed was not delivered. Authorities cited.
Duraind v. *Dych* (Pa.) 900

5. An **acknowledgment** of a mortgage **before a justice** of the peace, who has **qualified as clerk** of the oyer and terminer and quarter sessions, is valid.
Adam v. *Mengel* (Pa.) 184

II. DELIVERY.

6. A delivery of a deed, not beneficial to the grantee of property heavily incumbered, **cannot be inferred from** the **bare record** of the deed.
Gifford v. *Corrigan* (N. Y.) 277

7. An instrument in the form of a **deed** to a trustee, signed and acknowledged, no consideration being paid, and **retained by grantor** until death, *held,* **not valid.**
Duraind v. *Dych* (Pa.) 898

8. A **father executed** a **deed to** his **son but retained** the **deed in his possession** until his death. The son had no knowledge of the deed, which had not been recorded, until it was found among his father's papers. Notwithstanding evidence that the father had said to a stranger that he had given the land to his son, that he would keep the title during his life, but that the son would get the land after his death, *held,* **no title passed.** Authorities cited. *Id.* 899

9. Where a deed is sealed and delivered, and there is nothing to qualify the delivery except the **keeping** of the deed **in the hands of** the **executing party,** and nothing to show that he did not intend it to operate immediately, it is a valid deed. Authorities cited. *Id.*

10. Acts of grantor, such as recording, may give rise to the legal **presumption of** delivery. Authorities cited. *Id.* 900

III. RECORD: NOTICE.

11. A **deed sent to clerk** to be recorded, **without** payment of his **fees,** and which he "pigeon holed," is **not "lodged" for record** within Recording Act.
Dickerson v. *Bowers* (N. J.) 872

12. **Notice** of an unrecorded deed **to** an attorney or **agent** is equivalent to notice to principal. *Id.*

13. The **enrollment** of a deed is **evidence** of all circumstances necessary to give validity, but this evidence may be **rebutted.** Authorities cited.
Dunnington v. *Hubbard* (Md.) 888

IV. CONSTRUCTION.

14. A deed of land, with all rents, issues, and profits, and all grantor's estate, right and interest, to the grantee, his heirs and assigns, **vests** in the grantee the **legal title and equitable estate,** including ground rent and life estate.
Biddle v. *Tomlinson* (Pa.) 888

15. A deed stated that "This conveyance is upon the express condition that the company, their successors or assigns, shall at all times maintain an opening into the premises hereby conveyed, opposite to the hotel, adjacent to the premises hereby conveyed, for the convenient access of passengers," etc. *Held,* a **covenant running with the land,** providing for access or **right of way,** so as to continue or enhance the value of the hotel property, in favor of its owner or **lessee.**
Avery v. *New York Cent. & H. R. R. R. Co.* (N. Y.) 795

16. Courts frequently **construe** that which is in form a **condition,** a breach of which forfeits the whole estate, into **a covenant** on which only the actual damage can be recovered. Authorities cited. *Id.* 799

17. The owner of two adjoining city lots, Nos. 141, and 143, conveyed lot No. 143 to defendant's grantor, by metes and bounds, as being twenty-two feet wide, "with the buildings and improvements thereon, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging." The **house** on the lot conveyed **extended beyond** the

line called for by the **deed** five feet, on lot No. 141, on the east, up to the west wall of a building thereon, used as the east wall of the house, the greater part of which was on the land conveyed, but was not used as a party wall. The original grantor, being still the owner of lot No. 141, brought ejectment for the said five feet of lot No. 141. *Held*, said deed conveyed only that part of the house which is on the land described therein, and that **no easement exists for** the **extension** of the house **upon** the **land not conveyed.**
Griffiths v. *Morrison* (N. Y.) 773

18. By the word **"appurtenances,"** incorporeal **easements** or rights or privileges will alone pass, and of these only such as are necessary to the proper enjoyment of the estate granted. Authorities cited. *Id.* 775

19. The owner of a tract of **land,** on a plat of which a street was designated, but not then opened, conveyed a portion by deed **bounding on** west side of such **street.** Thereafter such **street** was **closed** by the public authorities with the acquiescence of the then holder of the abutting lot conveyed by said deed. *Held*, said deed did not convey **fee in road bed** of such street, and that grantor was entitled to recover possession of the road bed to the center.
Baltimore & O. R. R. Co. v. *Gould* (Md.) 379

20. A deed in pursuance of an antenuptial contract, conveyed land from the husband to a third party for the use and purpose mentioned in the contract, by which the husband in effect agreed to vest in his wife a life estate in the south half of the land, in case she survived him, with the remainder in fee to his heirs, and in the same contingency to vest in her an estate in the other half during two minorities of his children, with remainder in fee to such children, etc. *Held*, such deed was a mere conveyance to the **use of** the **beneficiaries** named.
Helck v. *Reinheimer* (N. Y.) 743

21. Where the contract provided that if the wife died before the husband, without issue, the **land** was **to be conveyed back** to the husband, **upon** her **death,** the deed ceased to have any operation. *Id.*

V. DEFEASANCE.

22. A deed absolute on its face may be **shown by parol** to be a security for money advanced.
Pearson v. *Sharp* (Pa.) 494

23. It does not follow from the possession of a **power of sale by** the **grantee** in such a deed that the power is to be exercised otherwise than by foreclosure. *Id.*

VI. WARRANTY.

24. Where grantee in a warranty deed assumes to **pay** certain **mortgages** as part of the purchase money, equity will compel him to discharge the obligation.
Cubberly v. *Yager* (N. J.) 365

BRIEFS AND NOTES.

Mental **capacity** of grantor; undue influence. (Pa.) 557, 558

Grantees must be plainly described. (N.Y.) 745

Consideration, support of grantor. (Pa.) 558

Inadequacy. (Pa.) 557, 558

Parol evidence to show. (Pa.) 650

Proof of. (Pa.) 511

Execution; proof of. (Pa.) 518

Any evidence tending to prove formal execution is sufficient to go to the jury. (Pa.) 203

Delivery; what constitutes. (Pa.) 900

Presumption of. (N. Y.) 278; (Pa.) 900

When not essential. (Pa.) 142

Escrow. (N. Y.) 765

Sufficient consideration for promise to pay. (Pa.) 153

Priority. (Pa.) 602

Receipt in; as evidence of payment. (Pa.) 511

Construction for court. (Pa.) 573

Intention of parties. (Pa.) 900

General words will be restrained by particular recitals. (Pa.) 879

Courses and distances yield to **monuments.** (Pa.) 573

Fence will not be taken as monument unless named in description. (Pa.) 574

Conditions; covenants. (N. Y.) 796

Conditions subsequent; where strictly construed. (N. Y.) 796

Words bargain and sell make covenant to stand seised. (Pa.) 900

Operation of bargain and sell for pecuniary consideration to motion *in futuro.* (Pa.) 900

Appurtenances. (N. Y.) 774; (Pa.) 904

Easement. (N. Y.) 774

An **exception** or **reservation** to a third party, not party to deed, is void. (N. Y.) 796

Exceptions construed most favorably to grantee. (Pa.) 879

Reservation. (Pa.) 625

Reservation; ground rent. (Pa.) 840

Title to **fee in way.** (Md.) 379, 380; (Pa.) 194

Estoppel by deed. (N. Y.) 304

Deed absolute on its face; **defeasance.** (Pa.) 494

DE FACTO OFFICER. See OFFICE AND OFFICER, 4–7.

DEFAULT. See JUDGMENT, I.

DEFEASANCE. See DEED, V.

DEFINITIONS.

1. Accomplice.
People v. *Ogle* (N. Y.) 49

2. *Donatio mortis causa.*
Perry's Appeal (Pa.) 165

3. Court of record.
Hutkoff v. *Demorest* (N. Y.) 34

4. Sale.
Gonser v. *Smith* (Pa.) 188

BRIEFS AND NOTES.

Advancements. (N. J.) 469, 470
"And." (Pa.) 498
Attestation defined. (Pa.) 204
Blackmail. (Pa.) 175, 176
Corporations. (Pa.) 661
Deed. (N. J.) 469
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"Duties," as used in Constitution. (D. C.) 858
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Sale. (Pa.) 190
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Sidewalks. (N. Y.) 47
Wharfage. (N. Y.) 777

DELIVERY. See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1, 2; DEED, II.; SALE, 5, 7, 9, 10.

DEPOSITION.

A deposition taken **before a justice** whose **commission** had been **vacated** by his removal out of the county within which he had been commissioned was held **admissible** in evidence, the justice being clothed with colorable authority. Authorities cited.
Adam v. *Mengel* (Pa.) 185

BRIEFS AND NOTES.

Admissibility of depositions read in a former case. (Pa.) 916

DESCENT AND DISTRIBUTION. See DEVISE AND LEGACY, 13, 14, 36.

When **tenant by curtesy** dies, nothing descends to his **heirs.**
Kulp v. *Bird* (Pa.) 576

DESERTION. See HUSBAND AND WIFE, 13, 14, 40.

DEVISE AND LEGACY.

I. CONSTRUCTION; GENERAL RULES.
II. DESCRIPTION OF GIFT AND BENEFICIARY; WHAT INTEREST PASSES.
III. DURATION AND NATURE OF ESTATE; LIMITATIONS, REMAINDERS, ETC.
IV. TRUSTS; CHARITIES.
V. POWER OF SALE; CONVERSION.
VI. ACCUMULATIONS.
VII. ADVANCEMENTS.
VIII. PAYMENT OF DEBT.
IX. PAYMENT; CHARGE ON LAND.
X. ACTIONS.
BRIEFS AND NOTES.

See CHARITIES AND CHARITABLE USES; DOWER; WILL.

I. CONSTRUCTION; GENERAL RULES.

1. To a **bill** filed **for** the **construction** of a will, testator's **heirs** at law are necessary **parties.**
Lomerson v. *Vroom* (N. J.) 366

2. That testatrix's plan of division of her property fails to effectuate her purpose will not justify the court in disregarding the **plain provisions** of the will.
Terry v. *Smith* (N. J.) 127

3. **Parol testimony** is **not admissible** to show that testator had other property to which the will applied.
Baker's Appeal (Pa.) 158

4. Where there is **no ambiguity** in the terms of a will, a doubt suggested by extraneous circumstances cannot be permitted to affect its construction. Authorities cited. *Id.* 160

5. **Intent of testator** must be gathered from will itself; all mere technical rules must give way to such construction. Authorities cited.
Rhein's Appeal (Pa.) 491

6. **Punctuation** must give way whenever it interferes with the proper and reasonable construction of a will. Authorities cited. *Id.* 491

7. It is only where the first sentence is complete and the other imperfect, or *vice versa*, that the word **"also"** can ever have the **meaning** of the words **"in like manner,"** given to it. Authorities cited. *Id.* 492

8. When one undertakes to make a will, it will be **presumed** that his purpose is to **dispose** of his **entire estate.**
Snyder v. *Baker* (D. C.) 847

II. DESCRIPTION OF GIFT AND BENEFICIARY; WHAT INTEREST PASSES.

9. A bequest to a **law library** to be established and maintained by fines, etc., to be paid to a committee appointed by the court, is a bequest to a mere inanimate thing, **having no capacity to receive** a gift and is void.
Craig v. *Lilly* (Pa.) 659

10. Even if the library were a charity, the gift would be **defeated** by the Act of April, 1855, **because** the **will** was **made within thirty days of** testator's **death.** *Id.*

11. The legal rights of the **heirs** or distributees to property of deceased persons **cannot be defeated, except by valid devise** of such property to other persons. Authorities cited.
Chamberlain v. *Taylor* (N. Y.) 291

12. The expression in a will, "the **moneys**

arising from the sales of my **real estate,"** *held*, to **refer** only **to** lands constituting the **residue** of testator's real estate.
Ballentine v. *Wood* (N. J.) 465

13. *Held*, that in a clause providing that after the death of all of testator's children (during whose lives the property was devised in trust) the residue of his real estate should "go and descend * * * to the respective right heirs of my said children in fee simple, to hold as tenants in common and not as joint tenants,"—the words **"right heirs" meant "children,"** and that the gift in remainder and the life estate vested at the same moment. *Id.*

14. *Held*, also, that testator's **grandchildren,** alive at his death, took a **vested title** to the remainder at his death by independent gift, their estate being, however, subject to the liability to open and let in grandchildren born subsequently. *Id.*

15. The **gift of** the **produce** of a fund **is a gift of** the **fund** itself, unless there be words of qualification restraining the extent and duration of the interest therein.
Snyder v. *Baker* (D. C.) 847

16. A testator bequeathed separate legacies to each of his three daughters, with directions to the trustees to invest and apply the interest to their use, and in case of the marriage of any of them, to hold her share in trust for the maintenance of her and her husband, and the survivors of them, for life, then in trust for such issue as she might leave at the time of her death; failing such issue, in trust for the surviving daughters, and the issue of any deceased daughter. One of the daughters died unmarried. *Held*, she died possessed of an **absolute estate in** the **legacy** bequeathed by her father, and that her **testamentary disposition of** it was **valid.** *Id.*

17. A **bequest of personalty** without words of limitation passes an **absolute estate,** unless the contrary intention is plainly expressed or necessarily implied. Authorities cited. *Id.* 851

18. A bequest: "I give and bequeath to my wife all my finished cabinet ware, on hand at the time of my decease, all my certificates of loan, bonds, notes, and all other evidence of indebtedness to me that I have or may have at the time of my decease; and I also give and bequeath to my said wife all my household furniture, of which I may die possessed, for her own use for and during her natural life, and after her death the same to go to my son," etc., is an **absolute gift** of cabinet ware, notes, and other evidence of indebtedness to the wife.
Rhein's Appeal (Pa.) 490

19. A bequest to A, and if she should die unmarried or without children to B, is an absolute gift to A, **defeasible by** an **executory gift over** in the event of A dying at any time unmarried or without children. Authorities cited.
Re New York, L. & W. R. Co. (N. Y.) 262

20. Where a testator, having a **power of appointment** under his father's will, and having in his possession some property subject to the power, makes this will: "I leave and bequeath all my property (as stated in my father's will) to my wife," etc., **nothing passes** thereby **except property to which** the power **applies.**
Baker's Appeal (Pa.) 158

21. Testator **devised lands in trust for** the **use** of his daughter E. **during** her **lifetime,** and her daughter S. and to her heirs after her, and if S. die before maturity and without issue, then to the children of his son, with power in the executor to sell the property. *Held*, that S. having arrived at maturity, and having children, is entitled to the whole estate after E's death, and that E. and S. **may elect** to take the land; and if S. cannot elect by reason of being a married woman, equity can give the necessary aid to protect her interests.
Howell v. *Tomkins* (N. J.) 463

III. DURATION AND NATURE OF ESTATE; LIMITATIONS, REMAINDERS, ETC.

22. A court of equity called upon to settle the equitable rights of the parties, may **charge remaindermen with moneys expended for** the benefit of the **estate.**
Thomas v. *Evans* (N. Y.) 800

23. **Municipal assessment** for permanent improvements upon land are **apportionable between** the **life tenant and** the **remainderman;** ordinary taxes of government are properly chargeable to the life tenant alone. Authorities cited. *Id.* 804

24. A **life tenant** cannot **charge a remainderman with** the expense of permanent **improvements** put upon the property by him during the life tenancy. Authorities cited. *Id.*

25. Where there is a devise to one person in **fee,** and, in case of his death, to another, the **contingency** referred to is the death of the first named devisee during testator's lifetime; and if such devisee **survives testator, he** takes an absolute fee.
Re New York L. & W. R. Co. (N. Y.) 259

26. The same rule of construction is to be applied where the alternative devise is made to depend upon the **death** of the first named devisee "**without issue,"** or "without children," etc. But the tendency is to lay hold of slight circumstances in the will to **vary such construction** and give effect to the **language** according to its natural import. *Id.*

27. When testatrix devised real **estate** to her daughter, without words of inheritance, and then directed that in case the daughter should die without issue, the estate (real and personal) should be possessed by the husband, sister and brothers of testatrix, the addition at the end of the clause, "the **devise over** to my husband, sister and brothers to depend upon the **contingency** of my daughter **dying without issue,"** indicated **an intention** by the testatrix that in the event of her daughter's dying without issue, her **husband,** sister and brothers should enjoy **the property,** without reference to any other **contingency.** *Id.*

28. The daughter took, under her mother's will, a **conditional fee,** defeasible by her dying without leaving issue at her **death**; that her issue, should she leave any, would **take** by

inheritance from her; but a **conveyance** by her **in** her **lifetime** would be **effectual** as **against** them, and that an indefeasible title in fee could be conveyed and the contingent expectant estate limited to the husband, sister and brothers of the testatrix, in the event of the daughter dying without issue, cut off by their joining with her in a conveyance.
Re New York L. & W. R. Co. (N. Y.) 259

29. Where the context is silent, the words referring to the death of a prior legatee, in connection with some collateral event, **apply** to the **contingency** happening as well **after as before** testator's **death.** Authorities cited. *Id.* 262

30. Where a will gave to testator's daughter $4,000 and one fourth of the residue absolutely, but the codicil thereto provided that executor should **pay** her the whole of the interest, and as much of the principal thereof **as** she **might need** from time to time, and whatever may remain at her death should go to her issue, and if she should have no issue then to testator's grandchildren living at her death, *held*, that the **amount** she was to receive **depended on** her **necessities.**
Reeves v. *Beekman* (N. J.) 458

31. The **burden** of proof is on such daughter's executor to **show** that the principal **sums** had been **paid,** according to her necessities; and in the absence of such proof, he must account for the principal. *Id.*

32. The absolute **power of distribution** of the entire fund in her hands as executrix did **not give** her the absolute **title** to it. *Id.*

33. If she was **in need,** she might have **used** such funds **at** her **own peril,** and the extent of her necessities could have been ascertained through a master. *Id.*

34. Where **testator** had held the principal moneys in hand for the purpose of investment and reinvestment, but **mingled** them with his own **funds,** it was not improper, in settling with the life tenant whose funds were so held, to charge the testator with **interest upon interest,** as he forebore investment and used the moneys for his own convenience. Earl, J., dissents.
Re Kernochan (N. Y.) 90

35. Where a will gives to testator's wife the use and income of all his estate during her life or until she marries again, with power to the executors to dispose of any of it and to change the investment, and upon his wife's death gives such use and income to his two sons, share and share alike, and upon the decease of his sons, to their heirs—should both have heirs—their father's portion only, and in case of one having no heirs then to the heirs of the other, share and share alike, and if both should have no heirs, then as the law directs—the **suspension of absolute ownership** will or may exceed a **longer** period **than two lives in being** at the death of the testator. Such **limitation** is **too remote,** and renders the disposition void.
Ward v. *Ward* (N. Y.) 67

36. A valid **trust** was created by the will, to continue during the life or widowhood of testator's wife, but on her death the **residue** then remaining of the estate should be **divided** according to the Statute of Distributions in cases of intestacy. *Id.*

IV. TRUSTS; CHARITIES.

37. In construing a will the same **rules of construction** to determine the quality of the estate bequeathed, whether for life or in fee, will be applied to trust estates as to those which are not.
Snyder v. *Baker* (D. C.) 347

38. Testator directed his **residuary estate** to be **divided** into two equal parts, **one part** to be paid **to a religious** corporation **and** the **other to an educational corporation.** All the rest of his real and personal estate not theretofore specifically devised he devised and bequeathed to his executors in trust for the payment of the bequests and legacies theretofore specified and ready to be paid; and for the execution of such trust empowered them to sell and convert his real and personal estate into cash. The executors conveyed certain real estate, and, the same being in the adverse possession of defendant, brought ejectment for their grantee. *Held*, (*a*) that no estate in land vested in the trustees; (*b*) that if the power to sell conferred by the will might be exercised as a power in trust, in that event the title would descend to the heirs at law, subject to the execution of the power; (*c*) that such devises are **invalid** to the extent of one half of the residuary estate, as conflicting with the statute forbidding bequests to religious corporations, etc., in excess of one half of testator's property; (*d*) that there was no equitable conversion of the realty so as to take it out of the statutory rules for the **descent of real estate;** (*e*) that there was nothing to prevent the regular descent of the land to the legal heirs of testator.
Chamberlain v. *Taylor* (N. Y.) 288

39. A will provided that the residue of the estate was "to be kept in reserve for further consideration in the way of charitable purposes in liberal way, not to any particular creed or sect a of religion." *Held*, that testator's intention was to give the **residue** to the executors in **trust for** such **charitable purposes** as they may think proper.
Claypool v. *Norcross* (N. J.) 917

40. Where a will gave to complainant and W., another daughter of testatrix, each the interest of one sixth of the entire estate for life, with remainder to complainant's daughter, and after giving certain legacies, gave the residue of the estate, real and personal, to the executor "in trust for the execution of my will," to pay debts, etc., and then to pay over to another daughter, S., the rents, issues, and profits of the balance of the residue, and at her death to hand over such balance to S's two daughters, *held*, that the **shares** of complainant and W. are **not subject to** the **trust** created for the residue.
Terry v. *Smith* (N. J.) 127

41. The **words "for** the **execution of** my **will," employed to qualify** the **trust,** are **superfluous,** and do not extend it over the shares of complainant and her sister W. *Id.*

42. The **trust** of the residue did **not de-**

volve upon the **administrator** with the will annexed.

Terry v. *Smith* (N. J.) 127

43. If a good reason be shown for so doing, a **mixed trust** is **partible** in equity. *Id.*

44. Where the will created **a trust and,** no trustee having been appointed, the trust would **devolve upon** the **executor—where** he has **renounced,** the administrator having no authority to execute the trust—the court may **appoint a trustee.** *Id.*

45. If the real estate can be partitioned without prejudice to the interests of the owners, the **share** of the complainant may be **set off and** she may enjoy it as a tenant for life. *Id.*

46. By one clause of his will a father devised his residuary estate to his daughter, "to have and hold the same, unto her heirs and assigns forever," and in a following clause committed to her the guardianship of his grandchild, the child of a deceased daughter, with the words: "I enjoin upon her to make such **provision for** such **grandchild** out of my residuary estate now in her hands, in such manner, at such times and in such amounts **as** she may **judge** to be **conducive** to the welfare of such grandchild and her own sense of justice and Christian duty should dictate." *Held*, such provision is **not ground for** a complaint by the general guardian of the grandchild to have a **trust** declared in her favor.

Lawrence v. *Cooke* (N. Y.) 101

47. The **provision** was **not** intended to **relieve** the **father** of the grandchild **from** his legal obligation to **support** his own child, and it vested the **absolute title** to his **residuary estate** in his daughter. *Id.*

48. Under a provision in a will in these words: "It is my request that all persons herein named as executors will consent to act as such executors and trustees; and that each executor and **trustee,** other than my wife, do also receive and take the full rate and commissions provided by law for each executor, intending thus to provide suitable compensation for their services in addition to the duties herein devolved upon them," *held*, the **intention** of the testator was to **exclude** his **wife from compensation.**

Re Kernochan (N. Y.) 90

V. POWER OF SALE; CONVERSION.

49. The **law** never **considers a conversion** of real and personal property to have **taken place** unless there has been a valid devise of the property in discussion in some form to the beneficiary, and the purposes of the will required it to be done.

Chamberlain v. *Taylor* (N. Y.) 288

50. A general devise of lands **in trust** to executors **to sell** and convey them **vests no title in** the trustees. Authorities cited. *Id.* 290

51. A merely **discretionary power of sale** in executors for purpose of distribution does not vest them with title to real estate. Authorities cited. *Id.* 291

52. An **equitable conversion** of real estate does not authorize its sale for convenience of one executor without the co-operation of his **coexecutor.** Authorities cited. *Id.* 292

VI. ACCUMULATIONS.

53. Under a will empowering the executors to "receive the rents, interest, and income," and to apply the net amounts thereof to the use of testator's widow during life, and after her death to divide the remaining estate among his heirs, a **dividend declared upon** railroad **stock,** assets of the estate, **before testator's death,** but payable after his death, **belonged to** the **executors.**

Re Kernochan (N. Y.) 90

54. Prior to testator's death the railroad company accumulated securities, and other assets, from earnings over and above expenses and dividends, and some two months after testator's death it had on hand $1,102,000, as a sinking fund for the redemption of outstanding obligations; and at that time an agreement was entered into between certain stockholders, among them the executors, and a canal association, for the sale of their stock to the canal association for $250 for each share, and providing that the canal association should have the sinking fund, but that the stockholders should be paid a ratable portion of this surplus, which amounted to $15.74 per share. *Held*, that the **price paid for** the **shares,** although increased by this prospective advantage, **belonged** altogether **to** the **remaindermen** and was properly carried to principal and not income. *Id.*

55. A **dividend declared** upon the stock by the company **after testator's death, from accumulated** net **earnings** of the company running back for a considerable period of time, went to the widow as **income** under the will. Andrews, *J.*, dissents. *Id.*

56. A **privilege** to **subscribe for,** and take at par, one or more **bonds** or shares of stock for a certain number of shares of stock before held by the estate, if accepted, operated as a change in the manner of investment of so much of the estate; and the value **belonged to** the **estate** and not to the life tenant. *Id.*

57. Payments in respect of profits, accruing and properly defeasible as such, are **income** and **belonged** to the **tenant** for life, if the sum payable is ascertained and payable after testator's death. *Id.*

58. A **gift of** the **profits** and dividends of stock for life will not be held to **carry dividends** declared **after** the **death of the beneficiary,** although made from profits accruing during his lifetime. Authorities cited. *Id.* 95

VII. ADVANCEMENTS.

59. An advancement **creates no debt to** the person making it.

Dawson v. *Macknet* (N. J.) 469

60. **Mortgages** executed **by a son to testator** to secure money received and notes indorsed and paid by the testator for the **accommodation** of the son, are **evidence of debt** and not of advancement. *Id.*

VIII. PAYMENT OF DEBT.

61. A **legacy** will generally be **presumed** to be in **satisfaction of a demand against** the testator. The **intention of the testator is**

to govern. A devise of land is not to be taken in satisfaction of a debt
Rusling v. *Rusling's Exrs.* (N. J.) 129

62. Where a husband in his will **recognised a claim** of his wife against him, for **money loaned,** it will be **presumed** to be still **outstanding.** *Id.*

63. When testator provides that his just debts shall be paid if any he has, and the legacy given is in excess of the amount of the debt and interest due his wife, and he directs that the bequests in favor of his wife shall be in lieu of dower or any other claim against his estate,—*Held*, that he thereby **intended** to **discharge** and satisfy his **indebtedness to** his **wife.** *Id.*

64. If a testator declares that all his debts and legacies shall be paid, it will **overcome** the **presumption** that he intended the legacy **to be** in satisfaction of a debt due from him. Authorities cited. *Id.* 131

65. The presumption is also overcome if the legacy be less than the debt, or if the debt be unliquidated, or the legacy be given to a third person. *Id.*

IX. PAYMENT; CHARGE ON LAND

66. The orphans' court has no jurisdiction to decree the **payment of** a **legacy by** a **devisee,** unless the legacy is charged upon land.
Schmehl v. *Bickel* (Pa.) 504

67. By a devise: "I order that my son my dwelling and piece of land containing about twenty-six acres more or less, as his own property, but (*aber*) my son shall keep my wife as long as she lives, or pay her annually $72, and my son must, after my wife's death, pay to my daughter $1,200, as follows" etc., the legacy to the daughter **is not charged upon** the **land.** *Id.*

68. By the words "subject to the payment of * * * $125 unto my widow during her life," following a devise of land, testator intended the **land** to be **charged with** the **annual payment,** of said sum during the life of the **widow.**
Hellerman's Appeal (Pa.) 600

X. ACTIONS.

69. A **share of** a judgment defendant, as **legatee** in the state of a decedent in the hands of an executor, may be **attached** by service upon the garnishee of a writ of attachment issued on the judgment, in the manner provided for the service of a writ of summons in a personal action.
Purves v. *Lex* (Pa.) 891

BRIEFS AND NOTES.

Devise **defined.** (N. Y.) 260

Construction; rule of, in doubtful cases. (D. C.) 848

Absurd, rejected. (Pa.) 492

Devesting estate not favored. (N. Y.) 260

In order to avoid a will for uncertainty, it must be incapable of any clear meaning. (N.J.) 917

Meaning of will is not controlled by value of respective estates. (Pa.) 159

Intention of testator. (D. C.) 849; (N.Y.) 67, 102, 103, 260, 261; (Pa.) 158, 159, 505, 506.

Must control. (N. J.) 466, 916; (Pa.) 492, 493

Particular intent governs. (Pa.) 492

Gathered from whole will. (D. C.) 847; (Pa.) 158

Presumption of intent by testator not to die intestate as to any part of property. (N. J.) 917; (Pa.) 159

Whole **will** must be **taken together.** (Pa.) 492, 493

The parts of a will are to be construed together. (D. C.) 847

One part of will may modify another. (Pa.) 492

An estate cannot be taken away or cut down by subsequent words not as clear and decisive as words giving estate. (N. Y.) 68, 260

Words; rule of construction. (N. J.) 453

Transposition. (Pa.) 159

Omission or insertion. (N. Y.) 68; (Pa.) 159

Judicial definitions prevail. (N. Y.) 102

Every sentence and word is to be considered. (Pa.) 157

"Item," usual word to introduce new matter. (Pa.) 493

Punctuation; regarded. (Pa.) 159

Not authoritative. (Pa.) 492, 493

Admissibility of parol **evidence** in construing will. *Note*, 158; (Pa.) 158, 159

Devise to **unincorporated association** is good. (Pa.) 663

Devise **of** rents and profits or **income** of land is equivalent to devise of land itself. (N. J.) 466

Usual meaning of word **"heirs"** must prevail, unless intention of testator to use otherwise appears. (N. Y.) 67, 68

Indefinite failure of issue. (N. J.) 453, 454

Executory devises. (N. J.) 454; (N. Y.) 261

Fee simple. (D. C.) 347

Gift of income, unaccompanied by words limiting duration of benefaction, confers absolute estate. (D. C.) 847, 849

After an absolute devise no subsequent language less decisive than itself will cut it down. (N. Y.) 101, 103

Absolute bequest of dividends gives absolute property of stock. (D. C.) 848

Life estate; remainders. (D. C.) 849, 850; (N. J.) 453, 466; (N. Y.) 260, 261; (Pa.) 492, 581

Cash dividends declared during a life tenancy from accumulated earnings belong to the tenant. (N. Y.) 91

Cash dividends are income. (N. Y.) 91

Rights and liabilities of life tenant. (N. Y.) 802

Devise over of personalty must be taken by express words or necessary implication. (D. C.) 847, 848

Contingent remainders. (N.Y.) 260, 746

Conditions; limitations. (N.Y.) 260, 261

Estate tail. (N. J.) 454

In construing **residuary** clauses, courts look at surrounding circumstances. (N. Y.) 102

The law favors immediate **vesting.** (N. J.) 466

Clause of **substitution** is generally referable to testator's death. (N. Y.) 261

Power of **alienation** of portion of estate for greater period than during continuance of two lives in being at testator's death. (N. Y.) 67

Unlimited power of disposition. (Pa.) 159

Precatory words defined. (N. Y.) 104

Rules of construction where used. (N. Y.) 104

Trusts. (D. C.) 349

Uncertainty. (N. J.) 454; (N. Y.) 103, 105

An act depending upon the sense of justice of another must be discretionary. (N. Y.) 102

Directions involving a personal trust can only be exercised by the person named for that purpose. (N. Y.) 103

If a valid trust is created as to personal estate, that is sufficient. (N. Y.) 105

Charitable uses. (N. J.) 917; (Pa.) 663

Charitable bequest void for uncertainty. (N. J.) 917

Power of sale; conversion. (N. Y.) 68, 289, 290, 802

Distinction between power to sell and trust to sell. (N. Y.) 707

Charge upon land. (Pa.) 506

Widow is neither heir nor next of kin. (N. J.) 466

Advancements. (N. J.) 470

What constitutes. (Pa.) 849

Note by son to father is not evidence of. (N. J.) 470

DISCONTINUANCE. See EJECTMENT, 3.

Where a **rule to show cause why** a judgment of **non pros.** should **not** be **set aside** was obtained on the ground that the court files showed that the judgment had been irregularly entered, and the rule recited matters appearing by the files, the plaintiff, on motion to make rule absolute, may produce files without further formality.

Souder v. *Lippincott* (N. J.) 108

BRIEFS AND NOTES.

When to be granted. (N. Y.) 276

DISSEISIN. See SEISIN AND DISSEISIN.

DISSOLUTION. See CORPORATIONS, V.; PARTNERSHIP, 2.

DISTRIBUTION. See DESCENT AND DISTRIBUTION.

DISTRICT AND PROSECUTING ATTORNEY.

The board of supervisors fixed the **salaries of** the district attorney, his **chief clerk,** and other subordinates at certain sums, but thereafter, by resolution included in the budget a sum less than the aggregate of amounts fixed by the first resolution. *Held,* that a chief clerk appointed under such arrangement and who accepted payment at such reduced rate had, after his employment, no claim for the larger salary fixed by the first resolution.

People v. *Supers. of Kings Co.* (N. Y.) 273

BRIEFS AND NOTES.

Salary of chief **clerk.** (N. Y.) 274

DISTRICT OF COLUMBIA.

1. Where a **corporation** had filed its certificate of organization on the 23d of June, 1884, but no practical organization or subscription to stock had been made until the September following, when the company announced itself ready for business, an **assessment** of **taxes** upon the capital stock for the year commencing July 1, 1884, is invalid and void, under Act of March 3, 1877, governing assessment of taxes in the District of Columbia.

Anglo-Am. Ins. Co. v. *Dist. of Columbia* (D. C.) 355

2. A **married woman** cannot contract in the District of Columbia as a **sole trader.**

Hitchcock v. *Richold* (D. C.) 353

BRIEFS AND NOTES.

Not a **State** in meaning of Constitution. (D. C.) 359

DIVORCE. See HUSBAND AND WIFE, VI.

DOCTOR. See PHYSICIAN AND SURGEON.

DOCUMENTARY EVIDENCE. See EVIDENCE, II.

DONATIO MORTIS CAUSA. See GARNISHMENT.

DOWER.

1. The **heirs** at law **agreed** that, so **long as** the **widow** should **make no claim** for dower, each heir should **pay her annually a certain sum,** etc., and that when the widow should claim dower the payments should cease; and provided that "Nothing herein contained and no receipt by her (the widow) of any of the above mentioned payments shall be any bar to her application for such dower; but such payments shall be claimed as a **credit** on the amount of dower which may be claimed." **One** of the heirs **paid only a part** of the amount stipulated, and in no year paid the full sum stipulated. After the widow's death her administrator brought suit for arrearages of dower against one who had purchased a portion of said real estate from said heir. *Held:*

(*a*) That the widow did not **waive her**

right under the law by receipt of payments under said agreement.

(*b*) That contract repels inference that widow **released** whole or any part of the amount due her.

(*c*) That recovery herein was properly measured by one third the annual rents of land in suit.

(*d*) That the facts failed to establish an **estoppel** against the widow's right to assert her claim to dower in the land in suit.

(*e*) That said **heir was incompetent to testify** to matters which occurred between himself and the widow in her lifetime.

(*f*) That the **purchaser** was only **entitled to a credit** of not more than one half of the amount paid to the widow by said heir.
Brodhead v. *Heller* (Pa.) 558

2. A **husband,** shortly after marriage, purchased a farm, but **had** the **deed made out to a third party.** *Held*, that a decree directing commissioners to lay off and assign dower to the wife in said farm should be affirmed, on ground that such deed was **in fraud of** her **dower rights.** Miller, *J.*, dissenting.
Rabbitt v. *Gaither* (Md.) 882

3. A mere **devise** by which a husband seeks at his death to **deny** his **widow** the share of his personalty which the law assigns to her will be **ineffectual** against her. Authorities cited. *Id.* 884

4. An absolute **sale** of an equitable interest in land by the husband alone during his life, will **bar** all **claim** to dower. Authorities cited. *Id.* 883

5. The **estate of** the **widow** for the assignment of dower is a continuation of the estate of her deceased husband. Authorities cited.
Witthaus v. *Schack* (N. Y.) 258

6. The **right** of a widow to dower, until it is assigned, is **a** mere **chose in action** which is not the subject of a sale upon execution at law. Authorities cited. *Id.* 259

7. The **joinder of** a **married woman with** her **husband** in a deed or mortgage of his land inures simply as a release to the grantee of her future contingent right of dower in the premises. Authorities cited. *Id.*

8. The **object of uniting** the **wife** with the husband in conveyance of his land to a third person is to extinguish her inchoate right of dower. Authorities cited. *Id.*

BRIEFS AND NOTES.

Inchoate **right.** (N. Y.) 257

Protection of right in equity. (Md.) 882

Wife may maintain separate action for injury to inchoate right. (N. Y.) 257

Fraud upon rights of widow. (Md.) 882

DURESS. See FRAUD AND FRAUDULENT CONVEYANCE, 8.

DYING DECLARATIONS. See EVIDENCE, VI.

EASEMENT.

1. The owner of two adjoining city lots, Nos. 141 and 143, conveyed lot No. 143 to defendant's grantor, by metes and bounds, as being twenty-two feet wide, "with the buildings and improvements thereon, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging." The **house** on the lot conveyed **extended beyond** the **line called for** by the deed five feet on lot No. 141 on the east, up to the west wall of a building thereon, used as the east wall of the house, the greater part of which was on the land conveyed, but was not used as a party wall. The original grantor, being still the owner of lot No. 141, brought ejectment for the said five feet of lot No. 141. *Held*, said deed conveyed only that part of the house which is on the land described therein, and that **no easement** exists **for** the **extension** of the house **upon** the **land not conveyed.**
Griffiths v. *Morrison* (N. Y.) 773

2. By the word **"appurtenances," incorporeal easements** or rights or privileges will alone pass, and of these only such as are necessary to the proper enjoyment of the estate granted. Authorities cited. *Id.* 775

3. A deed stated that "this conveyance is upon the express condition that the company, their successors or assigns, shall at all times maintain an opening into the premises hereby conveyed, opposite to the hotel adjacent to the premises hereby conveyed, for the convenient access of passengers," etc. *Held*, a covenant running with the land, providing for access or **right of way,** so as to continue or enhance the value of the hotel property, in favor of its owner or lessee.
Avery v. *New York Cent. & H. R. R. R. Co.* (N. Y.) 795

4. The first count of a complaint to enjoin the maintenance of a fence alleged that plaintiff was in possession of hotel premises and that the fence built by defendant railroad company was an obstruction to a public street adjacent to the hotel, and a nuisance; the second count alleged that defendant had **failed** to **maintain** an **opening** through the fence as it was bound to do, etc. *Held*, an amendment of the complaint, so as to set up a lease to plaintiff, was properly allowed. *Id.*

5. The **lessee** could not raise the question of validity of deeds executed by his lessor. *Id.*

6. For mere **interference with prospect,** it not being an incident of the estate, no remedy lies apart from contract.
Garrett v. *Janes* (Md.) 403

BRIEFS AND NOTES.

By **implication.** (N. Y. 804

EJECTMENT.

I. WHEN LIES; TITLE, EVIDENCE OF.
II. VERDICT; JUDGMENT.
BRIEFS AND NOTES.

I. WHEN LIES; TITLE, EVIDENCE OF.

1. Ejectment is the proper remedy against one **holding adversely.** Authorities cited.
Wistar's Appeal (Pa.) 653

2. Ejectment cannot be maintained against defendants, not in **possession** of the premises nor claiming title to the possession.
Sisson v. *Cummings* (N. Y.) 806

3. Such defendants are entitled to a **dismissal** of the complaint. *Id.*

4. A **general guardian** can **maintain** ejectment to recover possession of his ward's lands. Authorities cited.
Re Hynes (N. Y.) 683

5. A **vendor, upon vendee's request** may bring ejectment, take confession of judgment to be released on payment of sum due by vendor at stipulated time, and upon vendee's failure to perform condition, issue execution and recover possession of the land. Authorities cited.
Miles v. *Lewis* (Pa.) 865

6. Plaintiff need not always show **title** out of the Commonwealth and then trace each successive transfer down to himself.
Jones v. *Bland* (Pa.) 859

7. Where both plaintiff and defendant **claim under** the **same party,** it is sufficient for plaintiff to prove in the first instance, if he claims by devise, the seisin of the devisor and the will. *Id.*

8. **Seisin of** a **devisor** may **be proved,** *prima facie,* by showing that he was in actual possession or in receipt of the rents as landlord at his death. *Id.*

9. In ejectment by an execution purchaser against the execution defendant, evidence of the judgment, process and sheriff's deed is conclusive, and make a **prima facie case.**
Birkbeck v. *Kelly* (Pa.) 890

10. It is competent in ejectment to prove **declarations of** both **grantor and grantee,** as tending to show an intent to defraud plaintiff, a creditor of grantor.
Cope v. *Kidney* (Pa.) 866

11. An **objection** to plaintiff's title in ejectment, **not** suggested **at** the **trial,** cannot be **raised** in the supreme court. *Id.*

12. In ejectment to recover possession of the underlying mineral ore, from the owner of the surface, the defendant claimed title to the ore under a **release** alleged to have been executed by a former owner of the mineral right to a former owner of the surface, nearly forty years before suit brought, and **lost** or destroyed. *Held,* that **secondary evidence** was properly rejected.
Phœnix Iron Co. v. *Lewis* (Pa.) 515

13. A, B, and C, by conveyance which excepted certain lots, became **tenants in common** of a tract of land which, for the purpose of clearing up the title, A by agreement with B and C, permitted to be sold for taxes, and bought in his own name for the benefit of all. Still later both this tract and the excepted lots were again sold for taxes, and were bought by D. The excepted lots were not redeemed, and D conveyed them to A; B and C thereon brought ejectment against A for an undivided two thirds of the lots. *Held,* that in the **absence of fraud,** they could not recover.
Brickell v. *Earley* (Pa.) 520

II. VERDICT; JUDGMENT.

14. In ejectment, *held,* that the **question** was merely **one of lines,** and **that the** justice of plaintiff's claim was plain from certain deeds, which need **not have** been **submitted to the jury.**
Kime v. *Polen* (Pa.) 568

15. In ejectment in the nature of an appeal from the board of property, under the Act of April 3, 1792, § 11, *held,* that there was an error in directing a **general verdict** for the plaintiffs, **without** a **reservation** of **the** defendants' ore rights, reserved in a deed.
Thompson v. *Mattern* (Pa.) 621

16. Such **verdict** may be **amended** so as to reserve such rights. *Id.*

17. The **supreme court** has the power to **amend verdicts** in ejectment, especially those of an equitable kind. *Id.*

18. A verdict was rendered for a sum of money. There was no claim for **mesne profits.** The court ordered judgment for the land, without prejudice to plaintiff's right to bring suit for mesne profits. *Held,* not error.
Cope v. *Kidney* (Pa.) 866

19. **Judgment** obtained on the ground of relationship of successful party to the person last seised is **not a bar** to a **subsequent ejectment** by the unsuccessful party, or conclusive evidence of the fact of relationship.
Gehr v. *Miller* (Pa.) 508

BRIEFS AND NOTES.

Not **maintainable** after erroneous institution of partition proceedings. (Pa.) 509
Sufficiency of title to maintain. (Pa.) 902–904
Resulting trust enforced by. (Pa.) 855
Equity will not entertain a mere ejectment bill. (Pa.) 855
Possession. (N. Y.) 806; (Pa.) 856
Time of filing amended **description.** (Pa.) 573

In ejectment **by execution purchaser,** how far proceedings in execution is conclusive. (Pa.) 891
Verdict; certainty. (N. J.) 111
Judgment; *res judicata.* (Pa.) 508, 509
Relationship of parties; effect. (Pa.) 509

ELECTIONS. See VOTERS AND ELECTIONS.

EMINENT DOMAIN. See MUNICIPAL CORPORATIONS, V.; RAILROAD COMPANIES, 6–15; WAYS, II.; WHARVES.

BRIEFS AND NOTES.

Rule for construction of statutes. (N. Y.) 234
Attacking corporation collaterally. (N. Y.) 235

ENCROACHMENT. See WAYS, IV.

EQUITY.

I. IN GENERAL; REMEDY AT LAW.
II. FRAUD OR MISTAKE.

III. ACCOUNT.
IV. PLEADING.
V. PRACTICE; MASTER; DECREE; APPEAL.
VI. COSTS.
BRIEFS AND NOTES.

See CLOUD ON TITLE; CORPORATIONS, 28; CREDITORS' BILL; INJUNCTION; INTERPLEADER; LANDLORD AND TENANT, 11; MAXIMS; PARTITION; SPECIFIC PERFORMANCE; SUBROGATION; WASTE.

I. IN GENERAL; REMEDY AT LAW.

1. Where the **remedy at law** is adequate, no ground exists for the interposition of equity.
Oakville Co. v. *Double-Pointed Tack Co.* (N. Y.) 720

2. A **suit** in equity cannot be maintained by an executor to **recover the value** of **trees cut from** the **realty** belonging to the estate; the remedy is at law.
Lippincott v. *Barton* (N. J.) 920

3. Where a **person in** peaceable **possession,** under claim of lawful title, but really under a defective title, making in good faith **permanent improvements,** the true owner who seeks the aid of equity to establish his own title will be compelled to reimburse the occupant for his expenditure.
Thomas v. *Evans* (N. Y.) 800

II. FRAUD OR MISTAKE.

4. The jurisdiction of equity to **rescind contracts** for fraud or mistake is one of the best settled of its powers.
Diffendarfer v. *Dicks* (N. Y.) 741

5. In an action to reform a written contract for mistake, the plaintiff cannot **insist** that its **true meaning** is precisely what it would have been if the **instrument** were reformed as asked.
Oakville Co. v. *Double-Pointed Tack Co.* (N. Y.) 720

6. Equity will not **rescind** an executed **contract** when the parties have a full and complete **remedy at law.**
Travis' Appeal (Pa.) 553

7. Whenever there is a great **weakness of mind in grantor,** although not amounting to absolute disqualification, and the consideration given is grossly inadequate, equity will **set aside** the **conveyance.** Authorities cited.
Travis' Appeal (Pa.) 556

8. Equity will not aid an **imperfect** voluntary **conveyance,** even when by accident the deed was not delivered. Authorities cited.
Duraind v. *Dych* (Pa.) 900

9. Where one of the joint owners of land obtains the **signature** of the other owners to a deed thereof **by fraud,** and also by misrepresentations induced grantee to believe that he represented the other owners, the deed will be set aside.
Dunnington v. *Hubbard* (Md.) 387

10. In a suit to recover the **amount paid** under execution upon a judgment alleged to have been **erroneously included** through **mistake** of fact alleged to have been known to defendant, *held,* the complaint failed to show cause of action.
Wood v. *Amory* (N. Y.) 760

III. ACCOUNT.

11. The court of chancery may compel an account **of waste,** done only **as incidental to** relief by **injunction** to stay the commission for further waste, and that only to prevent a multiplicity of suits.
Lippincott v. *Barton* (N. J.) 920

12. An action by a stockholder of a bank against its **directors,** to call them to **account** as trustees, is **triable by the court.**
Brinckerhoff v. *Bostwick* (N. Y.) 711

13. Where upon a bill for an account, the **master** recommends a decree for the plaintiff, and his report is confirmed by the court below, the fact that he **disregarded** considerable **vague testimony,** is not ground for reversing the **decree** at the instance of the defendant.
Perry's Appeal (Pa.) 164

14. A **petition** cannot be maintained, **by one not entitled** to come in as complainant, filed in a suit terminated fifteen years before, against one not a party to, and who has not been appointed trustee in, the suit, and who has no court funds in his hands, charging him to be a self constituted trustee of certain funds in his hands, **to** make him **account for** his **misdoings** in regard to such funds and to bring them into court for distribution, the suit having been instituted for an entirely different purpose.
Rappanier v. *Bannon* (Md.) 420

IV. PLEADING.

15. A **bill** asking relief against all the defendants as executors and relief against one of defendants as mortgagee of trust property with notice of the trust, is **multifarious.**
Cocks v. *Varney* (N. J.) 457

16. In an action to compel a company to recognize plaintiff as a stockholder, an **answer** by a defendant who is president of the company that plaintiff agreed that his subscription should be for the use and benefit of said defendant, and that he would transfer the same to him, and that plaintiff was never the real owner of any shares, is **responsive** to the bill.
Rowley's Appeal (Pa.) 512

17. An affidavit by such defendant that the statements made in the charter of the company was true, annexed to such charter which contained plaintiff's name as a subscriber, and stated the number of shares subscribed for by him, is sufficient corroboration of plaintiff's **testimony to overcome the answer.** *Id.*

18. When the hearing is on petition and answer, all statements in the **answer** must be **regarded as true.** Authorities cited.
McKaig v. *James* (Md.) 452

V. PRACTICE; MASTER; DECREE; APPEAL.

19. Where plaintiff brings an action for both legal and equitable relief, he submits to

have the **issue tried by** the **court.** Authorities cited.
Cogswell v. *New York, etc. R. R. Co.* (N. Y.) 330

20. If plaintiff can with certainty have his rights determined without trying and **deciding a case as between codefendants,** the court will not enter into such a case.
Gaither v. *Clarke* (Md.) 438

21. Unless the **discretion** of the common pleas in refusing to **open a decree** in equity has been abused, it will not be reviewed.
Acuff's Appeal (Pa.) 914

22. When the **master's report** follows the direction of the decree, an exception to it will be overruled.
United N. J. R. R. & Canal Co. v. *Long Dock Co.* (N. J.) 920

23. In a suit to quiet title, when an **issue** as to the title was framed and **tried by** a **jury,** the **decree** will be in accordance with the verdict.
Wilson v. *Wilson* (N. J.) 456

24. Under Act of April 1, 1874, an **appeal** in equity must be taken within two years.
Acuff's Appeal (Pa.) 914

VI. COSTS.

25. Courts of equity exercise **discretionary** power as to cost.
Owings v. *Rhodes* (Md.) 407

26. Where a bill is filed by an administrator for an account of decedent's interest in an estate, and for a discovery of personal property, held by defendant, and to restrain him from expending that property in improvements upon the joint real estate, and it appears that defendant had made several settlements and paid the balance found due from him thereon and offered to make a further settlement which was refused, and that complainant could have got all the information he desired as to the property by inquiring of defendant, who had not refused to give it, and that defendant did not contemplate any expenditures upon the joint real estate except those which he was constrained to make by the municipal authorities, *held*, that **defendant** should **not** be required to **pay** the costs of the suit.
Barclay v. *Cooper* (N. J.) 132

BRIEFS AND NOTES.

Principles. Considers that as done which should be done. (N. Y.) 226; (Pa.) 211

Taking cognizance of a litigation will dispose of every subject embraced within it. (Pa.) 856

Forfeitures not favored. (N. Y.) 233, 264

Remedy at law. (N. Y.) 713; (Pa.) 855

Not entertain a mere ejectment appeal. (Pa.) 855

Jurisdiction over dealings of person standing in fiduciary relation. (Pa.) 537, 538

Trying title to land. (Pa.) 507

Fraud or **mistake;** relief. (N. Y.) 85; (Pa.) 836

Reformation of contract. (N. Y.) 722, 760 (Pa.) 558

Satisfactory evidence. (N. Y.) 226; (Pa.) 887

Mistake in law. (Md.) 436

Relief against judgment at law. (N. Y.) 320

Mere inadequacy in price is not ground for setting aside executed contract. (N. Y.) 742

Laches. (Pa.) 558

Pleading; practice. (Pa.) 168

Answer. (Pa.) 513, 514

Bill and answer are part of evidence. (Pa.) 168

Contradiction of answer by two witnesses. (Pa.) 887

Hearing of testimony of living witnesses in prior criminal prosecution. (Pa.) 916

Jury trial. (N. Y.) 713

Verdict of jury is always upon feigned issue. (Pa.) 151

Conclusiveness of findings of fact by **master.** (Pa.) 168, 558, 856

Rehearing, time of granting. (Pa.) 916

ERROR.

I. WHEN LIES; REARGUMENT.
II. RECORD; QUESTIONS CONSIDERED; PRACTICE.
BRIEFS AND NOTES.

See CERTIORARI; CRIMINAL LAW, V.

I. WHEN LIES; REARGUMENT.

1. A writ of error to review an order granting an alternative *mandamus* is **premature,** and will be quashed.
Supers. of Sauoon Twp. v. *Brodhead* (Pa.) 496

2. On a motion for a **reargument,** the court will consider only the **record** properly before the court for review.
McMeen v. *Commonwealth* (Pa.) 152

3. An **ex parte affidavit** made after judgment is affirmed, will **not** be **considered.** *Id.*

II. RECORD; QUESTIONS CONSIDERED; PRACTICE.

4. Rulings, not the subject of a **bill of exceptions,** will not be reviewed.
Passenger Conductors L. Ins. Co. v. *Birnbaum* (Pa.) 635

5. Where an **assignment of error** reveals a fatal defect in plaintiff's case, he shows cause for **affirmance** of the judgment.
Susquehanna Mut. F. Ins. Co. v. *Gackenbach* (Pa.) 588

6. **An objection** to plaintiff's title in ejectment, **not suggested at** the **trial,** cannot be raised in the supreme court.
Cope v. *Kidney* (Pa.) 866

7. The refusal of the court below **to grant** a change of venue, on the ground **that an impartial** trial cannot be had, will not **be reversed** unless the **discretion of the court has been abused.**
Healy v. *Dettra* (Pa.) 168

8. A writ of error to a **reference under** the Act of April 22, 1874, brings up **only questions** of law arising on bills of **exception to**

the rulings of the judge, and his **conclusions** on the facts of the case must be regarded **as** the **verdict** of a jury.
Gonser v. *Smith* (Pa.) 187

9. If a **verdict** does **not establish** a **contract,** the construction is immaterial and not ground for reversal.
Folsom v. *Cook* (Pa.) 585

10. The charge of the court, or refusal to charge, can be assigned for error only when the party is **injured by** the **ruling.**
Humphreys v. *Borough of Woodstown* (N. J.) 109

11. A **misleading charge** is good ground for reversal.
Reber v. *Herring* (Pa.) 841

12. Mere **technical error** in the charge of the court is not ground for reversal.
Boswell v. *Collins* (Pa.) 487

13. The supreme court has the power to **amend verdicts** in ejectment, especially those of an equitable kind.
Thompson v. *Mattern* (Pa.) 621

BRIEFS AND NOTES.

Record must be made and settled as a whole. (Pa.) 630

Questions opened; matters of **discretion.** (N. J.) 110; (Pa.) 176

Findings of fact. (Pa.) 190

Objections not taken below not considered. (N. J.) 111

Nonprejudicial error not ground for reversal. (N. J.) 111; (Pa.) 178, 198, 199, 571, 574

ESTATES OF DECEDENTS. See CURTESY; DESCENT AND DISTRIBUTION; DEVISE AND LEGACY; DOWER; EXECUTORS AND ADMINISTRATORS; WILL; WITNESS, 1.

ESTOPPEL. See JUDGMENT, III.

1. After a tax sale and comptroller's deed given therefor, the original owner executed to a third person a deed of the land, which was in reality a mortgage, and the grantee therein sued the holder of the comptroller's deed to remove the same as a cloud on title, which suit resulted in a judgment in favor of such holder, thereafter the plaintiff in that suit reconveyed the land to the original owner. *Held*, that the original owner was not estopped **by said judgment** in the suit brought by his mortgagee, from afterwards questioning the validity of the comptroller's deed, in an action against him by the holder of such deed.
Shattuck v. *Bascom* (N. Y.) 87

2. **Sureties** are **not estopped by** any **recital** in the undertaking from availing themselves of the invalidity of the instrument when sued thereon.
Mittnacht v. *Kellermann* (N. Y.) 714

3. Where plaintiff took a note and a mortgage as collateral security, with notice that the note was accomodation paper, the certificate of mortgagor that the note was subject to no defense constituted **no estoppel against setting up** the defense of **usury to** defeat the **mortgage.**
Lewis v. *Barton* (N. Y.) 781

4. **Satisfaction** of a **municipal claim** for water pipe operates as an estoppel on the municipality when a subsequent purchaser of the land applies for permit to introduce water from the pipe to the premises.
Philadelphia v. *Matchett* (Pa.) 907

5. The **purchaser** of iron **ore, under** a **contract** by which he retains part of the price and promises vendor to pay it to a third person, not a party to the contract, if such third person owned the land from which the ore was taken, but if not then to have nothing to pay, is **not estopped** from **setting up** his own **title to** the **land** as a defense to assumpsit by the third person for the sum so retained.
Grim v. *Thomas Iron Co.* (Pa.) 506

6. A **carrier** is **estopped** from denying the **acts of** its local freight **agent,** with power to issue bills of lading only upon actual receipt of property for transportation, in fraudulently issuing bills of lading whereby third persons suffer damages by advances thereon.
Bank of Batavia v. *New York, L. E. & W. R. R. Co.* (N. Y.) 822

7. A principal is estopped from denying his agent's representation as against a third person, where he has clothed the agent with power to do an act upon the existence of some extrinsic fact. Authorities cited. *Id.*

8. An **assent** to a change of grade of street by plaintiff **when** he was **not** the **owner** of the property will **not bind** him after he becomes such owner.
Freemansburg v. *Rodgers* (Pa.) 828

BRIEFS AND NOTES.

By deed. (Md.) 439

By recitals in bond. (N. Y.) 716

By contract. (N. Y.) 39, 40, 736; (Pa.) 186, 507

Equitable. (N. Y.) 724; (Pa.) 625

Must repose on consideration. (N. Y.) 791

Cannot be directed upon *nudum pactum.* (N. Y.) 791

By acts and declarations. (N. Y.) 715, 718, 724, 782, 791-2, 823-4; (Pa.) 186, 565, 911

By acquiescence. (Pa.) 913

Apparent authority operates by way of estoppel. (N. Y.) 718

By silence. (Pa.) 840

By admissions. (Pa.) 911

Parties bound by. (N. J.) 466

Waiver of. (N. Y.) 823

EVIDENCE.

I. BURDEN OF PROOF.
II. DOCUMENTARY.
III. SECONDARY; LOST PAPERS.
IV. PAROL.
V. DECLARATIONS; RES GESTÆ.
VI. DYING DECLARATIONS.

VII. CONFESSIONS.
VIII. EXPERTS; OPINIONS.
IX. COMPETENCY, ETC.; EVIDENCE IN OTHER SUITS.
BRIEFS AND NOTES.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 11; BENEFIT SOCIETIES, 6; BILLS AND NOTES, 4; CONTRACT, 20; CRIMINAL LAW, III.; DEPOSITION; DEVISE AND LEGACY, 8; EXECUTORS AND ADMINISTRATORS, 32; FORGERY, 2; FRAUD AND FRAUDULENT CONVEYANCE, 20; HOMICIDE, 1-3, 5; LANDLORD AND TENANT, 14; MUNICIPAL CORPORATIONS, VI. c; NEGLIGENCE, 9-11; RAPE; SEDUCTION; TRIAL, III.; WILL, 4, 5; WITNESS.

I. BURDEN OF PROOF.

1. The burden of proving **mental unsoundness** is upon alleging party.
Pennypacker v. *Pennypacker* (Pa.) 532

2. If general or habitual unsoundness of mind be shown previous to the will, the burden of **proving a lucid interval** of restoration to sanity, at the time, is in turn thrown upon those who allege it. *Id.*

3. The burden of proving **usury** is on alleging party.
Rappanier v. *Bannon* (Md.) 420

II. DOCUMENTARY.

4. A **transcript of proceedings in a court of another State,** duly authenticated, except that the **seal** of the court is not impressed on wax, is admissible.
Hunt v. *Hunt* (N. J.) 462

5. A copy of a judgment roll of a court of another State, is not inadmissible because the seal to the attestation clause is without wax.
Wells, Fargo & Co. v. *Davis* (N. Y.) 686

6. **Objections** that copy of a judgment roll of a district court of Utah was not properly exemplified, not considered in the court of appeals because **not raised at** the **trial.** *Id.*

7. The Act of Congress of 1790, as to **authentication of** court **records** for evidence in any other State, does **not exclude** any **other evidence.**
Otto v. *Trump* (Pa.) 629

8. In an **action upon a policy,** for the value of goods burned, where plaintiff's books and most of his papers were destroyed by the same fire, an **inventory** by the seller of the goods, assisted by the plaintiff ten months before the fire, on the purchase of the goods by plaintiff, showing the prices, is admissible upon the value of the goods burned.
Ellsworth v. *Ætna Ins. Co.* (N. Y.) 244

9. The footings of another **inventory,** made by plaintiff a **few days before** the **fire,** of the stock of goods then on hand, are also admissible. *Id.*

10. A **contract** signed by competent parties is admissible in evidence, notwithstanding it is also **signed** by **incompetent parties.**
Kulp v. *Bird* (Pa.) 576

III. SECONDARY; LOST PAPERS.

11. Where the **production** of a paper cannot be compelled, secondary evidence may be given.
Otto v. *Trump* (Pa.) 629

12. Parol evidence is not admissible to prove the **claim in a suit** in a court of record of another State. *Id.*

13. An **assignment of** a **judgment of another State** may be proved by an examined copy sworn to by a competent witness. *Id.*

14. Secondary evidence is admissible to establish the **execution of** a **paper** where the **subscribing witness** is **out of** the **jurisdiction** of the court,—as, if he were dead. Authorities cited. *Id.* 631

15. **Original entries** of tradesmen **may** be given in evidence, when the clerk **making** them is out of the State, on proof of his **handwriting.** His absence out of the State **has** the same effect as his **death.** Authorities cited. *Id.*

16. Where proof is by a copy, an **examined copy** duly made and sworn to by a competent witness is always admissible. Authorities cited. *Id.*

17. Without proof of the **notice to produce** the original of a writing in possession of the opposite party given to him or his attorney, secondary evidence cannot be given.
De Baril v. *Campoy y Pardo* (Pa.) 642

18. That the **opposite party** is **in a foreign country** does not affect the application of the rule. *Id.*

19. The fact **of agency** cannot be proved by parol while the written evidence of it exists. Authorities cited. *Id.* 643

20. Where a **power of attorney** has been **destroyed by fire,** the person to whom the power was given may prove its contents. Authorities cited. *Id.*

21. A deposition going to prove the contents of a paper was rejected, because it was **not shown** that the **paper** was **unobtainable.** Authorities cited. *Id.* 644

22. A paper deposited in a court of equity by a party who has leave to withdraw it is sufficiently under his control to let in secondary evidence of its contents, after notice to produce it; but it is otherwise if the **document** is **held by a stakeholder.** Authorities cited. *Id.* 643

23. Proof **that** a paper is **out of** the **State** will **not** alone be **sufficient foundation** for secondary evidence. Authorities cited. *Id.* 644

24. In ejectment to recover possession of the underlying mineral ore, from the owner of the surface, the defendant claimed title to the ore under a **release** alleged to have been executed by a former owner of the mineral right to a former owner of the surface, nearly forty years before suit brought, and **lost** or destroyed. *Held,* that secondary evidence was properly rejected.
Phœnix Iron Co. v. *Lewis* (Pa.) 515

25. Where an action is upon a note under seal, and, after the introduction of **evidence**

tending to **prove** its execution and **loss**, a paper alleged by the plaintiff to be a **copy** of it is, without exception, admitted in evidence as proof, not of its execution, but simply of its contents, an exception to binding instructions to the jury to find for defendant does not raise the question whether the court should have **admitted** the paper as a copy of a note the execution of which had been sufficiently proved to entitle it to go to the jury.

Cover v. *Mishler* (Pa.) 203

IV. Parol.

26. Parol evidence is **not** admissible to **contradict or alter** a written contract. Authorities cited.

Centenary M. E. Church v. *Clime* (Pa.) 889

27. Parol testimony is **not** admissible to show **that** the **testator had other property** to which the will applied.

Baker's Appeal (Pa.) 158

28. When the **record** does not show the **precise ground** upon which the case was decided, parol evidence may be given.

Bowe v. *Wilkins* (N. Y.) 734

29. A **resulting trust** in lands may be proved by parol.

Jackson's Appeal (Pa.) 850

30. Parol evidence is admissible to ascertain the **meaning of a** written **contract,** where the matter is not mentioned therein.

Centenary M. E. Church v. *Clime* (Pa.) 886

31. In an action by a stone mason for erecting a building according to contract which does not specify the kind of **stone** to be used, the kind **intended** may be **shown** by parol evidence, and also that defendant furnished a harder kind. *Id.*

32. The **circumstances** attending the making of a written instrument may be proved by parol. *Id.*

33. In an action on a written contract relating to **advertising charts,** parol evidence is admissible to show **material** of which chart was to be made. Authorities cited. *Id.* 889

34. **A deed absolute** on its face may be **shown** by parol to be a **security** for money advanced.

Pearson v. *Sharp* (Pa.) 494

V. Declarations; Res Gestæ.

35. **Letters** from the lender's agent to borrower's agent, found among the papers of the latter after his decease, their envelopes showing the dates of their passage through the post-office, in connection with letter press copies in the letter book of the writer, are admissible as part of the **res gestæ.**

Gaither v. *Clarke* (Md.) 438

36. In an action for **personal injuries,** evidence of a simple **declaration** of plaintiff after the injury, that he was **suffering pain,** is hearsay and not admissible.

Roche v. *Brooklyn City etc. R. R. Co.* (N. Y.) 702

37. The declarations and acts of a man cannot be given in evidence to **prove** that he is the **agent** of another. Authorities cited.

De Baril v. *Campoy y Pardo* (Pa.) 643

38. It is competent in **ejectment** to prove **declarations of** both **grantor and grantee** as tending to show an intent **to defraud** plaintiff, a creditor of grantor.

Cope v. *Kidney* (Pa.) 866

39. Declarations **of** the **president of** a railroad, authorized to bind the **corporation** by contracts in the ordinary business, recognizing the contract as subsisting, and as to what should be done in the matter, are admissible.

Baltimore & O. R. R. Co. v. *Brydon* (Md.) 396

40. **Claims against a decedent's estate** may be proved by oral evidence of declarations or **admissions.**

McCann's Appeal (Pa.) 847

VI. Dying Declarations.

41. The court may receive, in the presence of the jury, preliminary proof of the **expectation of death,** before deciding to admit dying declarations.

People v. *Smith* (N. Y.) 215

42. Where the trial court heard the whole statement of the dying declarations upon the **preliminary issue** and permitted a cross examination on the subject, and then decided upon their admissibility, and directed a portion of them to be read to the jury as evidence, and ordered the remainder to be struck out, and instructed the jury to disregard it, *held*, that that was not first **admitting erroneous proof** to go to the jury and then striking it out, and that no error was committed. Andrews and Peckham, *JJ.*, dissent. *Id.*

43. The inquiry will remain in each case, under its own peculiar circumstances, **how far** the **preliminary examination** should **extend** in order to ascertain the mental condition and belief of the deceased, before admitting his dying declarations. *Id.*

VII. Confessions.

44. Where a **magistrate tells** a **prisoner** that it would be **better** for him to **tell** the **truth** and have no more trouble about it, the confession thus obtained is **inadmissible** in evidence, although he was told at the same time that the magistrate could make no promises.

Biscoe v. *State* (Md.) 416

45. Where the prisoner, before the confession is received, offers to prove that the **magistrate held out inducements** to him to confess, the court should permit him to do so. *Id.*

46. The **preliminary question as to** the **admissibility** of a confession should be decided by the court before it is permitted to go to the jury. *Id.*

VIII. Experts; Opinions.

47. Whether a **deckload on** a canal **boat** was **properly covered** so as to protect it

from rain, is not a subject for expert testimony; it is a question for the jury.
Schwinger v. *Raymond* (N. Y.) 747

48. On appeal to the common pleas from a report of viewers assessing damages for a **change of grade** of street, the **opinion of** the **viewers** that the change was a **damage,** after having testified to an acquaintance with the value of such property and that they had viewed the premises, is admissible.
Freemansburg v. *Rodgers* (Pa.) 828

49. A question calling for an **inference** or opinion of a witness upon **undisclosed facts** should be excluded.
Pollock v. *Morris* (N. Y.) 752

IX. COMPETENCY, ETC.; EVIDENCE IN OTHER SUITS.

50. **Proceedings in partition** are **relevant** to show that defendant accepted a deed for the land named in such proceedings.
Hunt v. *Hunt* (N. J.) 462

51. **Declarations** made **by counsel on** a **former occasion** in the course of a trial, while urging the question of damages before a jury of condemnation of the property in question, are not admissible to prove malice on the part of defendant in order to enhance the damages.
Baltimore & O. R. R. Co. v. *Boyd* (Md.) 435

52. Depositing a **letter** in the postoffice is *prima facie* **evidence of** its **receipt.**
Folsom v. *Cook* (Pa.) 585

53. Evidence that a **letter** was so **sent, demanding** payment of **rent,** is competent to rebut the allegation that no demand had been made. *Id.*

54. Evidence that **others** had **fallen** on the sidewalk, at the same place **where plaintiff** was **injured,** is admissible.
Pomfrey v. *Saratoga Springs* (N. Y.) 44

55. A party cannot testify as to the motives or **intent of another party.**
Mfrs. & Traders Bank v. *Koch* (N. Y.) 672

56. Where the assumptions contained in a **hypothetical question** are not proved, the question is inadmissible.
Reber v. *Herring* (Pa.) 841

57. Where an offer of evidence as a whole includes **irrelevant** evidence, it is proper to **refuse** the **whole offer.**
Heath v. *Slocum* (Pa.) 648

BRIEFS AND NOTES.

Judicial notice; of laws of other States. (N. Y.) 687

Of import of words and popular parlance. (Pa.) 177

That seventeen months' old infant is *non sui juris.* (N. Y.) 246

Mining custom. (Pa.) 552

Presumption; of continuance of relation once established. (Md.) 378

Evidence; of delivery of deed. (N. Y.) 278

Of fraud. (Pa.) 546

Of receipt of letter from mailing. (Pa.) 587

That everything was done rightly and according to law. (Pa.) 607

Of insanity; **burden of proof.** (Pa.) 178

Of usury. (Md.) 439

Of want of consideration. (Pa.) 531

Ancient documents. (Pa.) 518, 519

Written instruments are best possible evidence of existence and contents. (Pa.) 630

Authentication of **judicial record.** (N. Y.) 687, 688; (Pa.) 630

Foreign judicial record; seal. (N. Y.) 687, 688

Foreign judgment. (N. Y.) 687, 688; (Pa.) 606

Pleadings. (N. Y.) 779

Secondary; lost instruments. (Pa.) 518–520, 646–7

Notice to produce papers. (Pa.) 587, 646

Parish registers provable by an examined copy. (Pa.) 630

Parol; to contradict or vary written instrument. (N. J.) 470; (Pa.) 148, 511, 887, 888

To contradict record. (N. Y.) 735

To explain subject matter of written agreement. (Pa.) 522, 887, 888

To explain latent ambiguities. (Pa.) 158, 159

Of intention. (Pa.) 650

To show that deed absolute on its face intended as mortgage. (Pa.) 494, 495

In construing will. (Pa.) Note 158

To show consideration. (Pa.) 511, 650

Res gestæ; declarations; of past events. (N. Y.) 215. (Pa.) 617, 650

Must be concomitant with principal act. (Pa.) 545

Must state facts, not opinions. (N. Y.) 215

Hearsay. (Pa.) 545

Proof of **handwriting.** (N. Y.) 244; (Pa.) 203–4

Identity of name is identity of person. (Pa.) 203

Proof of **former accidents** happening at same place. (N. Y.) 45

Competency; party may show own acts in carrying out agreements. (Pa.) 649

A party may not testify to motives and intentions of another party. (N. Y.) 673

Sufficiency of evidence to submit to jury. (N. Y.) 276, 671

Weight is for jury. (N. Y.) 673, 676; (Pa.) 157, 837, 891

EXHUMATION. SEE BODY-STEALING.

EXECUTION. SEE INTERPLEADER; JUDGMENT, 4.

1. Before entry or foreclosure, the **equity of redemption** may be **sold** on execution against mortgagor but not afterwards.
Mallalieu v. *Wickham* (N. J.) 367

2. **Firm property** will **pass under a sale** upon a joint execution against all the

partners, issued upon a judgment recovered for any joint debt whatever.
Saunders v. *Reilly* (N. Y.) 59

3. **After** the **sale of firm property** upon a joint judgment against both members of a firm, **no equity is left in** either **member** to have the property thereafter applied in discharge of the firm debts. *Id.*

4. Although the **writ** of execution **on a joint judgment** must be joint in form, it may be **levied** upon all or any one of the partners named in it. Authorities cited. *Id.* 63

5. In **ejectment by** an execution **purchaser** against the execution defendant, evidence of the judgment, process, and sheriff's deed is conclusive and makes a **prima facie case.**
Birkbeck v. *Kelly* (Pa.) 890

BRIEFS AND NOTES.

Return; construction for court. (Pa.) 573

Falsity. (N. Y.) 61

A general **creditor** who has sold the judgment debtor goods which are not paid for has no claim to the property which the officer can respect. (N. Y.) 62

Sale on fraudulent judgment will not pass title. (Pa.) 835

Setting aside for gross inadequacy of price. (Pa.) 155

Deed; construction is for court. (Pa.) 578

Purchaser need not regard notice of defense contained in record. (Pa.) 840

EXECUTORS AND ADMINISTRATORS.

I. WHO ENTITLED TO ADMINISTER.
II. ADMINISTRATOR D. B. N.
III. IN GENERAL; THE ESTATE.
IV. SALE OF REAL ESTATE.
V. ACCOUNTING; COMMISSIONS.
VI. CLAIMS AGAINST ESTATE; PAYMENT; LIEN.
VII. ACTIONS; COSTS.
VIII. BONDS.
BRIEFS AND NOTES.

SEE INSURANCE, 8; WILL, 1.

I. WHO ENTITLED TO ADMINISTER.

1. Upon the debtor's death a chattel **mortgagee** has **no right** to undertake to **administer** any part of the debtor's personal estate for the satisfaction of his own debt.
Heft's Appeal (Pa.) 592

2. Where the **mortgagee** in **good faith** ntervenes, and in **administration** of the estate sells the pledge and settles an account of the proceeds, he is entitled to **commissions.** *Id.*

II. ADMINISTRATOR D. B. N.

3. **Where** there is alleged to be a **claim** due the estate which the **executor** has **not collected,** the proper remedy is to have an administrator *de bonis non* with the will annexed appointed, who can proceed to collect the claim.
Re Estate of Soutter (N. Y.) 818

4. An administrator *de bonis non* appointed after the death of the executrix is **bound by** her **contracts.**
Buckland v. *Gallup* (N. Y.) 703

5. Where the executrix sold the testator's property and put a portion of the proceeds into the hands of an agent, the administrator *de bonis non*, appointed after her death, may **sue in his own name.** *Id.*

III. IN GENERAL; THE ESTATE.

6. When the duties imposed upon the executors are active, they will be **deemed trustees** for the performance thereof, to the same extent as though declared to be so by the most explicit language.
Ward v. *Ward* (N. Y.) 67

7. The orphans' court has power to determine the **fairness of inventories;** one method is by filing exceptions to it.
Pickel v. *Alpaugh* (N. J.) 471

8. **Prior to testator's death** the railroad company accumulated securities and other assets, from earnings over and above expenses and **dividends,** and some two months after testator's death it had on hand $1,102,000 as a sinking fund for the redemption of outstanding obligations; and at that time an arrangement was entered into between certain stockholders, among them the executors and a canal association, for the sale of their stock to the canal association for $250 for each share, and providing that the canal association should have the sinking fund, but that the stockholders should be paid a ratable portion of this surplus, which amounted to $15.74 per share. *Held*, that the price paid for the shares, although increased by this prospective advantage, belonged altogether to the remaindermen, and was **properly carried to** the **principal** and not income.
Re Kernochan (N. Y.) 90

9. Under a will empowering the executors to "receive the rents, interest and income," and to apply the net amounts thereof to the use of testator's widow during life, and after her death to divide the remaining estate among his heirs, a **dividend** declared upon railroad stock, assets of the estate, **before** testator's **death, but payable after** his death, **belonged to** the **executors.** *Id.*

10. A **privilege to subscribe** for, and take at par, one or more bonds or shares of stocks for a certain number of shares of stock before held by the estate, if accepted, operated as a change in the manner of investment of so much of the estate; and the value **belonged to** the **estate** and not to the life tenant. *Id.*

11. A court of equity, called upon to settle the equitable rights of the parties, may **charge remaindermen with moneys expended for** the **benefit of** the **estate.**
Thomas v. *Evans* (N. Y.) 800

IV. SALE OF REAL ESTATE.

12. If the estate is sufficient to pay dece-

dent's debts the creditors cannot ask that a **receiver** be appointed **to apply** the **rents** and profits **of** the **real estate** to their payment.
McKaig v. *James* (Md.) 452

13. A general **devise** of lands in trust to executors, **to sell** and convey them, **vests no title** in the trustees. Authorities cited.
Chamberlain v. *Taylor* (N. Y.) 290

14. An **equitable conversion** of real estate does not authorize its sale for convenience of one executor without the co-operation of his **coexecutor.** Authorities cited. *Id.* 292

15. The power of the orphans' court to **set aside** a **sale** of real estate, made in pursuance of its own order, rests within the sound discretion of the court, and will not be reviewed unless the record shows palpable and gross abuse.
Frey's Appeal (Pa.) 154

16. Where a deed from executors apparently conferred the legal title under the power of sale contained in the will, the **purchaser** is under **no responsibility for** any **misapplication** by the executors.
Thomas v. *Evans* (N. Y.) 800

V. ACCOUNTING; COMMISSIONS.

17. Where **testator** was **domiciled in New York** and his will was proved there, and it does not appear that it was ever proved in New Jersey, the executors can **not** be **required** to come **to** an **account** in the latter State.
Cocks v. *Varney* (N. J.) 457

18. Where it was agreed that defendant should manage an estate in his hands for the interest of those concerned, and should **not charge for** his **services,** should make annual settlements and should pay no interest for balances in his hands, and a settlement was made on that basis, and defendant tendered a further settlement, *held,* that he should **pay no interest** up to the time of the settlement nor since, as he was always ready to pay the money to the complainant.
Barclay v. *Cooper* (N. J.) 132

19. **Land** bought in **under foreclosure** proceedings by the defendant in trust for himself and the others interested in joint mortgages which were foreclosed before the death of complainant's intestate, and which purchases were necessary to protect the interest of the holders of those mortgages and which land remains unsold, is to be **regarded** as **real estate in** the **accounting** of defendant with complainant of the **personal estate** of his intestate, who was interested in the mortgages. *Id.*

20. **Land** conveyed to defendant after the death of complainant's intestate, in satisfaction of a mortgage thereon given to defendant and complainant's intestate and others, in order to save the expense of foreclosure proceedings, which conveyance was taken by defendant in trust for those interested in the mortgage, must be **regarded as personal property;** and complainant is entitled to an account in respect thereto, and defendant to an allowance of taxes paid by him thereon. *Id.*

21. After a decree judicially settling the accounts of an executor a **further accounting** should not be ordered unless there are other matters not embraced in his former account for which he is responsible.
Re Estate of Soutter (N. Y.) 818

22. Where a trust is **devolved** upon executors by will, an error in the executors' **account** may be **corrected** by the orphans' court in their subsequent accounts as trustees.
Griggs v. *Shaw* (N. J.) 472

23. The **functions** of an administrator **end after** his **final accounting** and the payment of the balance in his hands to the persons entitled thereto.
Rogers v. *Traphagen* (N. J.) 476

24. In the absence of bad faith on the part of an administrator making payment, he should be **allowed** the **benefit of disbursements** which would clearly have been sanctioned by a court of equity had the administrator occupied the position of guardian. *Id.*

25. **Personalty** which a testator **gave** his **wife** absolutely was during her life treated as given for life only, and was **retained by** his **executor, in good faith,** who had rendered valuable services **to the estate.** *Held,* that he was entitled to commissions and a counsel fee.
Miller v. *Rhein* (Pa.) 493

26. Where executors' **commissions** were too large, in a not final account, it is competent for the court, without notice, and *ex proprio motu,* to take such **error in** the **allowance** of commissions into account when fixing the commissions in a subsequent account.
Griggs v. *Shaw* (N. J.) 472

27. Under a provision in a will in these words: "It is my request that all persons herein named as executors will consent to act as such executors and trustees; and that each executor and trustee, other than my wife, do also receive and take the full rate and commissions provided by law for each executor, intending thus to provide suitable compensation for their services in addition to the duties herein devolved upon them." the **intention** of the testator was to **exclude** his wife **from compensation.**
Re Kernochan (N. Y.) 90

VI. CLAIMS AGAINST ESTATE; PAYMENT; LIEN.

28. An **executor paying out** of his **own money** preferred debts of testator is entitled to be reimbursed out of funds of estate in the hands of a subsequent administrator appointed on his removal, in **preference** to an **unpreferred** claim against the executor, the **estate** being insolvent.
Chamberlin v. *McDowell* (N. J.) 472

29. A creditor of a decedent brought **suit in** equity for amount due him without **having** filed his claim with executors or **established it** at law, they having recognized the **claim by** payment thereon, *held,* a preliminary **injunction** issued to **restrain collection of** alleged **fraudulent claim** from **property of**

deceased, will not be dissolved on motion before final hearing.
Emson v. *Ivins* (N. J.) 373

30. In an action by a residuary legatee to set aside an **assignment of a claim** due estate the plaintiff is entitled to prove the **inadequacy of** the **consideration** therefor.
Diffendarfer v. *Dicks* (N. Y.) 741

31. Where the administrator **sold a claim** due the estate of more than $5,000 for $273, in an action to set aside the sale for fraud, the **fullest inquiry** as to the facts should be **permitted.** *Id.*

32. **Evidence** as to what the **books** of the debtor and creditor show is admissible. *Id.*

33. The **filing** of a **bill** not verified by oath, against an executrix, for a discovery of trust funds and to follow them into certain land, is **not a presentation of** the **claim** for such funds in the form contemplated by the statute.
Robins v. *Arnold* (N. J.) 121

34. A **creditor** whose **claim was not** duly **presented cannot receive a dividend** thereon with the other creditors complying with the order of the orphans' court. *Id.*

35. Claims against a decedent's estate may be **proved by oral evidence** of declarations or admissions.
McCann's Appeal (Pa.) 847

36. Nothing less than clear and undoubted evidence should extend the **lien of debts against** the **real estate** of a decedent.
Welsh's Appeal (Pa.) 498

37. Conversations between an administrator *d. b. n.* and the widow and heirs, *held*, too indefinite to amount to a **waiver of** the **limitation** of the Act of February 24, 1834. *Id.*

38. The **presentation** by a creditor of his claim before an auditor making distribution under a previous sale, and the receipt of a dividend, do **not continue** the **lien.** Authorities cited. *Id.* 499

39. If **five years expire** between the time when a sale is ordered by the orphans' court and the day of sale, the **lien** of an estate creditor is **gone** as against the heirs. Authorities cited. *Id.*

40. Creditors of a decedent do not become the owners of the personal estate of their debtor so as to prevent the plea of the **Statute of Limitations** as against their debt. Authorities cited.
Heft's Appeal (Pa.) 598

41. Unless the **mortgage lien** is complete **at** debtor's death, **priority** cannot be claimed over other judgment creditors. Authorities cited. *Id.*

42. In an action against executors to recover for goods, etc., furnished to their testator, *held*, that a too general instruction that plaintiff was entitled to recover if the jury should find the **account** to be established, and **admitted by** the **testator** within three years before suit brought, was cured by a subsequent instruction that plaintiff could not recover unless the jury should also find that such admission applied to the account in suit.
Shipley v. *Shilling* (Md.) 418

VII. ACTIONS; COSTS.

43. A **suit in equity** cannot be maintained by an executor to **recover** the **value of trees cut** from the realty belonging to the estate; the remedy is at law.
Lippincott v. *Barton* (N. J.) 920

44. A **bill** asking relief against all defendants as executors, and relief against one of defendants as mortgagee of trust property with notice of the trust, is **multifarious.**
Cocks v. *Varney* (N. J.) 457

45. If an injury to the property of a decedent, or its conversion, happens after his death, the executor or administrator may **sue in** his **own name.**
Buckland v. *Gallup* (N. Y.) 703

46. Only such causes of action accruing during decedent's lifetime need be prosecuted by his executors or administrators **in** their **representative capacity.** *Id.*

47. Where the **complaint** by one **as executor** shows a **cause of action** in favor of the plaintiff in his **individual character,** descriptive words therein, such as "executor," etc., may be rejected, leaving the action to stand as one in the individual capacity of the plaintiff.
Litchfield v. *Flint* (N. Y.) 41

48. The court of appeals may **substitute** an **administratrix** in *certiorari* to review the action of municipal authorities in removing the relator from office, where, in the relator's lifetime, the proceeding was affirmed and *certiorari* quashed at special term, with costs, and the order of special term was affirmed at general term, with costs, and the relator's estate is liable for such costs.
People v. *Brooklyn* (N. Y.) 927

49. Under Code, § 3246, in an action by an executor, in his representative capacity, **costs** may be awarded **against** him **as executor.**
Syms v. *New York* (N. Y.) 225

50. A **judgment for costs** against an executor **in** his **representative capacity,** should not contain a provision that execution issue for such costs. *Id.*

51. Where a plaintiff sues as an **administrator,** but might have sued in his own name, he is **personally liable** to pay **costs.**
Buckland v. *Gallup* (N. Y.) 703

52. Merely **describing** himself **as administrator** will **not relieve** him **from costs.** *Id.*

53. Where a **bill** is filed **by** an **administrator for** an **account** of decedent's interest in an estate, **and** for a **discovery** of personal property, held by defendant, and to restrain him from expending that property in improvements upon the joint real estate, and it appears that defendant had made several settlements and paid the balance found due from him thereon and offered to make a further settlement which was refused, and that complainant could have got all the information he desired as to the property by inquiring of defendant, who had not refused to give it, and that defendant did not contemplate any expenditures upon the joint real estate, except those which he was constrained to make by the

municipal authorities, *held*, that **defendant** should **not** be required to **pay** the **costs** of the suit.
Barclay v. *Cooper* (N. J.) 132

54. In assumpsit by an executor for purchase money of land conveyed by testator to his son, the question **whether** the son was to have the land partly **as a gift** is **for** the **jury.**
Horn v. *Buck* (Pa.) 509

VIII. BONDS.

55. To maintain an **action on** an administration bond it is not necessary to push the administrator to **insolvency.**
Kauffman v. *Commonwealth* (Pa.) 539

56. A **judgment** at law or a decree of the orphans' court ascertaining the **amount of** the personal **responsibility** of the administrator to the particular creditor suing is a sufficient **prerequisite** to maintain an action on his bond. *Id.*

57. **Notice by a surety** in an administration bond before adjudication to creditors of the estate, that the administratrix is wasting the estate and that all claims against the estate must be pushed at once or he will **not** be responsible for losses, is ineffectual to **relieve** him **from liability** to such creditors. *Id.*

58. An administration bond is **not within** the provisions of the **Act** of May 14, **1874.** *Id.*

BRIEFS AND NOTES.

De son tort; who is; defined. (Pa.) 598, 599

Rights and liabilities. (Pa.) 599

Administrator de bonis non; when to be appointed. (N. Y.) 819

Claims against estate; limitation of actions. (Pa.) 500

Oral testimony. (Pa.) 849

Rights, etc.; cannot bind the estate upon executory contracts of their own. (N. Y.) 801

Duty of person dealing with executors or administrators in their right character. (N. Y.) 742

Investments upon real estate security; liability of executors and administrators for loss. (N. Y.) 701

Presumed to have acted in good faith. (N. Y.) 801

Suits by; costs. (N. Y.) 704

Power of **sale** by will. (N. Y.) 69, 289, 290

Adequacy of consideration. (N. Y.) 800–802

Setting aside for inadequacy of price. (Pa.) 155

Setting aside for mistake injuring purchaser. (Pa.) 154, 155

Power of probate court to set aside. (Pa.) 154, 155

Right to further **accounting** after account settled. (N. Y.) 818, 819

Chargeable with interest. (Pa.) 594

Devastavit; remedy of residuary legatee. (N. Y.) 742

Right of action. (N. Y.) 318

Commissions. (N. Y.) 92; (Pa.) 594

Liability of sureties on **bond.** (N. Y.) 715

EXECUTORY CONTRACTS. See CONTRACT, 9.

EXECUTORY GIFT. See DEVISE AND LEGACY, 19.

EXPERT TESTIMONY. See EVIDENCE, VIII.

EX POST FACTO LAWS. See CONSTITUTIONAL LAW, II.

EXPRESS TRUSTS. See TRUSTS, I.

EXTRINSIC EVIDENCE. See EVIDENCE, IV.

FACTORS. See PRINCIPAL AND AGENT, II.

FALSE IMPRISONMENT.

1. In an action against the prosecutor and a justice of the peace, **statements** by prosecutor to the justice, at the time the warrant was issued, are admissible to prove **probable cause,** or disprove malice, in mitigation of damages.
Neall v. *Hart* (Pa.) 500

2. The gist of the action is unlawful detention; and **malice** will be **inferred** from want of probable cause. Authorities cited. *Id.* 503

BRIEFS AND NOTES.

Trespass is proper remedy. (Pa.) 502

Probable cause; malice. (Pa.) 502, 503

Liability of magistrate for illegal and void proceeding. (Pa.) 503

If a warrant of arrest be set aside, the attorney procuring it and his client will be liable. (Pa.) 503

FALSE PRETENSES.

An **information** charging that defendant, by misrepresentation and trickery, defrauded prosecutor in the sale of curbing and stone, and appropriated the same to his own use, is sufficient to sustain a warrant for the **arrest** of defendant.
Neall v. *Hart* (Pa.) 500

FEES. See ARBITRATION AND REFERENCE, 8; ATTORNEY AND CLIENT, 2–6; AUDITOR; EXECUTORS AND ADMINISTRATORS, V.; OFFICE AND OFFICER, 8, 10; TRUSTS, III. b.

FELLOW SERVANTS. See MASTER AND SERVANTS, II.

FEME COVERT. See HUSBAND AND WIFE.

FIRE INSURANCE. See INSURANCE, I.

FIRES AND FIRE DEPARTMENTS.

1. Where **certiorari** to the commissioners of a department of a city, reciting that a detailed fireman removed and commanding them to make **return** and the affidavit states that he was removed without cause; and the commissioners return thereto only their resolution

that the "inspector of kerosene oil, be dismissed," such return is an admission that while the fireman occupied such position he was **summarily dismissed** by such resolution.
People v. *Comrs. of Brooklyn* (N. Y.) 770

2. Under Brooklyn Charter Act, § 14, a **member** of fire department cannot be arbitrarily **dismissed** without a charge, **hearing,** or trial. *Id.*

BRIEFS AND NOTES.

Dismissal of member without hearing. (N. Y.) 770, 771

FORCIBLE ENTRY AND DETAINER.

1. Unless there is **evident force** against the person in actual possession, indictments should be discouraged.
Thompson v. *Commonwealth* (Pa.) 861

2. **Entering a house** under claim of right and in occupant's absence, and substituting a new lock for the occupant's, does **not amount to** forcible entry and detainer. *Id.*

BRIEFS AND NOTES.

One breaking open door of his house, which is forcibly detained from him by one who claims the bare custody of it, cannot be guilty of forcible entry. (Pa.) 862

Owner may peaceably take possession of his own real estate. (N. Y.) 88

Indictment; requisites and sufficiency. (Pa.) 861

FORECLOSURE. See MORTGAGE, IV.

FOREIGN ATTACHMENT. See ATTACHMENT, II.

FOREIGN JUDGMENT. See JUDGMENT, II.

FORFEITURE. See CORPORATIONS, V.; INSURANCE, 9, 11.

FORGERY.

1. A **certificate** of indebtedness for war claims of the militia, **countersigned** by the acting paymaster general under an Act of Missouri, is capable of being the **subject of** forgery.
People v. *Bris* (N. Y.) 85

2. On a trial for forgery committed by knowingly uttering a forged check, **evidence** of **similar acts** upon other occasions is admissible to show guilty knowledge and intent.
People v. *Everhardt* (N. Y.) 58

BRIEFS AND NOTES.

An instrument legally null, void or invalid cannot be the **subject of.** (N. Y.) 87

May be of any writing which, if genuine, might apparently be of legal efficacy or the foundation of legal liability. (N. Y.) 87

Variance. (N. Y.) 87

Admissibility of **proof** of previous forgeries. (N. Y.) 54

FRAUD AND FRAUDULENT CONVEYANCE.

I. FRAUD; IN GENERAL; UNDUE INFLUENCE.
II. FRAUD UPON CREDITORS.

BRIEFS AND NOTES.

See CHARTER-PARTY; EQUITY, II.; JUDGMENT, 15, 16; LANDLORD AND TENANT, 11.

I. FRAUD; IN GENERAL; UNDUE INFLUENCE.

1. An unconditional **assignment** and transfer by delivery, of all her estate, **by an aged person of weak mind,** to those who live with her, reserving only the interest on a few small sums of money and taking no voucher for such reservation, is **void** in law, **unless** shown to be **free from undue influence.**
Morton's Admr. v. *Morton* (N. J.) 134

2. When, at the time of an assignment of all of her real estate by an aged person of weak mind the persons to whom it was made held a power of attorney from her, enabling them to take charge of her affairs, and had obtained from her absolute possession of all her estate, they were **trustees** for her; and the law will hold them to the strictest account for the property, and the assignment will be held void. *Id.*

3. A **conveyance** of a farm worth $2,200, **by a man** seventy-seven years old, and **weak in** body and **mind,** to his son-in-law, in consideration of a promise, afterward fulfilled, on the part of the latter to take care of the grantor as long as he lived and to bury him, will not, in the absence of positive proof of **fraud or duress,** upon grantor's death within a year after conveyance, be set aside at the instance of his heirs.
Travis v. *Lowry* (Pa.) 553

4. Whenever there is a great weakness of mind in grantor, although not amounting to absolute disqualification, and the **consideration** given is grossly **inadequate,** equity will set aside the conveyance. Authorities cited. *Id.* 556

5. In a suit to set aside an assignment to defendant of a bond and mortgage, made by complainant when he was weak in body and mind, in consideration of an agreement by defendant to maintain him and provide a home for him during his life, which agreement defendant refused to perform—*held*, the **assignment** was **fraudulently obtained,** and that the same be set aside, and that complainant credit defendant for board, etc., furnished.
White v. *Borden* (N. J.) 124

6. The **failure to inform** of the existence of a fact is not a fraud, unless there was some legal duty to make the disclosure.
Wood v. *Amory* (N. Y.) 760

7. No **trust to disclose** such **fact** can be supposed in the case of adverse parties to a contested lawsuit, as to facts connected with the amount of the judgment. *Id.*

8. Where one of the joint owners of land obtains the **signature** of the other owners to a deed thereof **by fraud,** and also by misrepresentations induced grantee to believe that

he represented the other owners, the deed will be set aside.
Dunnington v. *Hubbard* (Md.) 887

9. In an action to recover back the price paid for certain shares of stock on the ground of **misrepresentations,** the question whether plaintiff **rescinded** by tendering back the stock without conditions is for the jury.
Bridge v. *Penniman* (N. Y.) 732

10. The referee having found as a fact that plaintiff did not make an **unconditional tender,** the judgment dismissing the complaint will be affirmed. *Id.*

11. Where the administrator **sold a claim due** the **estate** of more than $5,000 for $273, in an action to set aside the sale for fraud, the **fullest inquiry** as to the facts should be permitted.
Diffendarfer v. *Dicks* (N. Y.) 741

12. In an action by a residuary legatee to set aside an assignment of a claim due the estate, the plaintiff is entitled to prove the **inadequacy** of the consideration therefor. *Id.*

13. **Evidence** as to what the **books** of the debtor and creditor show is admissible. *Id.*

14. A question of motive or **intent** is always one of fact **for the jury.**
Baltimore etc. R. R. Co. v. *Brydon* (Md.) 396

II. FRAUD UPON CREDITORS.

15. A **voluntary conveyance to a child by a father** who is indebted at the time is not *ipso facto* fraudulent and void.
Close v. *Benjamin* (Pa.) 541

16. If the grantor had other property at the time, or was otherwise of sufficient ability to pay all his debts, it is for the **jury** to **say** whether there was any **design to defraud** creditors; and if there was not, the conveyance is valid. *Id.*

17. **A sale, by partners to a copartner,** of partnership property, conceived in fraud, and carried through by fraudulent representation on vendee's part will, at the suit of a firm creditor, be declared **void;** and where the property sold has been converted into money, the proceeds must be accounted for.
Hagerman v. *Farr* (N. J.) 116

18. It is fraud upon firm creditors for a **partner** to **take firm property** and apply it upon his **individual debts,** or for the firm to take firm property and apply it upon the debts of any member.
Saunders v. *Reilly* (N. Y.) 62

19. Evidence that an **amicable ejectment between vendor and vendee** was for the purpose of hindering a judgment creditor of vendee from reaching the property, and that the payments of rent by vendee were to apply on the purchase money, should have been submitted to the jury; and if such intent was found to exist, the transaction would be **void.**
Miles v. *Lewis* (Pa.) 862

20. **Vendee's testimony** as to such intent was competent. *Id.*

21. **Judgment creditors cannot complain** that plaintiff in an **amicable** action and confession of judgment in **ejectment** allowed the time given for payment of the money to expire before filing the confession of judgment in the court. Authorities cited. *Id.* 865

22. A party cannot testify as to the **motives or intent** of another party.
Mfrs. & Traders Bank v. *Koch* (N. Y.) 672

23. Plaintiff has the right to **give in evidence** all the facts regarding his alleged purchase, to show that it was **bona fide** and for full value, notwithstanding that question had once been determined in a **prior suit** to which the plaintiff was not a party.
Snyder v. *Berger* (Pa.) 595

24. It is competent, in ejectment, to prove **declarations** of both grantor and grantee as tending to show an intent to defraud plaintiff, a creditor of grantor.
Cope v. *Kidney* (Pa.) 866

25. The **burden** is upon a judgment creditor to set aside an assignment made by his debtor for fraud.
Crook v. *Rindskopf* (N. Y.) 727

26. Although an assignment transferred all the property of the assignor, it may have been a fraudulent contrivance to embarrass or delay creditors, but this was a **question for the jury.**
Bagley v. *Bowe* (N. Y.) 253

27. Whether a sale was fraudulent as to a creditor of the seller was a question for the jury on the facts.
Snyder v. *Berger* (Pa.) 595

28. To authorize the judge to **take from** the **jury** the question of fraudulent intent arising upon the extrinsic facts and direct a verdict, the evidence must be undisputed.
Bagley v. *Bowe* (N. Y.) 253

BRIEFS AND NOTES.

Where there are suspicous circumstances, party is put upon proof of **bona fides.** (Pa.) 650

Party is not permitted to perpetrate fraud by availing of statute intended to prevent fraud. (N. Y.) 671

Confidential relation of parties. (Pa.) 150

Setting aside for **mental incapacity** of grantor; undue influence. (Pa.) 557, 558

Presumption of fraud in taking advantage of imbecility, ignorance, dependancy, or necessity. (Pa.) 150

Undue influence. (Pa.) 151

Question for the court. (Pa.) 151

False representations; right of action by party defaulted; laches. (N. Y.) 732, 733

Fraud upon creditors; amicable action of ejectment. (Pa.) 865

Intention. (N. Y.) 254, 255; (Pa.) 545-7, 864

It is fraud for a man to secretly dispose of his property just before his marriage. (Pa.) 168

Burden of proving validity of voluntary donation. (Pa.) 150

Acts and declarations of parties. (Pa.) 596

Conveyances between parent and child. (Pa.) 545-547

Transactions between husband and wife. (Pa.) 650

Presumption. (Pa.) 203, 546

Question for jury. (N. Y.) 254; (Pa.) 545

Notice of fraud. (N. Y.) 819

FRAUDS, STATUTE OF.

1. To take a **parol sale of land** out of the statute, the purchaser must take possession under the sale.
Birkbeck v. *Kelly* (Pa.) 890

2. **Possession** by the purchaser at time of sale defeats his title. *Id.*

3. Where the consideration for sale of land is the conveyance of other lands by vendee to a third person, and the latter deed is duly executed and delivered, the **promise of** the **third person to** the **vendor, to pay** him a certain sum as the consideration for the conveyance of the latter land, is not within the Statute of Frauds, and **need not** be in **writing.**
Freed v. *Richey* (Pa.) 153

4. The Statute of Frauds does not require an agreement for purchase money to be in writing. Authorities cited. *Id.* 154

BRIEFS AND NOTES.

Promise to pay debt of another. (N. Y.) 671

Parol contract for **sale of lands.** (Pa.) 153

Previous possession will not withdraw the parol sale of lands from the statute. (Pa.) 891

Part performance, taking case out of. (N. J.) 363

GARNISHMENT.

A **judgment** in attachment **against a nonresident, not personally served,** is good as personal judgment against him, where the record shows a general appearance by his attorneys, and such judgment is sufficient upon which to enter judgment against a garnishee.
Donoghue v. *Hanley* (Pa.) 604

GIFT.

1. Under the evidence a transfer of personal property, held to be an absolute gift **inter vivos** and not a *donatio mortis causa.*
Perry's Appeal (Pa.) 164

2. *Donatio mortis causa* **defined.** *Id.* 165

3. Proof that land conveyed to a married woman was bought with her husband's money raises a **presumption** of a gift to her.
Jones v. *Bland* (Pa.) 859

4. In assumpsit by an executor for purchase money of land conveyed by testator to his son, the **question** whether the son was to have the land partly as a gift is **for the jury.**
Horn v. *Buck* (Pa.) 509

5. A sick husband agreed with his wife to divide the household goods and separate. He went to his father's house, and the father took away the son's part of the furniture. A few days afterward the son died. The wife, as his administratrix, brought trover against the father for the furniture. The defense was that the son had given the furniture to his father in consideration of the latter's promise to pay the funeral expenses, and that the promise had been fulfilled. *Held*, the question whether the furniture had been so given was for the jury.
Flanigan v. *Flanigan* (Pa.) 483

6. In a feigned issue to try the ownership of a promissory note of a third person, claimed to have been delivered by a decedent as a gift to the holder, the question of **undue influence** is for the jury to determine.
Osthaus v. *McAndrew* (Pa.) 148

BRIEFS AND NOTES.

Mortis causa; defined. (Pa.) 168

Inter vivos; manner of **delivery.** (Pa.) 599

Delivery; what constitutes. (Pa.) 900, 901

Delivery of personal property by parent to child. (Pa.) 849

GUARANTY.

1. A national bank executed a bond to secure deposits by the obligee, a savings bank. Certain individuals indorsed on the bond: "In consideration of the making of the deposits mentioned in the foregoing agreement, we each and severally guaranty the performance of the foregoing contract by the" national bank; a similar bond between the same banks, in force for some time, was surrendered on the execution of the new bond; after the giving of the new bond the national bank failed, having funds of the savings bank on deposit, the date of the last deposit being prior to the execution of the new bond. *Held:* (*a*) The **new bond** was intended as a **substitute** for the old one. (*b*) That the **surrender of** the **old** bond was a **good consideration** for the new bond and also for the guaranty, and that it was immaterial whether the guarantors knew or did not know that the surrender of the old bond was in the contemplation of the parties when they became guarantors.
Erie Co. Sav. Bank v. *Coit* (N. Y.) 39

2. Where a contract of guaranty is entered into concurrently with the principal obligation, a **consideration** which supports the principal contract supports the subsidiary one also; and the consideration may be shown by parol. Authorities cited. *Id.* 41

3. In an action on a **joint and several** guaranty it is no defense to show that there are **other persons liable** for the whole or a portion of the same debt claimed of the defendants, or that such persons are not made parties to the action.
People v. *Lee* (N. Y.) 35

4. Guaranties are to be **interpreted** and enforced **according to** the meaning and **intent,** and in the manner designed by the parties at their execution, giving due effect to every part of the same. Authorities cited. *Id.* 38

5. Where an indorser of a note transferred it, but is still liable thereon as indorser, and

makes an agreement for valuable consideration with a **third person** to **pay** the **note,** the transferee and holder of the note may maintain an **action** against such third person to enforce payment of the note.
Litchfield v. *Flint* (N. Y.) 41

6. The **legal obligation of** the **promisee** to the holder of the note creates a privity by substitution with the promisor. *Id.*

7. Where such **note** is subsequently **retransferred** to the indorser, the latter, having fulfilled such agreement on his part, may maintain an **action** against such third person to enforce payment. *Id.*

BRIEFS AND NOTES.

Consideration may be shown by parol. (N. Y.) 40

A guaranty of passed indebtedness without other consideration does not create valid obligation. (N. Y.) 39

Agreement to forbear collection of debt is good consideration. (N. Y.) 39

So far as the language of a guaranty is broader than its recitals, it is powerless to sustain the **liability.** (N. Y.) 36

That a State is a party to a contract does not change the rule of law. (N. Y.) 36

Notice of **acceptance.** (N. Y.) 36

When **action** upon accrues. (N. Y.) 670

Where one person, for a valuable consideration, makes a promise to another, for a third party's benefit, such third party may maintain an action to enforce the promise. (N. Y.) 43

GUARDIAN AND WARD. See INFANTS; PARENT AND CHILD.

1. The appointment of a guardian over a child whose legal domicil is in another State, who has a guardian appointed under the laws of that State, does not deprive the court of the power in its discretion to decree the **custody** of the child **to a foreign guardian.** Authorities cited.
People v. *Allen* (N. Y.) 81

2. Where the maternal **grandmother** of a minor under fourteen years old **petitions for** a **guardian** of the estate to which the petitioner alleges the minor is entitled, and the minor's **father answers denying** the same, the proper **practice** is to take testimony to determine the truth of the respective allegations; but a decree appointing a fit person guardian on petition and answer will not be reversed.
Seff's Appeal (Pa.) 894

3. A **decree appointing** a guardian may be **amended** by limiting the guardianship to the estate, although the father of the minor has meanwhile filed an appeal from the decree. *Id.*

4. A **general guardian** may **employ** an **attorney** to obtain possession of the ward's lands, and make an agreement to **pay** such attorney a certain portion of the property recovered.
Re Hynes (N. Y.) 682

5. An **agreement** by a general guardian to **pay an attorney,** in consideration of his services in attempting to recover possession of the ward's lands, one **third** of the value of all property **recovered,** is valid. Ruger, *Ch. J.*, and Earl, *J.*, dissent. *Id.*

6. Under said agreement, the **attorney** was **entitled to** his stipulated share in **funds** arising from the sale of lands of the deceased father of the infants in another State, **for which notes** were **given.** *Id.*

7. The **fee of counsel employed by** a **third person** to assist such attorney in litigation to recover said real estate should **not** be **deducted** from the amount to be **paid** to said attorney under said agreement. *Id.*

8. A general guardian has a right to the possession of his ward's land and to the receipt of rents and profits thereof, and can maintain **ejectment** to recover **possession of** such **land.** Authorities cited. *Id.* 683

9. A **grandfather,** the guardian of an infant grandchild who lives in his family from childhood to death and is unable to work, is **entitled to compensation** out of the estate for support.
Wildoner's Appeal (Pa.) 911

10. Under Act of 1868, chap. 278, it is irregular for a guardian to file a **bill** in **his** own name as guardian for the **sale of** his ward's **real estate;** such irregularity does not deprive the court of jurisdiction when the infant is a party defendant, and answers by guardian appointed by the court.
Newbold v. *Schlens* (Md.) 449

11. The court having acquired jurisdiction of the proper parties, its **decree** is **binding** upon all the parties interested, **notwithstanding** such **irregularity.** *Id.*

12. On appeal from an order overruling exceptions to the sale, taken by the purchaser, it is immaterial whether there is **evidence** in the case upon which the court below could have reasonably concluded that it would **be to** the **advantage of all** parties concerned that the **property** should **be sold.** *Id.*

13. Even if the decree could be reversed, a **purchaser** in good faith under it, while it was subsisting and binding the parties thereto, will **not** be **affected by** such **reversal.** *Id.*

14. A **surety** of a guardian paying a judgment in the orphans' court against his principal may file a bill to **compel** his **cosurety** to **pay one half** thereof, without first obtaining a judgment at law against him.
Neilson v. *Williams* (N. J.) 369

BRIEFS AND NOTES.

Appointments; petition; notice; decree. (Pa.) 895

Amendment of decree appointing. (Pa.) 895

Right of general guardian to employ attorney to obtain possession of ward's lands and make agreement for his payment. (N. Y.) 683

Guardian standing *in loco parentis.* (Pa.) 913, 914

Sale of real estate. (N. Y.) 683

Right of guardian to **compensation** for ward's support. (Pa.) 913, 914

Guardian liable to **account** notwithstanding lapse of time. (Pa.) 914

HABEAS CORPUS.

Relator and defendant were married in Illinois where they resided and had children; relator obtained in that State, a final decree dissolving the marriage and awarding her the custody of the children. Thereafter she sued out *habeas corpus* in New York, where defendant had taken the children, to obtain the custody of them. The court below awarded the **custody of** the **children** to her. *Held*, that defendant's appeal should be dismissed, as the court below exercised its discretion upon the facts and did not give the Illinois decree the force of an estoppel.
People v. *Allen* (N. Y.) 78

BRIEFS AND NOTES.

To obtain custody of children. (N. Y.) 84

HEALTH. See NUISANCE.

Where the City of Rochester caused a **nuisance** within the Town of Brighton, by the discharge of sewerage, after it was collected in the sewers, into open drains constructed by the city across lands in the town, and continued this discharge after it was prohibited by an order of the board of health of the town, and continued also to use the ditches it had constructed in the town, *held*, that the **order** of the board of health of the town could be properly **served on the city;** and that the board could maintain an action against the city, to enforce its regulation and to **restrain** a continuance of the nuisance.
Gould v. *City of Rochester* (N. Y.) 99

BRIEFS AND NOTES.

Authority of **board** of health. (N. Y.) 99
Police power. (N. Y.) 248
Form of **action** by board of health. (N. Y.) 99

HIGHWAYS. See TURNPIKE COMPANIES; WAYS.

HOMICIDE.

1. Where the **identity of** the **prisoner** and the person who committed the crime is in question, no matter how slight may be the inference of identity to be drawn from any single fact, it is admissible as a fragment of the material from which the induction is to be made.
Johnson v. *Commonwealth* (Pa.) 608

2. Where it is in **evidence** that the man who committed the crime **wore a certain coat,** evidence is **admissible** to prove that such a coat was given to the prisoner before the crime, and was afterwards found in a house which he robbed, taking instead a coat belonging to the owner of the house. *Id.*

3. Where the **prisoner is told** by the district attorney to **repeat sentences,** and he does so without objection, the purpose being to **afford a witness** then on the stand an opportunity of seeing the prisoner and **hearing** the sound **of his voice** so as to **testify** more intelligently whether he was the man who used the words at the time of the murder, this court has no power to review the action of the court below. *Id.*

4. Where the **prisoner's doings** are **accounted for except** during a **few hours** before and after the murder, it is not error to say to the **jury:** "He has not been able to tell us where he was that night; that is the unfortunate part of his case." *Id.*

5. On a trial for murder, the **action of** the **officers** in seeking for the prisoner after the crime was committed is admissible **to show** the **flight** of the prisoner.
People v. *Ogle* (N. Y.) 49

6. The district attorney, upon the **cross examination of** the **prisoner,** may ask him if he had been arrested for shooting a man, where his counsel had already proved the same fact by another witness. *Id.*

7. It is competent to show that the prisoner had made **previous threats** or attempted to kill his victim. Authorities cited.
People v. *O'Sullivan* (N. Y.) 57

8. The court may receive, in the presence of the jury, **preliminary proof** of the expectation of death, before deciding to admit the **dying declarations.**
People v. *Smith* (N. Y.) 215

9. The inquiry will remain in each case, under its own peculiar circumstances, how far the preliminary examination should extend in order to ascertain the mental condition and belief of the deceased, before admitting his dying declarations. *Id.*

10. Where the trial court heard the whole statement of the **dying declarations** upon the preliminary issue, and permitted a cross examination on the subject, and then decided upon their admissibility and **directed** a **portion** of them to be **read to** the **jury** as evidence, and ordered the remainder to be struck out and instructed the jury to disregard it, *held*, that that was not first admitting erroneous proof to go to the jury and then striking it out, and that no error was committed. Andrews and Peckham, *JJ.*, dissent. *Id.*

11. **Dying declarations** relating to transactions prior to homicide and **not** part of the **res gestæ,** are not admissible. Authorities cited. Dis. Op. *Id.* 220

12. A mere **expression of opinion** as to the prisoner's guilt, by the judge in his charge to the jury, is not, if warranted by the evidence, ground for reversal.
Johnson v. *Commonwealth* (Pa.) 608

13. The right of the supreme court to **review** proceedings **on error** is limited to matters of record. *Id.*

14. The exercise of that **discretion** by the trial court, in acquiring the needed information, is **reviewable** by the general term, but **not** by this court, unless such discretion was abused.
People v. *Smith* (N. Y.) 215

BRIEFS AND NOTES.

Identity of prisoner. (Pa.) 616–618

Dying declarations; admissibility. (N. Y.) 215

Sufficiency of preliminary proof. (N. Y.) 216

Of prior attempts of prisoner to kill deceased is not admissible. (N. Y.) 215

Right of district attorney to prove **efforts** of police officers in **seeking prisoner.** (N. Y.) 50

Right of district attorney on cross examination to inquire as to **previous arrest** of defendant for shooting. (N. Y.) 50

Accused as witness. (Pa.) 616–618

Presence of. (Pa.) 617

HORSE RAILWAYS. See STREET RAILWAYS.

HUSBAND AND WIFE.

I. MARRIAGE SETTLEMENTS; ANTENUPTIAL CONTRACTS.
II. HUSBAND.
III. WIFE; CONTRACTS; SEPARATE ESTATE; TORTS.
IV. DEALINGS AND TRANSACTIONS BY AND BETWEEN.
V. SEPARATION.
VI. DIVORCE.
BRIEFS AND NOTES.

I. MARRIAGE SETTLEMENTS; ANTENUPTIAL CONTRACTS.

1. In the absence of proof of fraud or concealment a **widow cannot avoid** an antenuptial settlement.
Smith's Appeal (Pa.) 141

2. A subsequent **increase in the value of** the husband's **property** does not affect the validity of a settlement. *Id.*

3. It is **not essential** that the settlement should be **recorded** and delivered to the trustee named therein. *Id.*

4. A widower, fifty-two years of age, with six children, and worth about $75,000, married a woman forty-three years old, who had no property. In an antenuptial settlement, she released, in consideration of real estate producing $1,200 a year, all her interest in his estate. The deed of settlement remained in the husband's possession and was never recorded. He died worth about $400,000. In addition to the real estate settled he bequeathed to her the interest of $15,000 for life; the residue of his estate he gave to his children. *Held*, the **settlement** was **valid** and binding upon the wife. *Id.*

5. A **presumption** of fraud or concealment does not arise under circumstances in which the **disproportion** of the wife's provision to the husband's means might well have been intended by the parties. *Id.*

6. A **deed** in pursuance of an antenuptial contract conveyed land from the husband to a third party for the use and purpose mentioned in the contract, by which the husband in effect agreed to vest in his wife a life estate in the south half of the land, in case she survived him, with the remainder in fee to his heirs, and in the same contingency to vest in her an estate in the other half during two minorities of his children, with remainder in fee to such children, etc. *Held*, such deed **was a mere conveyance to** the use of the **beneficiaries** named.
Helck v. *Reinheimer* (N. Y.) 743

7. A **promise by one to his intended** wife; that all he had or might have was to be hers, **is not sufficient consideration** for a deed to her fourteen years after **marriage** and after he had failed.
Neilson v. *Williams* (N. J.) 869

II. HUSBAND.

8. A husband undertaking to be bound for the **commissions** of a broker for **effecting** the **sale of real estate** of his wife is personally bound, whether he disclosed his **agency** for his wife or not.
Jarvis v *Schaefer* (N. Y.) 675

9. When the **trustee is** the **husband of** the **cestui que trust,** nothing short of clear and satisfactory proof will establish **that** the obligation of the former to the latter **has been discharged** or forgiven.
Rusling v. *Rusling's Exrs.* (N. J.) 129

10. The **Statute of Limitations is** not a bar to such trusts. *Id.*

III. WIFE; CONTRACTS; SEPARATE ESTATE; TORTS.

11. A married woman cannot contract in the District of Columbia as a **sole trader.**
Hitchcock v. *Richold* (D. C.) 352

12. A married woman living with her husband carried on business on her own account and with her separate estate. For the purpose of keeping up her stock she bought a quantity of goods of plaintiff, giving her promissory note in payment. *Held*, plaintiff could not recover, this not being a **contract** having relation to the defendant's **separate estate** within the Married Woman's Act. MacArthur, *J.*, dissents. *Id.*

13. Where a wife claiming in sheriff's interpleader relies for her title on **desertion** by her husband, and her **subsequent acquisition of** the **property** under the Act of May 4, 1855, the question of desertion is for the jury.
Bernhart v. *Mitchell* (Pa.) 562

14. **Property acquired in carrying on a business** by a married woman, whose husband neglects or refuses to provide for her, is, under the Act of 1855, not liable to execution for her husband's debts. *Id.*

15. In an action to obtain possession of land bought at an execution sale, where the wife of the execution debtor claimed the property as her separate estate, which claim was alleged by the plaintiff to be fraudulent, *held*, that evidence by defendants, the execution debtor and his wife, to show that before the plaintiff had become a creditor, the debtor had **assigned** the **property to his wife,** should have been admitted,—it appearing that the **property** had been **acquired with the wife's money.**
Heath v. *Slocum* (Pa.) 643

16. If the **husband had** possession of the **wife's money** and used it in the purchase of the property, it would **support** the **wife's title.**
Heath v. *Slocum* (Pa.) 648

17. Where a woman **paid** her **money** for land and accepted a conveyance thereof to herself and another, as her husband, in the belief that she was the legal wife of such other, and that in case she should survive him the property should be wholly hers, and she **learns** after his death that when he married her he **had a wife living,** she can maintain a suit against the latter and her children to obtain a **decree assuring** the complainant the **title** to the whole of the property.
Gebel v. *Weiss* (N. J.) 126

18. In such case she is **competent** to **prove** that **her money was used** in the purchase and improvement of the property. *Id.*

19. The **deed** itself is **evidence** of an agreement that she should be sole owner of the property in case she should survive him, and such agreement may be effectuated in equity. *Id.*

20. A **note** by a married woman **to** a firm of which her **husband** is a member is void at law.
Nat. Bank of Rahway v. *Brewster* (N. J.) 482

21. Where the **wife loaned** money **to** her **husband's firm** upon their promissory note, in order to **recover** the money after his default, she must have recourse to **equity.** Authorities cited. *Id.* 482

22. A wife has **no estate in** the **lands of** her **husband during** his **life** which she may convey to another.
Witthaus v. *Schack* (N. Y.) 257

23. The **property of** the **wife of** a **partner** cannot be charged with moneys drawn by the husband from the firm's funds with knowledge of the other partner, and used in improving her property.
Sharp v. *Hibbins* (N. J.) 919

24. A married woman residing with her husband does **not** thereby render herself **liable for rent.**
Sanford v. *Pollock* (N. Y.) 821

25. The **husband's** statement of a right to sign for his wife is no evidence of **his authority to bind her.** *Id.*

26. That the wife subsequently resided on the premises is no evidence of her **husband's authority to hire as her agent.** *Id.*

27. Where the record of a former judgment shows that the justice had jurisdiction, the **liability** of one of defendants, a married woman, **cannot be retried on a scire facias.**
Weber v. *Detwiller* (Pa.) 833

28. For a **tort** committed by a married woman, the husband and wife are **jointly liable.**
Wheeler & W. Mfg. Co. v. *Heil* (Pa.) 179

29. When a **tort** is committed by the wife she is **personally liable,** unless her husband is both present and directs the doing of it at the time; his presence furnishes evidence and raises presumption of direction, but is not conclusive. Authorities cited. *Id.* 182

IV. DEALINGS AND TRANSACTIONS BY AND BETWEEN.

30. A **mortgage** executed **by a married woman, her husband not joining** therein, held, on the facts, **without vitality,** being without consideration, and executed only to protect the property from a dissipated husband.
Heller v. *Groves* (N. J.) 139

31. The grantee in a deed from husband and wife, of the husband's land, derives title through the husband wholly; and the **widow** of such grantor, bringing suit to **annul** the **deed** so far as it affects her dower right, is, under the Code of Civil Procedure, § 829, **incompetent to testify** to communications between herself and her deceased husband, in reference to such deed.
Witthaus v. *Schack* (N. Y.) 257

32. The **joinder** of a married woman **with** her **husband** in a deed or mortgage of his land inures simply **as a release** to the grantee of her future contingent right of **dower** in the premises. Authorities cited. *Id.* 259

33. The **object of uniting** the **wife** with the husband in conveyance of his land to a third person is to extinguish her inchoate right of dower. Authorities cited. *Id.*

34. Proof that **land conveyed to a married woman** was bought **with** her **husband's money** raises a presumption of a gift to her.
Jones v. *Bland* (Pa.) 859

35. **Possession** of a **wife's chattels by** her **husband,** *held,* not to amount to **a** transfer of the title from her to him.
Perry's Appeal (Pa.) 164

36. An offer seeking to introduce the **opinion** of a third person to whom the debtor had transferred the land, and who in turn transferred to the wife, **as** to the **purpose of** the **transfers** was properly refused.
Heath v. *Slocum* (Pa.) 648

37. The **original deed** to the husband and the assignment were **admissible** in evidence. *Id.*

38. Where the contract provided that if the **wife died** before the husband, without issue, the **land was to be conveyed back to** the **husband,** upon her death the deed ceased to have any operation.
Helck v. *Reinheimer* (N. Y.) 743

V. SEPARATION.

39. A husband agreed with his wife to **divide** the household goods **and separate.** He went to his father's house and the father took away the son's part of the furniture. A few days afterward the son died. The wife as his administratrix brought trover against the father for the furniture. The defense was that the son had **given** the **furniture to** his **father** in consideration of the latter's promise to pay the funeral expenses, and that the promise had been fulfilled. *Held,* the **question** whether the furniture had been so given was **for** the **jury.**
Flanigan v. *Flanigan* (Pa.) 483

VI. DIVORCE.

40. A **wife** who, after obtaining in the quarter sessions an **order** against her husband **for support** on the ground of his desertion, persistently refuses, for the period of two years, his request to leave her parents' house and live with him, is guilty of **desertion;** and the husband is entitled to a divorce.
Bauder's Appeal (Pa.) 199

41. The **record of** the proceeding in the court of **quarter sessions is not a bar** to the divorce. *Id.*

42. **Adultery** must ordinarily be established by circumstantial **evidence.**
Pfisterer v. *Pfisterer* (Md.) 414

43. Every such case must depend upon its own peculiar **circumstances.** *Id.*

44. On the **facts** in the case, *held*, that defendant was guilty of **adultery** as charged in the petition.
Reading v. *Reading* (N. J.) 120

45. The law will not charge a husband with **condonation** because he takes time to consider whether the allegations against his wife are likely to be sustained. *Id.*

46. Where complainant is **entitled** to a decree **on** the ground of **adultery,** the court **cannot grant** the divorce on the ground of **cruelty** and desertion set up in defendant's answer.
Osborne v. *Osborne* (N. J.) 123

47. Relator and defendant were married in Illinois where they resided and had children; relator obtained in that State a final decree dissolving marriage and awarding her the custody of the children. Thereafter she sued out *habeas corpus* in New York, where defendant had taken the children, to obtain the custody of them. The court below awarded the **custody of** the **children** to her. *Held*, that defendant's appeal should be dismissed as the court below exercised its discretion upon the facts and did not give the Illinois decree the force of an estoppel.
People v. *Allen* (N. Y.) 78

48. A **decree of** a tribunal as to the **custody** of the children **is never final.** Authorities cited. *Id.* 81

BRIEFS AND NOTES.

Breach of promise of marriage; measure of damages. (Md.) 377, 378

Marriage settlements; delivery. (Pa.) 142

Family settlements. (Pa.) 500

Antenuptial contract; consideration. (Pa.) 142

Any provision which an adult agrees to accept before marriage is sufficient. (Pa.) 142

Record. (Pa.) 142

Validity. (Pa.) 142

Invalidity of antenuptial conveyances by wife in fraud of husband. (Md.) 382

Provision for wife disproportionate to means of husband. (Pa.) 142

Alienability of personal property of husband. (Md.) 382

Wife's separate estate; evidence to establish. (Pa.) 564, 565

Right of husband's creditors to. (Pa.) 564, 565

Contract; necessaries. (D. C.) 853, 854; (Pa.) 180, 835

Wife as creditor of husband; proof. (Pa.) 168

Wife as *feme sole trader*. (D. C.) 854; (Pa.) 180, 564–5.

Confession of judgment **by wife.** Note 179; (Pa.) 180–1

Liability of wife for **rent.** (N. Y.) 821, 822

Liability of married woman for **torts.** (Pa.) 181

Property rights. (Pa. 860

Actions; parties. (Pa.) 564

Witness. (N. Y.) 257

Divorce as matter of right. (Pa.) 200

Desertion; what amounts to. (Pa.) 200

Refusal of wife to live with husband after separation by agreement. *Note.* (Pa.) 199

Conviction in a criminal court as bar to suit for divorce on ground of desertion. (Pa.) 200

Right to custody of children. (N.Y.) 83, 84

Welfare of children is criterion. (N.Y.) 83

Change of circumstances. (N. Y.) 84

IDENTITY. See HOMICIDE, 1–3

BRIEFS AND NOTES.

Identity of name is identity of **person.** (Pa.) 208

IMPLICATION. See STATUTES, II.

IMPRISONMENT. See JAIL AND JAILER.

INCEST.

BRIEFS AND NOTES.

Evidence of previous criminal intimacy. (N. Y.) 56

INDICTMENT. See CRIMINAL LAW, II.; OFFICE AND OFFICER, 11.

INFANTS. See GUARDIAN AND WARD; MASTER AND SERVANT, I.; NEGLIGENCE, 5–8; PARENT AND CHILD.

1. **Money paid by** a minor in consideration of being admitted **as a partner can not** be **recovered back,** unless he was induced to enter into the partnership by fraudulent representations.
Adams v. *Beall* (Md.) 430

2. **Contracts** by a minor, of a personal nature, may be **avoided** before or after majority. *Id.*

3. An infant **cannot disaffirm** a contract **if** he has **enjoyed** the consideration thereof. Authorities cited. *Id.* 431

4. A **trustee paying** an infant, without the sanction of the court, may be **compelled** to **pay again** to the infant when he comes of age.
Rogers v. *Traphagen* (N. J.) 476

5. In the absence of bad faith on the part of an **administrator** making payment to an infant, he should be allowed the **benefit** of **disbursements** which would clearly have **been sanctioned by** a court of **equity** had the administrator occupied the position of guardian.
Rogers v. *Traphagen* (N. J.) 476

6. Where the account is small, for the purpose of saving taking out letters of guardianship, the **court** will sometimes **direct payment to a relative of** the **infant.** Authorities cited. *Id.* 478

BRIEFS AND NOTES.

Judicial notice taken that seventeen months' old infant is *non sui juris*. (N. Y.) 246

Contracts; affirmance or avoidance. (Md.) 430, 431

Inefficiency is not to be used in perpetration of fraud. (Md.) 431

Liability for **torts.** (Pa.) 181

Negligence on part of. *Note*, 245, (N.Y.) 246

INFORMATION. See FALSE PRETENSES.

INJUNCTION.

1. An injunction will not issue unless complainant's **right to** the subject matter in dispute, and also to the remedy, is **clear.**
Harper v. *McElroy* (N. J.) 366

2. On a bill by a **lessee** for an injunction to **restrain** the grantees of his landlord from **trespassing** on lots which he claims he rented, but for which the alleged trespasser **has** a conveyance in fee, it being plain that the complaint had only a license to pass over such lot, *held*, that the **order** to **show cause** should be discharged with costs. *Id.*

3. The court of chancery may compel an **account of waste,** done only **as incidental to** relief, by injunction to stay the commission of further waste, and that only to prevent a multiplicity of suits.
Lippincott v. *Barton* (N. J.) 920

4. On an application for an injunction **restraining** the execution of a **judgment at law** in ejectment, it appearing that plaintiff has no equity, and no fraud, mistake, or surprise being shown, the injunction is denied.
Anglecey v. *Colgan* (N. J.) 119

5. A creditor of a decedent brought suit in equity for amount due him without having filed his claim with executors nor established it at law, they having recognized the claim by payment thereon. *Held*, a **preliminary** injunction, issued to **restrain collection** of an alleged **fraudulent claim from** property of **deceased,** will not be dissolved on motion before final hearing.
Emson v. *Ivins* (N. J.) 373

6. Although a **count** in **complaint** based upon obstruction of a highway could **not** be **maintained** when it appeared that the land referred to was not a highway, yet **another count** based upon a claim of right to an opening **from** the railroad premises was **maintainable.**
Avery v. *New York Cent. & H. R. R. R. Co.* (N. Y.) 795

7. An equitable action to restrain the continuance of **a nuisance** is not, under the Code of Civil Procedure, § 968, **triable** by a **jury.**
Cogswell v. *New York, N. H. & H. R. R. Co.* (N. Y.) 828

INSANE PERSONS. SEE FRAUD AND FRAUDULENT CONVEYANCE, 1–5; WILL.

BRIEFS AND NOTES.

Burden of **proof** of insanity. (Pa.) 178

Subscribing witnesses are not always the best to prove sanity of testator. (Pa.) 538

Contract. (Pa.) 557

Liability for wrongs or **torts** committed. (Pa.) 178

INSOLVENCY. See ASSIGNMENT FOR BENEFIT OF CREDITORS; BANKRUPTCY; CORPORATIONS, 12, 28.

1. The insolvent **laws** of a State have **no extraterritorial effect.**
Glenn v. *Clabaugh* (Md.) 391

2. A **discharge** under the insolvent laws of this State is **no defense to** an **action** for an assessment on the stock of a corporation of **Virginia.** *Id.*

3. In an **action on** an **insolvent's bond** an **affidavit of defense** is sufficient if it alleges that the bond was not forfeited on the day the insolvent's petition was dismissed; that the hearing was fixed not for that day but for a subsequent one and had been continued by a rule, not yet disposed of, to show cause why the order dismissing the petition should not be rescinded, and that, on the day the petition was dismissed, the insolvent surrendered himself to the keeper of the county prison.
Betz v. *Greenwaldt* (Pa.) 856

BRIEFS AND NOTES.

Hearing of **application;** notice. (Pa.) 858

Decree; conclusiveness. (Pa.) 858

Sequestration of assets of corporation. (N. Y.) 316

Bonds; failure of debtor to conform to statutory requirements. (Pa.) 858

Forfeiture by surrender to jail. (Pa.) 858

INSTRUCTIONS. See CRIMINAL LAW, III.; HOMICIDE, 12; TRIAL., IV.

INSURANCE.

I. FIRE.
II. LIFE.
BRIEFS AND NOTES.

See BENEFIT SOCIETIES.

I. FIRE.

1. Where the company's agent allows an insurance broker to take the insurance and pay therefor when it suits his convenience, a **notice of cancellation** under a proviso in the policy reserving to the company the right to **return** the **unexpired premium prorata** at any time, with effect of cancelling policy, is effectual without returning part of the pre-

mium, where the premium had not in fact been paid to the company.
Stone v. *Franklin Ins. Co.* (N. Y.) 749

2. An insurance broker, *held*, so far the agent of the assured that **notice** to him of the **cancellation** of the policy was notice to the assured. *Id.*

3. In an **action upon policy** for the value of goods burned, where plaintiff's books and most of his papers were destroyed by the same fire, an **inventory** by the seller of the goods, assisted by the plaintiff, **ten months before the fire,** on the purchase of the goods by plaintiff, showing the prices, is **admissible upon** the **value** of the goods burned.
Ellsworth v. *Ætna Ins. Co.* (N. Y.) 244

4. The footings of another **inventory** made by plaintiff a **few days before** the **fire,** of the stock of goods then on hand, are also **admissible.** *Id.*

II. LIFE.

5. An **insurable interest** in the life of another arises from the relation of the party taking the insurance to the insured, so that from the relation thus established there may be some expectation of benefit or advantage in the continuance of the assured life.
Keystone Mut. Ben. Asso. v. *Norris* (Pa.) 204

6. A policy issued by a prearranged plan to **one** who **assigns it to** a third **person** having **no insurable interest** in the insured, the latter paying all the premiums, is **void,** notwithstanding the one to whom the policy was issued had such an interest. *Id.*

7. The sum insured by a policy of insurance **on** the life of a **debtor** must not be disproportionate to the interest the holder of the policy has in the life insured.
Grant v. *Kline* (Pa.) 626

8. A creditor for $802 took out a policy for $3,000 on the life of his **debtor** who was sixty-five years old. He had insured the debtor's life twice before and had paid the premiums, but abandoned the policies on account of the insolvency of the companies. He paid premiums on the last policy to the amount of $293. The insured died within a year. *Held,* there was no **disproportion** of which the debtor's administrators could take advantage. *Id.*

9. In construing a contract between an insurance company and a policy holder, the **construction not involving a forfeiture is preferred** by the court.
Holly v. *Metropolitan L. Ins. Co.* (N. Y.) 263

10. This rule is applicable only where the words used in a policy leave the **meaning in doubt.** *Id.*

11. Where, after the **premium was due,** the company, at the request of the policy holder, **postponed** its **payment, upon the giving** by the latter, of his **note** for the same, containing the condition that if he failed to pay the note at maturity he should thereby immediately forfeit all claims to further insurance, and the company gave its receipt with similar condition, *held*, that by failing to pay such note when due the **forfeiture attached.** *Id.*

12. Although a policy **contained a promise** by the company that upon its **surrender within** thirty days after the unpaid premium should be due the company could in exchange issue a **paid up policy** for the amount of premium received upon it, and although the policy holder offered to pay the note twelve days after it became due, he could not compel the company to give a paid up policy for the amount of premiums paid by him previous to the time when the one fell due for which he gave the note. *Id.*

13. **Punctuality** in the **payment of premiums** is the very essence of the contract; and when payment is not made at the time, the company has the right to forfeit if such was the contract. Authorities cited. *Id.* 265

14. An action instituted in a court having no jurisdiction of the defendant will not suspend the running of a condition of **limitation in a policy** of insurance.
Keystone Mut. Ben. Asso. v. *Norris* (Pa.) 204

BRIEFS AND NOTES.

Fire; cancellation; return of unexpired premium. (N. Y.) 749, 750

Notice of cancellation served upon agent of assured. (N. Y.) 750

Admissibility of inventory of purchase of goods upon question of value. (N. Y.) 244

Admissibility of inventory by plaintiff taken a few days before fire. (N. Y.) 244

Assessment; validity. (Pa.) 590

Life; insurable interest. (Pa.) 206

Policy on life of debtor must not be disproportionate to interest holder of policy has in life of insured. (Pa.) 627

Policy not founded on separable interest is mere wagering policy and is void. (Pa.) 205

Wagering policies. (Pa.) 627

Assignment of policy. (Pa.) 206

The conditions of the policy are part of the contract between the parties. (Pa.) 205

Forfeiture for nonpayment of premium. (N. Y.) 264

Forfeitures not favored. (N. Y.) 264

Waiver of forfeiture by company. (N. Y.) 264

Limitation of time within which action may be brought on policy. (Pa.) 205

Premiums. *Note.* (N. Y.) 263

Effect of nonpayment of interest on premiums upon paid up policies. *Note.* (N. Y.) 263

Assessments. (Pa.) 639, 640

INTEREST. See BANKS AND BANKING, 5; DEVISE AND LEGACY, 34; EXECUTORS AND ADMINISTRATORS, 18; SPECIFIC PERFORMANCE, 6; USURY.

1. The **rate** of interest **upon a judgment** must be measured by the laws of the State in which the action upon the judgment is brought.
Wells, Fargo & Co. v. *Davis* (N. Y.) 686

2. A **trustee** inexcusably **delaying ac-**

counting for **trust** money and using it as his own, will be charged with interest.
Rappanier v. *Bannon* (Md.) 420

3. Where **testator** had held the principal moneys in hand for the purpose of investment and reinvestment, but **mingled** them with his own **funds,** it was not improper, in settling with the life tenant, whose funds were so held, to charge the testator with **interest upon interest,** as he forebore investment and used the moneys for his own convenience. Earl, *J.*, dissents.
Re Kernochan (N. Y.) 90

BRIEFS AND NOTES.

Compounding. (N. Y.) 92

On judgment. (N. Y.) 687, 688

INTERPLEADER.

1. Where the holder of a fund to which there are **conflicting claims** files a bill of interpleader, it is unnecessary to make nonconflicting claimants **parties;** and if made parties, the bill will be dismissed as to them.
Varrian v. *Berrien* (N. J.) 867

2. **Where a maker of a note** desires to pay it, but two persons claim to be entitled to such payment, he **is entitled to a** bill of **interpleader.**
Fitch v. *Brower* (N. J.) 871

3. In interpleader the **claims** should be **specifically set forth.** Authorities cited.
Varrian v. *Berrien* (N. J.) 868

4. The court **cannot determine** the validity of the claims in controversy **before** all the **evidence** has been **adduced.**
Owings v. *Rhodes* (Md.) 407

5. On a bill for interpleader there must be a **preliminary decree.** *Id.*

6. The **person holding** the **property** in controversy cannot be affected by the final decree. *Id.*

7. Where the rights of parties have been settled by final decree, the determination of the court may be enforced by bringing in the person holding the property in controversy, who may be **compelled to pay** the money in **accordance** with the **final decree.** *Id.*

8. Where a **wife,** claiming in sheriff's interpleader **relies** for her title **on desertion** by her husband, and her subsequent acquisition of the property under the Act of May 4, 1855, the **question** of desertion **is for the jury.**
Bernhart v. *Mitchell* (Pa.) 562

INTERSTATE COMMERCE. See CONSTITUTIONAL LAW, III.

JAIL AND JAILER.

1. **Laws** 1886, chap. 672, **limiting period** of imprisonment within the jail liberties upon execution against the person, does **not apply to** an **order of arrest** issued before a recovery has been obtained.
Levy v. *Salomon* (N. Y.) 783

2. **An order of general term** affirming an order of special term discharging a defendant from the jail limits and from arrest under a preliminary order of arrest, upon the ground that he was entitled to discharge under Laws 1886, chap. 672, **is appealable** to the court of appeals. *Id.*

BRIEFS AND NOTES.

Act of 1886, limiting **imprisonment** within jail liberties, does not apply to cases where the debtor **is** held on an order of arrest. (N. Y.) 783, 784

JOINT TENANTS AND TENANTS IN COMMON.

A, B and C, by conveyances which excepted certain lots, became tenants in common of a tract of land which, for the purpose of clearing up the title, A, by agreement with B and C, permitted to be sold for **taxes,** and bought in his own name for the benefit of all. Still later both this tract and the excepted lots were again sold for taxes, and were bought by D. The excepted lots were not redeemed, and D conveyed them to A. B and C thereupon brought **ejectment** against A for an undivided two thirds of the lots. *Held,* that in the absence of **fraud,** they could not recover.
Brickell v. *Earley* (Pa.) 520

BRIEFS AND NOTES.

Deed of tenant in common while void **as to cotenant is** valid as against grantor. (Md.) 444

Reciprocal obligations enforceable in equity. (Pa.) 587

Partition. (Md.) 446

JUDGMENT.

I. ENTRY; DEFAULT; CONFESSION.
II. FOREIGN.
III. RES JUDICATA.
IV. LIEN; DISCHARGE; NOTICE.
BRIEFS AND NOTES.

See EJECTMENT, II.; EQUITY, V.; ESTOPPEL; EXECUTION; HUSBAND AND WIFE, 41; INJUNCTION, 4.

I. ENTRY; DEFAULT; CONFESSION.

1. Where a **default** has been regularly taken and the case contains no exception worthy of consideration, the motion to open the default will be denied with costs.
Schenck v. *Bingler* (N. Y.) 696

2. Where a rule to show cause why a judgment of *non pros.* should not be set aside was obtained on the ground that the court files showed that the judgment had been **irregularly entered,** and the rule recited matters appearing by the file, the plaintiff, on motion to make rule absolute, may produce files without further formality.
Souder v. *Lippincott* (N. J.) 108

3. A motion at special term to **amend** a **confession** of judgment **is** addressed to the discretion of the court.
Symson v. *Selheimer* (N. Y.) 685

4. A judgment in attachment **against** a **nonresident, not personally served, is** good as personal judgment against him, where the record shows a general appearance by his

attorneys, and such judgment is sufficient upon which to enter judgment against a garnishee.
Donoghue v. *Hanley* (Pa.) 604

5. An **order** entered in the minutes of a court of record **is not a record until** it has been **enrolled.** Authorities cited.
Hutkoff v. *Demorest* (N. Y.) 84

II. FOREIGN.

6. Courts of other States are bound to give a judgment of a sister State the same **force and effect** that would be given to it by the courts of the State where it was rendered. Authorities cited.
People v. *Allen* (N. Y.) 80, 81

7. A **copy** of a judgment roll of a court of another State is **not inadmissible** because the **seal** to the attestation clause is **without wax.**
Wells, Fargo & Co. v. *Davis* (N. Y.) 686

8. The **rate of interest** upon a judgment must be measured by the laws of the State in which the action upon the judgment is brought. *Id.*

9. An **assignment** of a judgment of another State may be **proved by** an examined **copy** sworn to by a competent witness.
Otto v. *Trump* (Pa.) 629

III. RES JUDICATA.

10. A judgment for an **agent** on a contract for an undisclosed **principal,** bars the latter.
Ludwig v. *Gillespie* (N. Y.) 740

11. Both parties having **consented to litigate** are **bound** by the judgment.
Helck v. *Reinheimer* (N. Y.) 743

12. A judgment recovered by a lower against an upper riparian owner, for diminishing the natural flow of the stream and polluting it by mine drainage is, **in a subsequent action** for a continuance of the same acts, **conclusive** evidence that defendant has no right to divert the stream.
Long v. *Trexler* (Pa.) 547

13. Where the record of a former judgment shows that the justice had jurisdiction, the **liability** of one of defendants, a married woman, **cannot be retried on a scire facias.**
Weber v. *Detwiller* (Pa.) 833

14. Judgment in ejectment, obtained on the ground of relationship of successful party to the person last seised, is **not a bar to a subsequent ejectment** by the unsuccessful party, or conclusive evidence of the fact of relationship.
Gehr v. *Miller* (Pa.) 508

15. A judgment is **not a bar** against a **party** sought to be **defrauded** thereby.
Biddle v. *Tomlinson* (Pa.) 838

16. A judgment cannot be **attacked collaterally,** save for collusion. *Id.*

IV. LIEN; DISCHARGE; NOTICE.

17. Where a motion to amend a judgment was granted, but the **lien** of the judgment was absolutely **postponed,** the order should have been in the form of granting leave upon condition of his assenting to the postponement of his lien.
Symson v. *Selheimer* (N. Y.) 685

18. An order postponing the lien of a judgment does not postpone to the lien of a void judgment. *Id.*

19. A judgment, founded upon a debt which existed when bankruptcy proceedings were commenced and was provable therein, is **discharged by** the discharge in **bankruptcy.**
McDonald v. *Davis* (N. Y.) 754

20. An order in the bankruptcy court vacating the stay has no effect by way of limiting the subsequent discharge of defendant; and such **discharge** is a perfect **defense in an action upon the judgment.** *Id.*

21. It is competent to interpose the discharge to any proceeding to enforce the judgment, by asking for a **perpetual stay upon the execution.** *Id.*

22. The **purchaser** of a judgment is **affected with notice** of any right which the record plainly discloses.
Biddle v. *Tomlinson* (Pa.) 838

BRIEFS AND NOTES.

Defined. (N. Y.) 687
By confession. (Pa.) 607, 608, 865
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Res judicata; when a bar. (Md.) 407; (N. Y.) 99, 320, 818-9; (Pa.) 200, 205, 509, 551, 596
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Foreign; conclusiveness. (N. Y.) 83, 84
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JURY. See TRIAL.

BRIEFS AND NOTES.

Competency; prejudice. (N. Y.) 54
Power of court to **excuse** juror. (N. Y.) 54
Right to **trial by jury.** (N. Y.) 712
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JUSTICES OF THE PEACE.

1. Under Act of March 31, 1860, and the

Local Act of May 1, 1861, a **county** to which the latter Act applies is **liable to** a justice of the peace **for** all the **costs,** except those of prosecutor and defendant of a **criminal proceeding** before him.
Codding v. *Bradford Co.* (Pa.) 869

2. Under Act of 1861, the **sentence** by the justice has the full **effect and force** of a sentence by the court of quarter sessions. *Id.*

3. A statute giving **power to** a magistrate to examine such witnesses as should be produced before him authorizes him to **use subpœnas** to such witnesses and to compel their attendance by the usual process of the court.
New York v. *Sands* (N. Y.) 272

BRIEFS AND NOTES.

Special and limited **jurisdiction.** (Pa.) 502

LACHES.

A **trustee** can **not** be **protected from accounting because of** the **lapse** of **time,** or because he has kept no accounts, or has seen fit to appropriate and claim all the trust estate as his own.
Reeves v. *Beekman* (N. J.) 453

BRIEFS AND NOTES.

What amounts to. (N. Y.) 318, 319

Cannot be **set up by** parties with notice of wrong. (N. Y.) 320

Effect of, by bankrupt. (N. Y.) 756

In **rescission** of contract. (N. Y.) 732, 733

Equity. (Pa.) 558

LANDLORD AND TENANT. See HUSBAND AND WIFE, 24–26; LICENSE, 2, 3; USE AND OCCUPATION.

1. A **demise of coal** under the surface of a specified piece of land **is a sale** of the coal.
Fairchild v. *Fairchild* (Pa.) 878

2. A **lease of coal lands,** in which lessee agrees, in case the quantity mined falls short of a certain minimum quantity in any year to pay the same rent as if he had mined such quantity, provided that if he in any year mined more than such quantity, such excess, or so much thereof as may be necessary, may be set off against the deficiency of any other year, permits mining in excess of that quantity in any year, and an application of that excess to the rent otherwise unearned but still due in subsequent years when there happens to be a deficiency in production. Ruger, *Ch. J.*, and Rapallo, *J.*, dissent.
McIntyre v. *McIntyre Coal Co.* (N. Y.) 335

3. The deficiency need not have occurred before the excess is produced; the lessee may apply the excess upon the **deficiency** of any other years. *Id.*

4. A **covenant** to **work** the **mine continuously** can **not** be **inferred** from an agreement to carry on the mining operations in a safe, skillful, and workmanlike manner, the lease providing a penalty for omitting to do so. *Id.*

5. A **lease,** "from the first day of December, 1878, at the rent of $600 per annum, payable monthly when due," with a provision that if the lessee shall continue on the premises "after the termination of the contract, then this contract is to continue in full force for another year, and so on from year to year until legal notice shall be given for a removal," followed by a clause that if the lessee shall continue on the premises "after the termination of the above contract, then he shall have the privilege of staying another five years, at the above fixed rent per annum,"—is a lease **for** one **year with** the **option of continuing from year to year** for five more years.
Jones v. *Kroll* (Pa.) 877

6. A lease for no determinate length of time but by which an annual rent is reserved, payable in any aliquot proportions, is a **lease for a year.** Authorities cited. *Id.* 879

7. A demise for monthly or weekly **rent** affords a presumption of a monthly or weekly **tenancy.** Authorities cited. *Id.*

8. A lease by the City of New York in 1810, demising lands for thirty years, containing an agreement that the city, at the expiration of the term, would demise the premises to lessee, his assigns, etc., for twenty-one years thereafter, with a like **covenant for future renewals,** should **not** be so construed as to create a **perpetuity.**
Syms v. *New York* (N. Y.) 225

9. Its language is satisfied by holding that it gave the lessee the right to **two renewals.** *Id.*

10. A practical **construction** given to such lease **by** both **parties,** is entitled to great weight in ascertaining its meaning and effect. *Id.*

11. Where there is no proof of any mistake or fraud in the execution of leases, there is no **basis for** their **reformation.** *Id.*

12. Where the lessee of a **quarry** assigns the lease, with the provision that if assignee makes **no profits** and believes the quarry is not a profitable one to work he **may abandon** it, the assignee's right to terminate the contract depends upon the fact that he makes no profits and has such belief.
Krum v. *Mersher* (Pa.) 880

13. If, after a fair trial, he has made no profits, he **may terminate** the **contract,** *Id.*

14. In an action by lessee for so surrendering the lease, **testimony** that the quarry might have been worked profitably, is **irrelevant.** *Id.*

15. Evidence that a **letter, demanding** payment of **rent,** was **deposited in** the **postoffice,** is competent to rebut the allegation that no demand had been made. Authorities cited.
Folsom v. *Cook* (Pa.) 588

16. A **lessee** has an interest in the land, and is entitled to notice of partition proceedings, and will **not** be **prejudiced by** a **partition to which** he is **not** a **party.** Authorities cited.
Wistar's Appeal (Pa.) 654

17. On a bill by a **lessee** for an injunction to **restrain** the grantees of his landlord from

trespassing on lots which he claims he rented, but for which the alleged trespasser has a conveyance in fee, it being plain that the complainant had only a license to pass over such lot, *held*, that the order to show cause should be discharged with costs.
Harper v. *McElroy* (N. J.) 866

BRIEFS AND NOTES.

Lease; construction is for court. (Pa.) 879
Covenant; consideration. (N. Y.) 226
Covenant. (N. Y.) 336
Lease for no determined length of time, but by which an annual rent is reserved, payable yearly, is lease for year. (Pa.) 880
Grant of right to mine coal for so much per ton is a lease. (Pa.) 876
Express provision in lease not enlarged by construction. (N. Y.) 336
Reconciliation of inconsistent or repugnant clauses. (Pa.) 879
Perpetuities in lease not favored. (N.Y.) 226
Right of **renewal** is a continuing right. (N. Y.) 225
Tenancy by implication. (Pa.) 568
Tenancy for year. (Pa.) 880
Tenancy at will. (Pa.) 880
Tenant cannot dispute landlord's **title.** (Pa.) 599
Fixtures. (Pa.) 567

LAWS. See STATUTES.

LEASE. See LANDLORD AND TENANT.

LEGACY. See DEVISE AND LEGACY.

LEGISLATIVE POWER. See CONSTITUTIONAL LAW, I.

LIBEL AND SLANDER.

1. **Words** spoken of a **lawyer,** in reference to what he has done in his profession, that he is a **"blackmailer,"** are **actionable** *per se*.
Healy v. *Dettra* (Pa.) 168

2. H. refused in the presence of several witnesses to shake hands with D., saying: "I don't shake hands with blackmailers; a certain person told me he had to pay you hush money in the prosecution against me." P. threatened to sue H.; whereupon H. replied: "The sooner the better; I will show you that you are a blackmailer, and that you have blackmailed me." *Held*, that, in an action for slander, upon proof of these facts, D. was entitled to **recover** against H., **without proof of special damage.** *Id.*

3. In the absence of malice, compensation is the **measure of damages.** *Id.*

4. If the words were uttered with special malice, **punitive damages** may be awarded; and **defendant's means** might be taken into account. *Id.*

5. An action for slander for calling an attorney a blackmailer is not a case where a large number of the inhabitants of the county are interested adversely to the defendant so as to make it obligatory on the court to grant a **change of venue,** under the Act of 1875. *Id.*

BRIEFS AND NOTES.

Words actionable *per se*. (Pa.) 174, 178
Words slandering attorney in official character. (Pa.) 175, 176
Accusing attorney of blackmail. (Pa.) 175
Malice; evidence. (Pa.) 175
Probable cause. (Pa.) 176
Sufficiency of **evidence.** (Pa.) 174–178
It is sufficient if substantially slanderous words are laid and proved. (Pa.) 175
Meaning of words. (Pa.) 177
Innuendo. (Pa.) 174, 177
Measure of **damages.** (Pa.) 178

LICENSE. See PATENTS.

1. A right to remove, or use at will, a house built on another's land is **a revocable license.**
Lockard v. *Robbins* (Pa.) 565

2. The **licensee** may **lease** the house. *Id.*

3. A licensee can maintain an action for **use and occupation** against the owner of the land to recover compensation for possession by the owner. *Id.*

4. The Act of August 23, 1871, § 21, of the District of Columbia, imposing a license tax **upon commercial agents,** whose business it is, as agents for nonresident manufacturers, to offer merchandise for sale, is unconstitutional **as a restriction upon interstate commerce.**
Re Hennick (D. C.) 357

BRIEFS AND NOTES.

Tax upon commercial agent representing **nonresident** manufacturer void. (D. C.) 357–359
Parol. (Pa.) 568
Not **assignable.** (Pa.) 568
Revocation. (Pa.) 568

LIEN. See EXECUTORS AND ADMINISTRATORS, VI.; JUDGMENT, IV.; MORTGAGE.

1. Prior to Laws 1878, chap. 315, there was no law by which any lien could attach **upon public buildings or** upon the **moneys due from a city** to the contractor who did any work thereon.
Bell v. *New York* (N. Y.) 266

2. The object of that Act is to give **security to those** who furnished supplies or **did work for** the **contractor** on public works in cities. *Id.*

3. Individuals who furnish materials to such contractor are entitled to the lien, provided in Act of 1878, **on moneys in the city treasury due** or to grow due **under the contract.** *Id.*

4. A **contract** between a person and the trustees of public schools in a ward of the City of New York, **to do the mason work on a school building** on a lot belonging to

the city, is one **within** the **Act of 1878.**
Bell v. *New York* (N. Y.) 266

5. Filing the **notice** of the lien with the clerk of the board of education, and with the city comptroller, **was a** fulfillment of Act of 1878, § 2. *Id.*

6. Where property is delivered, under an agreement which permits a lien for the work, for the purpose of having work done thereon, which adds to its value, it makes no difference that the **deliveries take** place **at different times,** provided they are all made under a single contract. The **lien attaches to all** the **property;** and if part of it is voluntarily returned without payment for the work, the only consequence is that the workman has abandoned a part of his security for the total amount due him, and retained his lien therefor only upon the property which remains in his possession.
Wiles Laundry Co. v. *Hahlo* (N. Y.) 280

7. Where a particular future time of **payment** for the work is fixed, which may be **subsequent to** the **time** when the **owner** is **entitled to a return** of the article upon which the work is done, the workman can have **no lien.** *Id.*

8. Where the parties contract for a particular time or mode of payment, the **workman** has **no right** to set up a right of **possession inconsistent with** the terms of his **contract;** and in such a case there is no lien. *Id.*

9. Logs were delivered to defendant's sawmill on different days upon agreement that he would saw into boards all the logs delivered. He sawed part of them and delivered boards without being paid for sawing. *Held,* he had a lien **upon** the **logs undelivered, for** the **sawing** of the **others,** provided all the logs were delivered to him under a single contract. Authorities cited. *Id.* 282

10. Under Act of June 16, 1836, a **mechanics'** lien may be filed **for articles** consisting of heating, laundry, and cooking apparatus furnished **in** the construction of a **hotel.**
Dimmick v. *The E. H. Cook Co.* (Pa.) 191

11. If the record in proceedings to designate a **curtilage subject to a mechanics'** lien, under Act of June 16, 1836, contains no irregularity, the decree will be affirmed on *certiorari.*
Menner v. *Nichols* (Pa.) 581

12. In such proceedings the court **has** power **to set aside** the **report** of the commissioners and appoint others. *Id.*

13. **Notice** of the appointment of commissioners must be given, but not of time of view. *Id.*

14. The **extent of** the **curtilage** necessary **for** the **use** of the **building** rests in the discretion of the commissioners and the court below. *Id.*

15. One agreeing to take **pay for** erecting **buildings,** by **taking one** of them, may **sell** it before erection.
McPherson v. *Walton* (N. J.) 374

16. Where the owner accepted **an order from contractor** in **favor of material men,** they are entitled to payment out of the first money due contractor. *Id.*

17. In a **notice by a material man,** the amount demanded must be the amount due. *Id.*

18. Where material man **extended time of payment** of claim by accepting notes his claim will be rejected. *Id.*

BRIEFS AND NOTES.

Waiver of **common-law** lien for work by surrender of possession of property. (N. Y.) 280

Effect of partial payments and partial delivery. (N. Y.) 280

Not exist where credit given, or where special agreement for particular mode of payment exists. (N. Y.) 280

Mechanics'; notice and filing. (N. Y.) 266

Principles governing subjection of building already completed to a lien for erection of other buildings, on same piece of land. (Pa.) 584

Estates of married women. (Pa.) 833

LIFE ESTATE. See DEVISE AND LEGACY, 13, 22–24, 56.

LIFE INSURANCE. See BENEFIT SOCIETIES; INSURANCE, II.

LIMITATION OF ACTIONS.

I. IN GENERAL; ADVERSE POSSESSION.
II. EXCEPTIONS.
III. ACKNOWLEDGMENT; PROMISE.
BRIEFS AND NOTES.

See EXECUTORS, VI.; INSURANCE, 14; LACHES.

I. IN GENERAL; ADVERSE POSSESSION.

1. Statute of Limitations, affecting **existing rights** and remedies, shall allow a reasonable time after they take effect for the commencement of suits on such cause of action.
Hunt v. *State* (N. J.) 114

2. Possession of land for any length of time, without taking possession of the mineral by mining it, cannot constitute an **adverse possession** against the owner of the **mineral right.**
Phœnix Iron Co. v. *Lewis* (Pa.) 515

II. EXCEPTIONS.

3. The Statute of Limitations is no bar to an action to establish a resulting **trust,** where the *cestui que trust* continues in possession.
Jackson's Appeal (Pa.) 850

4. The Statute of Limitations is not a bar to the obligation of a **bailee** of money to hold or invest where there is no stipulation as to the length of time he should hold it, and there has been no demand.
Rusling v. *Rusling's Exrs.* (N. J.) 129

5. Creditors of **a decedent** do not become the owners of the personal estate of their debtor so as to prevent the plea of the Statute of Limitations as against their debt. Authorities cited.
Heft's Appeal (Pa.) 593

III. ACKNOWLEDGMENT; PROMISE.

6. The **efficacy of a payment, to avert** the Statute of Limitations as a bar, resides in the voluntary act of the debtor.
Blair v. *Lynch* (N. Y.) 668

7. A payment obtained through **proceedings supplementary to execution** will not revive the promise of third person to pay the debt. *Id.*

8. If the **debtor alleges** that there was a **different account** or demand from that claimed by plaintiff, to which the acknowledgment relied on to take the case out of the statute referred, the **onus** of proving that fact rests upon him.
Shipley v. *Shilling* (Md.) 418

9. In an action against executors to recover for goods, etc., furnished to their testator, *held*, that a too general instruction that plaintiff was entitled to recover if the jury should find the **account** to be established, and **admitted by** the **testator** within three years before suit brought, was cured by a subsequent instruction that plaintiff could not recover unless the jury should also find that such admission applied to the account in suit. *Id.*

10. It is for the **jury** to **determine** whether a general, indefinite **acknowledgment** of indebtedness **applies to the demand sued** on. *Id.*

11. Whether a **payment** by such promisor of one half of the debt, in consideration of the transfer to him of one half of such debt, was accepted as a payment upon the original promise was a **question for** the **jury.**
Blair v. *Lynch* (N. Y.) 668

12. A clear and unequivocal **acknowledgment** of a debt is sufficient to take a case out of the statute.
Yost v. *Grim* (Pa.) 836

13. Such acknowledgment being proved, a **promise** will be **implied** without its having been actually made. *Id.*

14. **Evidence** that the specific statement of the account was exhibited to the debtor and the items pointed out to him, and that he made a payment, and no objection, justifies the finding of the jury that he admitted the bill to be right and **acknowledged** his **liability** therefor. *Id.*

BRIEFS AND NOTES.

Not **apply** where special statutory remedy, precluding all others, has been provided for cause of action unknown to common law. (Pa.) 214

Personal actions. (Pa.) 206

Certiorari. (Pa.) 498

Adverse possession; what constitutes. (Pa.) 519, 574

Extent and duration. (Pa.) 214, 519

Payment of taxes is evidence of claim. (Pa.) 519

What constitutes **color of title.** (Pa.) 519

When statute **begins to run.** (N. Y.) 735

Decedents' estates. (Pa.) 500

Removal of bar of statute by new promise. (N. Y.) 670; (Pa.) 837

General acknowledgment; application to debt, question for jury. (Md.) 418

Part payment. (N. Y.) 670

Part payment by surety does not revive demand against principal. (N. Y.) 670

Part payment by executor or administrator; by assignee of insolvent. (N. Y.) 670

Plea of limitations is not plea to merits. (Md.) 418

LIVERY STABLE KEEPERS.

BRIEFS AND NOTES.

Attachment of horses and carriages left with. (Pa.) 656

LOCAL IMPROVEMENTS. See MUNICIPAL CORPORATIONS, V.

LOGS AND LOGGING. See LIEN, 9.

1. An equitable title to land is sufficient to maintain **trespass for cutting standing timber** therefrom, contrary to Act of March 29, 1884.
Kulp v. *Bird* (Pa.) 576

2. The court may double the single **damages** given by the jury. *Id.*

BRIEFS AND NOTES.

Plaintiff must show ownership of land at time **timber cut** therefrom. (Pa.) 581

LOST INSTRUMENTS. See EVIDENCE, III.

MAIL. See POSTOFFICE.

MALICE. See FALSE IMPRISONMENT.

MALICIOUS PROSECUTION. See FALSE IMPRISONMENT.

MALPRACTICE. See PHYSICIAN AND SURGEON.

MANDAMUS.

1. Where an Act of Congress imposes upon a Federal officer a **ministerial duty,** upon the performance of which depend individual rights, it is **no** sufficient **answer** to *mandamus* proceeding to set up a **contrary direction by** the **President.**
United States v. *Bayard* (D. C.) 341

2. When **money** is in the **custody of** the **department of State** to which the petitioner has a clear legal right, and by an Act of Congress the Secretary is directed to pay it over to him, *mandamus* will lie to **compel** its **payment.** *Id.*

3. The **distribution of money due claimants** under joint Mexican and American commission is, by Act of June 18, 1878, **a purely ministerial duty** by the secretary of state enforceable by *mandamus.* *Id.*

4. The **return** must deny with certainty the material averments of the petition; **otherwise,** they will be taken as true. *Id.*

5. No *mandamus* can be issued **against** a **public officer** unless relator shows a clear **legal right** to the relief claimed. Authorities cited.
United States v. *Bayard* (D. C.) 343

6. *Mandamus* lies to **compel** a **comptroller** to hear an application by the purchaser at a state tax sale to **cancel** the **sale** and refund the purchaser money on the ground of illegality of tax.
People v. *Chapin* (N. Y.) 253

7. A writ of **error** to review an order granting an **alternative** *mandamus*, is premature, and will be quashed.
Supers. of Saucon Twp. v. *Brodhead* (Pa.) 496

BRIEFS AND NOTES.

To **ministerial officer.** (N. Y.) 293, 294

To compel comptroller to hear application to cancel state tax sale. (N. Y.) 293, 294

MANUFACTURING COMPANIES. See CORPORATIONS, VI.

MARRIAGE SETTLEMENTS. See HUSBAND AND WIFE, I.

MARRIED WOMEN. See HUSBAND AND WIFE.

MASTER. See EQUITY, V.

MASTER AND SERVANT.

I. MINOR SERVANTS; ASSUMPTION OF RISK.
II. FELLOW SERVANTS.
BRIEFS AND NOTES.

See SEDUCTION.

I. MINOR SERVANTS; ASSUMPTION OF RISK.

1. If a **person is** so **young** that even after full instructions he does not appreciate the danger arising from a want of care, the **employer keeps** him at such work **at** his **risk.**
Hickey v. *Taaffe* (N. Y.) 72

2. If an employee of immature years (here a female of fourteen years) has had **no instructions as** to the **danger** of a machine at which she is set at work, and never worked at any machinery before, and is injured by such machine within a short time of her employment, because of her unfamiliarity with, and lack of appreciation of, the dangers attendant upon the working of the machine, the **employer** will be **liable.** Ruger, *Ch. J.*, and Danforth, *J.*, dissent. *Id.*

3. But **where** such employee has **acquired knowledge** of the dangers of the machine at which she was set at work, the fact that she was a minor does not alter the general rule of law upon the subject of employees **taking** upon themselves the **risks** which are patent and incident to the employment. *Id.*

4. Where the injury to the employee occurred from an **accident** which **no** human being would have **thought of as possible** to occur, resulting from an apparently safe act, the employer is not liable. *Id.*

5. The master is not obliged to furnish the best possible **appliances**, but only those which are reasonably **safe** and suitable. Authorities cited. *Id.* 74

6. Merely going through the form of **giving instructions**, by the employer, is not sufficient. Authorities cited. *Id.* 75

7. A servant takes upon himself the **risks** which are **patent** and incident to the employment. Authorities cited. *Id.*

8. A **servant** by continuing in his employment with knowledge of the risk from the location of a trap door, and its negligent use by employees in a lower floor, assumes the **hazard of the situation;** and the master is not liable where such servant falls through such door, the same being opened by employees of lower floor, contrary to the instructions of the foreman.
Anthony v. *Leeret* (N. Y.) 698

II. FELLOW SERVANTS.

9. An employee engaged in the construction of a building was **injured** while being lowered by an engine **from** the top of a wall to an upper story. He sued his employer for damages, alleging that the engine was run at that time by a new and **incompetent** engineer, with defendant's knowledge and without notice to or knowledge of plaintiff, and that the injury resulted from such **engineer's negligence.** *Held*, on the evidence, plaintiff was properly **nonsuited.**
Barton v. *Jones* (Pa.) 871

10. A **mining boss,** under Act of April 28, 1877, **is** a fellow servant with the miners; and his employers are not liable to miners injured from an explosion of fire damp caused by his negligence.
Redstone Coke Co. v. *Roby* (Pa.) 151

11. The master is **responsible for** the **negligent** act **of** one servant causing injury to a **coservant** where such servant was, by the appointment of the master, charged with the performance of duties which the master was bound to perform for the protection of his servants.
Loughlin v. *State* (N. Y.) 70

12. If the **coservant** was simply performing the work of a servant in his character as a servant or employee merely, the **master** is **not liable.** *Id.*

13. For an injury sustained by claimant from the **negligence of** the **captain of** the **state boat** who, at the time, was engaged with several employees, including claimant, in digging clay from a bank and loading it on to the boat, which negligence consisted in setting the claimant to work under the bank after the captain had loosened the overhanging earth so that it fell upon and injured the plaintiff, the **State is not liable.** *Id.*

14. The **captain** of the boat, although he had power to direct those under him, was nevertheless **a coservant,** within the rule. *Id.*

15. Where the injury is one for which the master, if an **individual,** would **not** be **liable,** it is not one for which the **State** is liable under Laws 1870, chap. 321. *Id.*

BRIEFS AND NOTES.

Duty of master; to furnish safe machinery. (N. Y.) 72, 73, 699, 700

To use due care in selecting experienced employees. (Pa.) 873

To instruct minor servant as to dangers attendant upon employment. (N. Y.) 72, 73

Assumption of risks by servant. (N. Y.) 70–73, 699, 700; (Pa.) 873

Fellow servants; who are. (Pa.) 873

Negligence of. (N. Y.) 70, 71

Master not liable. (N. Y.) 699, 700

Forewoman not fellow servant. (N. Y.) 73

Liability of mine owner for negligence of mining boss. (Pa.) 151, 152

Respondeat superior. (Pa.) 873

Superior servant; liability of master for negligence of. (N. Y.) 70, 71

MAXIMS.

1. A delegated power cannot be redelegated.
De Baril v. *Campoy y Pardo* (Pa.) 644

2. Equity considers that done which should have been done. Authorities cited.
Chamberlain v. *Taylor* (N. Y.) 292

3. De minimis non curat lex.
Crook v. *Rindskopf* (N. Y.) 730

4. Nemo debet locupletari ex alterius incommodo.
United N. J. R. R. & C. Co. v. *Long Dock Co.* (N. J.) 922

5. Omnis ratihabitio mandato æquiparatur.
Dunnington v. *Hubbard* (Md.) 388

6. Presumptio juris et de jure.
Close v. *Benjamin* (Pa.) 543

7. Quando lex aliquid concedit, concedere videtur et id per quod devenitur ad illud.
Mayor of New York v. *Sands* (N. Y.) 272

8. Ut res magis valeat quam pereat.
Crook v. *Rindskopf* (N. Y.) 731

9. Vigilantibus, non dormientibus, leges subveniunt.
Suprs. of Saucon Twp. v. *Brodhead* (Pa.) 497

BRIEFS AND NOTES.

To whomsoever anyone grants a thing he grants with it also that without which the thing itself could not exist. (N. Y.) 774

Actore non probante, absolvitur reus. (Pa.) 168

Cessante ratione, cessat lex. (N. Y.) 756

Eadem rátio, eadem est lex. (N. Y.) 756

Expressum facit cessare tacitum. (Pa.) 492

Omnia præsumuntur rite esse acta. (Pa.) 607

Potior est conditio defendentis. (N. Y.) 765

Respondeat superior. (Pa.) 873

Sic utere tuo ut alienum non lædes. (Pa.) 552

Vigilantibus, non dormientibus, leges subveniunt. (Pa.) 558

MECHANICS' LIEN. See LIEN.

MILLS AND DAMS. See CANALS, 5.

MINES AND MINING.

1. Possession of land for any length of time, without taking possession of the mineral by mining it, cannot constitute an **adverse possession** against the owner of the mineral right.
Phœnix Iron Co. v. *Lewis* (Pa.) 515

2. In ejectment to recover possession of the underlying mineral ore, from the owner of the surface, the defendant claimed title to the ore under a **release** alleged to have been executed by a former owner **of the mineral right** to a former owner of the surface nearly forty years before suit brought, and **lost** or destroyed. *Held*, that **secondary evidence** was properly rejected. *Id.*

3. **A demise of coal** under the **surface** of a specified piece of land **is a sale** of the coal.
Fairchild v. *Fairchild* (Pa.) 873

4. **A lease** of coal lands, in which **lessee** agrees in case the quantity mined falls short of a certain minimum quantity in any year to pay the same rent as if he had mined such quantity, provided that if he in any year mined more than such quantity, such excess, or so much thereof as may be necessary, may be **set off** against the deficiency of any other year, permits mining in excess of that quantity, and an application of that excess to the **rent** otherwise unearned but still due in subsequent years when there happens to be a **deficiency in production.** Ruger, *Ch. J.*, and Rapallo, *J.*, dissent.
McIntyre v. *McIntyre Coal Co.* (N. Y.) 335

5. The deficiency need not have occurred before the excess is produced; the **lessee may apply** the **excess upon the deficiency** of any other years. *Id.*

6. A **covenant to work** the mine **continuously** can **not** be **inferred** from an agreement to carry on the mining **operations** in a safe, skillful, and workmanlike **manner,** the lease providing a penalty for omitting to do so. *Id.*

7. In **ejectment** in the nature of an **appeal** from the board of property, under the **Act** of April 8, 1792, § 11, *held*, that there **was** an error in directing a **general verdict for the plaintiffs, without a reservation** of the defendants' ore rights, reserved **in a deed.**
Thompson v. *Mattern* (Pa.) 621

8. Such **verdict** may be **amended so as** to reserve such rights. *Id.*

9. Where appellant had sought to show **unfitness of** appellee's **coal for** the **use** contemplated **by** the **contract,** by showing **that** it contained red or rusty coal, it was competent for the appellee to **show** that the rust did not affect its steam generating power, and **that** the appellant, in its **subsequent** purchase of coal for its engines, did **not reject coal similarly** affected.
Baltimore & O. R. R. Co. v. *Brydon* (Md.) 396

10. A **mining boss,** under the Act of **April** 28, 1877, is a **fellow servant with the miners;** and his employers are not **liable to** miners injured from an explosion of **fire damp** caused by his negligence.
Redstone Coke Co. v. *Roby* (Pa.) 151

BRIEFS AND NOTES.

Lease of mine. (N. Y.) 886

Grant of right to mine coal for so much per ton is a lease. (Pa.) 876

Rents or payments for coal mine, to be mined under a sale, by a married woman, of such coal, with the right to mine and remove it, are personal property, payable to her executor on her death. (Pa.) 877

Adverse possession may be held of minerals. (Pa.) 519

Mining boss is fellow servant with miners. (Pa.) 151

Liability of mine owner for negligence of mining boss. (Pa.) 151, 152

Customs. (Pa.) 552

MINORS. See INFANTS.

MISREPRESENTATIONS. See FRAUD AND FRAUDULENT CONVEYANCE, I.

MISTAKE. See EQUITY, II.; LANDLORD AND TENANT, 11.

MORTGAGE.

I. DEED ABSOLUTE.
II. VALIDITY; USURY; AFTER ACQUIRED PROPERTY.
III. PARTIES; ASSUMPTION; REDEMPTION.
IV. FORECLOSURE.
V. CHATTEL.

BRIEFS AND NOTES.

See CORPORATIONS, 28.

I. DEED ABSOLUTE.

1. A deed absolute on its face may be **shown by parol** to be a security for money advanced.
Pearson v. *Sharp* (Pa.) 494

2. It does not follow from the possession of a **power of sale** by the grantee **in** such a **deed** that the power is to be exercised otherwise than by foreclosure. *Id.*

3. A deed and lease, *held*, to be **security for** a **loan, at usurious interest;** and only the amount found due at legal interest, deducting payments, allowed priority over plaintiff's mortgage.
Gaither v. *Clarke* (Md.) 438

II. VALIDITY; USURY; AFTER ACQUIRED PROPERTY.

4. A mortgage executed by a married woman, her **husband not joining** therein, *held*, on the facts, without vitality, being without consideration, and executed only to protect the property from a dissipated husband.
Heller v. *Groves* (N. J.) 139

5. An **acknowledgment** of a mortgage **before** a **justice** of the peace who has **qualified as clerk** of the oyer and terminer and quarter sessions is valid.
Adam v. *Mengel* (Pa.) 184

6. The **acceptance of** the **money** secured by the mortgage would **estop** the mortgagor from **denying** the validity of the **acknowledgment.** *Id.*

7. Where plaintiff took a note and a mortgage as collateral security, with notice that the note was accomodation paper, the **certificate of mortgagor** that the note was subject to no defense constituted **no estoppel against** setting up the defense of **usury** to defeat the mortgage.
Lewis v. *Barton* (N. Y.) 781

8. One paying off liens upon another's realty and receiving a mortgage void for **usury,** is **not** entitled to **subrogation.**
Perkins v. *Hall* (N. Y.) 751

9. A mortgage upon **after acquired property** attaches to such property, subject to existing equitable liens thereon, although it is prior to them in point of time.
United N. J. R. R. & C. Co. v. *Long Dock Co.* (N. J.) 920

10. Where a mortgage is **given by a part owner during proceedings in partition** to which he is a party, and at the sale in such proceedings the **land** is **purchased** by and conveyed to trustees **for** the **beneficial owners** of the property, *held*, that the legal title of the mortgagor was extinguished and the mortgage attached, but in equity only, to the equitable interest of the mortgagor in the property, and that when on the division thereof, such part owner obtained title to the part allotted to him, such mortgage cannot be maintained beyond the extent of the mortgagor's interest in the property, and that a lien for purchase money of such part owing by him was paramount to the mortgage. *Id.*

III. PARTIES; ASSUMPTION; REDEMPTION.

11. Unless the mortgage lien is complete at debtor's death, **priority** cannot be claimed over other judgment creditors. Authorities cited.
Heft's Appeal (Pa.) 593

12. Where **grantee** in a warranty deed **assumes** to pay certain mortgages as part of the purchase money, equity will compel him to discharge the obligation.
Cubberly v. *Yager* (N. J.) 365

13. Before entry or foreclosure, the **equity of redemption** may be sold on **execution** against mortgagor but not afterwards.
Mallalieu v. *Wickham* (N. J.) 367

14. A **mortgagor cannot maintain a** bill to **interplead** against one who claims, as agent of the owner of the mortgage under a power of attorney, to be entitled to the money due thereon, and a daughter of such owner who forbids the mortgagor to pay the money to such agent on the ground of the mental incapacity of the owner when she executed the power of attorney, **without joining** such **owner as** a party to the bill.
Blake v. *Garwood* (N. J.) 365

15. The **agency** was **revoked when** such **owner** became **incapacitated,** to all who had notice of the fact, and therefore such alleged agent has no claim to the money, and there is no foundation for the bill to interplead. *Id.*

IV. FORECLOSURE.

16. If defendants in a foreclosure suit claim

by paramount rights, and allege that they are therefore **improper parties,** it is proper to **dismiss** the complaint, with **costs** as to them.

Helck v. *Reinheimer* (N. Y.) 743

17. But if defendants set up such rights and demand that the premises be freed from the mortgage and obtain judgment thereon, it is **too late** for the plaintiff, **on appeal,** to take the ground that the complaint should have been dismissed as to them. *Id.*

18. Where, in a foreclosure proceeding, it becomes necessary, the court may **determine effect of a deed and lease** which stand **ahead of plaintiff's mortgage**; and that question may be determined as between the codefendants.

Gaither v. *Clarke* (Md.) 433

19. It is **not necessary** in such case that plaintiff should have **offered** to **redeem**; a willingness stated in the bill, to allow all that is actually and fairly due, is all that is required. *Id.*

20. **Letters from** the lender's **agent to** borrower's **agent,** found among the papers of the latter after his decease, their envelopes showing the dates of their passage through the postoffice, in connection with letter press copies in the letter book of the writer are **admissible** as part of the *res gestæ.* *Id.*

21. In a suit to foreclose a mortgage, *held,* the alleged **defenses** of an agreement **to extend** time of payment of mortgage, **and** an agreement to **assign** the same, are **not maintained.**

Eastwood v. *Worrall* (N. J.) 363

22. A mortgagee who has assigned the bond and mortgage before any payment of interest is due cannot, in a foreclosure suit, for default in payment of interest, put in the **defense** that **before** the **assignment** the **interest** was **settled** with him but **not indorsed,** as against the purchaser without knowledge thereof.

Newton Twp. Build. & Loan. Asso. v. *Boyer* (N. J.) 368

23. A **subsequent purchaser** of the premises who purchased subject to the bond and mortgage, who has paid nothing on his purchase nor assumed payment of the bond, and who does not allege that he supposed the interest was paid, can **not,** in such suit, **claim** any benefit from the **alleged** previous **payment of interest.** *Id.*

24. The **burden** of proof is on mortgagee to **establish** the **priority of** allowances which he claims, for **taxes,** etc., **paid by him on a** foreclosure sale.

Rappanier v. *Bannon* (Md.) 420

25. The filing of a bill to foreclose in a court of chancery, claiming decree for deficiency, is not a presentation of the claim for the **deficiency** within the meaning of the statute. Authorities cited.

Robins v. *Arnold* (N. J.) 122

26. A judgment creditor of a mortgagor, made a defendant in the foreclosure suit, may compel the **mortgagee,** who took possession before such defendant obtained his judgment, to **account for the rents and profits.**

Mallalieu v. *Wickham* (N. J.) 367

27. Where complainant and defendant in a foreclosure proceeding both derived **title to** mortgaged premises **from same source,** but defendant also had title from another source, complainant is not entitled to a **writ of assistance** against such latter title.

Chadwick v. *Island Beach Co.* (N. J.) 116

28. When a person refusing to deliver possession of mortgaged premises was a party defendant in foreclosure proceedings, equity will **put** the foreclosure **purchaser in possession by** writ of **assistance.** *Id.*

V. CHATTEL.

29. **Possession** by mortgagee of personal property is **essential** to the validity of his lien.

Heft's Appeal (Pa.) 592

30. The **death of** the **debtor** gives general creditors the right to deny the validity of such a mortgage when **possession** has **not** been taken **in** the debtor's **lifetime.** *Id.*

31. Upon the debtor's death a chattel **mortgagee has no right** to undertake **to administer** any part of the debtor's personal estate for the satisfaction of his own debt. *Id.*

32. But **where** the mortgagee **in good faith intervenes,** and in administration of the estate sells the pledge and settles an account of the proceeds, he is **entitled to commissions.** *Id.*

33. **Chattels** in a mortgagor's **possession** may be **attached** for his debts.

Blauvelt v. *Fechtman* (N. J.) 107

34. Where by the mortgage, mortgagor is entitled to **possession until default,** the chattels do not, before default, belong to mortgagee, within section 60 of Act for Trial of Small Causes, Rev. 550. *Id.*

35. In replevin for chattels claimed under a mortgage which had **not** been accompanied with an immediate **change of possession,** it is **incumbent** on plaintiff to **show** that the mortgage was made in **good faith and** without any intent to defraud.

Mfrs. & Traders' Bank v. *Koch* (N. Y.) 672

36. Where notice to the mortgagee of **sales** of the mortgaged chattels **by the mortgagor and** of the **appropriation** of the proceeds by the mortgagor on his own account is only evidence from which a previous agreement to permit such sales and appropriation may be inferred, it is not ground for an absolute direction to the jury to find for the defendant in such case. *Id.*

BRIEFS AND NOTES.

Deed absolute as. (Md.) 440; (Pa.) 186, 494
Where grantee has power to sell, transaction cannot be mortgage. (Pa.) 495
Bona fide purchasers. (N. Y.) 88
Acknowledgment necessary. (Pa.) 186
Estoppel by. (Pa.) 186
Validity of **unrecorded** mortgage. (Pa.) 186
Usury. (N. Y.) 752
Defense of. (Md.) 439

Junior mortgagees may set up. (Md.) 439

After acquired property. (N. Y.) 819

Rights of **mortgagee.** (N. Y.) 819

Payment to be in reasonable time where no particular time specified. (Md.) 440

Agreement to extend time of **payment** is valid contract; such agreement may be by parol. (N. J.) 863

Satisfaction of judgment on bonds accompanying mortgage does not impair same debt secured by the mortgage. (Pa.) 910

Assignment. (Md.) 444; (N. J.) 863

Subrogation. (N. Y.) 752

Foreclosure; jurisdiction. (Md.) 440

Parties. (N. Y.) 744

Rights claimed in priority of, or hostility to, mortgage cannot be litigated in. (N. Y.) 745

Decree; conclusiveness. (N. Y.) 819

Chattel; retention of goods by mortgagor; evidence of intent. (N. Y.) 672, 673

MOTIONS. See TRIAL, II.

MUNICIPAL CORPORATIONS.

I. DIVISION.
II. POWERS; REGULATIONS; ORDINANCES.
III. OFFICERS.
IV. PUBLIC PROPERTY; WORKS; CONTRACTS.
V. EMINENT DOMAIN; LOCAL IMPROVEMENTS.
  a. *Streets; Opening; Dedication.*
  b. *Assessments.*
  c. *Change of Grade of Street.*
VI. DEFECTIVE WAYS.
  a. *In General; Repairs, Barriers, etc.*
  b. *Ice and Snow.*
  c. *Notice; Practice; Evidence, etc.*
VII. ACTIONS.
VIII. PARTICULAR CHARTERS.
BRIEFS AND NOTES.

See HEALTH; LANDLORD AND TENANT, 8-11.

I. DIVISION.

1. Under Constitution, art. 8, § 2, the division of townships, wards of cities, and boroughs, **into election districts** is entirely within the discretion of the court of quarter sessions.
Re Bern Township (Pa.) 182

2. The **Act** of May 18, **1876,** in so far as it prescribes the procedure by which the division shall be made, is **unconstitutional.** *Id.*

II. POWERS; REGULATIONS; ORDINANCES.

3. If a **grant** is made to a municipal corporation, **charged with a trust** in favor of an individual, private corporation or charity, the interest which the *cestui que trust* or beneficiary has under the grant may sustain it against legislative **revocation.**
Stockton v. *City of Newark* (N. J.) 458

4. The power to **regulate porches,** etc., **in Mount Vernon Place,** given to the City of Baltimore by the Act of 1833, chap. 180, is not taken away by the Act of 1854, chap. 9, nor by Ordinance No. 36 of 1874. Bryan, *J.*, dissents.
Garrett v. *Janes* (Md.) 403

5. An **ordinance** of Baltimore **allowing steps,** etc., to **extend** nine feet **into Mount Vernon Place** is a valid exercise of the power derived from the Act of 1854. *Id.*

6. A municipal Legislature may, by a single ordinance, declare any **compilation of ordinances** to be in force, unless prohibited by statute. *Id.*

III. OFFICERS.

7. Under Laws 1871, chap. 323, the **comptroller** of the City of New York **in** the creation and **issuing** of **"consolidated stock** of the County **of New York,"** was impliedly **authorized** to contract for **assistance in negotiating** the **loan,** and to pay for such services a reasonable commission out of the premium realized on the bonds. Andrews and Finch, *JJ.*, dissent.
Mayor of New York v. *Sands* (N. Y.) 268

8. It was competent for a **city officer** to render **services to** the **county** and receive compensation therefor. *Id.*

9. **Defendant** having **received,** by indorsement from the comptroller, a check in **payment** of services is **not liable** to the county for the amount thereof. *Id.*

10. The board of supervisors fixed the **salaries** of the district attorney, his chief clerk and other subordinates, at certain sums, but thereafter, by resolution, included in the budget a sum less than the aggregate of amounts fixed by the first resolution. *Held,* that a chief clerk appointed under such arrangement and who accepted payment at such reduced rate had, after the termination of his employment, no claim for the larger salary fixed by the first resolution.
People v. *Supers. of Kings Co.* (N. Y.) 273

11. Under Brooklyn Charter Act, § 14, a member of the fire department cannot be **arbitrarily dismissed** without a charge, hearing, or trial.
People v. *Comrs. of Brooklyn* (N. Y.) 770

IV. PUBLIC PROPERTY; WORKS; CONTRACTS.

12. The City of **Newark** has no title to the land known as "the **old burying ground,"** except such as it may have under the Act of 1804 and its charter; if the Indian title is valid, the city has no title under it.
Stockton v. *Newark* (N. J.) 458

13. If **title** to land was held by the township under Act of 1804, **in trust** for burial ground, the city holds it upon the same trust. *Id.*

14. The **Act** of **1886** is not an exercise of the **police power** of the Legislature. *Id.*

15. If the Act of 1886 gives the city the power to destroy the trust, such **Act** is **unconstitutional.** *Id.*

16. The fact that the place in question has become a **nuisance** from the neglect by the city to take proper care of it is no reason why

the city should be permitted to go still further and **destroy** the **use** altogether.
Stockton v. *Newark* (N. J.) 458

17. In an action by a town to recover **port duties** it is not necessary to show that it did actually keep the port in repair. Authorities cited.
Stults v. *East Brunswick etc. Turnpike. Co.* (N. J.) 109

18. Prior to Laws 1878, chap. 315, there was no law by which any **lien** could attach **upon public buildings** or upon the **moneys due from** a **city** to the contractor who did any work thereon.
Bell v. *New York* (N. Y.) 266

19. The object of that Act is to give security to those who furnished **supplies** or did work **for** the **contractor** on public works in cities. *Id.*

20. A **contract** between a person and the **trustees of public schools** in a ward of the City of New York, to do the mason work on a school building on a lot belonging to the city, is one within the Act of 1878. *Id.*

21. Such school **trustees** act as the **agents of** the **city,** legally appointed. *Id.*

22. **Individuals** who **furnished materials to** such **contractor** are entitled to the **lien** provided in Act of 1878, on moneys in the city treasury due or to grow due under the contract. *Id.*

23. Filing the **notice** of the lien with the clerk of the board of education and with the city comptroller was a fulfillment of the Act of 1878, § 2. *Id.*

V. EMINENT DOMAIN; LOCAL IMPROVEMENTS.

a. *Streets; Opening; Dedication.*

24. In a **proceeding to open a street in** the City of **New York** where no owner is named in the commissioner's report, the city may, in an action in the superior court to recover the **award,** bring the money into that court for the true owner, by depositing it with the chamberlain to the credit of such action.
Pollock v. *Morris* (N. Y.) 753

25. In an action to recover damages by the owner of land against a municipality, for the taking of land for a street, a reference to the street as a boundary in deed to private parties, *held,* **not** to operate as a **dedication,** so as **to prevent** the **recovery of damages.**
Easton Borough v. *Rinek* (Pa.) 192

26. The **right to damages** did not **accrue** until the **street was opened.** *Id.*

27. The acceptance by the City of Cumberland of its amended Charter of 1848 did not operate as an **acceptance** of **streets** previously laid out within the city limits and **dedicated** to the public by the owners.
Kennedy v. *Cumberland* (Md.) 409

28. Where a principal street of a village and its sidewalk had been used for about forty years, and the village had made improvements upon it, the jury are authorized to find that the **street** and sidewalk were **dedicated** to public use.
Pomfrey v. *Saratoga Springs* (N. Y.) 44

b. *Assessments.*

29. **Rural** or suburban **land** in front of which water pipes are laid cannot be **assessed** according to the **"foot front rule."**
Allentown v. *Adams* (Pa.) 195

30. In **scire facias** upon **a municipal** lien, filed against such land according to the "foot front rule," testimony that the **land is** enhanced in value by the pipes **is inadmissible.** *Id.*

31. It is for the **jury** to **determine** whether the **land** is urban, **suburban,** or **rural.** *Id.*

32. Municipal assessments for permanent improvements upon land are **apportionable between the life tenant and** the **remainderman;** ordinary taxes of government are properly chargeable to the life tenant **alone.** Authorities cited.
Thomas v. *Evans* (N. Y.) 304

33. Assessments **for water rates, against vacant lots in Brooklyn,** under Laws 1859, chap. 396, § 24, *held* illegal and void, the statute failing to provide for notice to the lot owners or opportunity to be heard. **Finch** and Andrews, *JJ.*, dissent.
Remsen v. *Wheeler* (N. Y.) 691

34. Where **vacant lots,** belonging to minors, had been **sold to** enforce such **illegal assessments,** and a proceeding was had to enable the owners to sell a part of the land to pay off the incumbrances, and the purchaser paid to the city the amount of the outstanding illegal tax sale certificates on account of the purchase money, *held,* that while the money remained in possession of the city an **action** was maintainable **by** the **lot owners** to **compel** the **delivery** thereof to them. *Id.*

35. **Satisfaction of** a municipal **claim for water pipe** operates as an **estoppel** on the municipality, when a subsequent **purchaser** of the land applies for permit to introduce water from the pipe to the **premises.**
Philadelphia v. *Matchett* (Pa.) 907

c. *Change of Grade of Street.*

36. **Act** of May 24, **1878,** providing for damages to property owners, occasioned **by** the change of grade of streets in **boroughs, is not retroactive** so as to give **damages** for injuries prior to the Constitution of **1874.**
Folkenson v. *Easton Borough* (Pa.) 211

37. The **measure of damages** is the difference in the market value of the property before the change in the immediately adjoining property and the market value after the change of grade in front of the **property,** with interest on the principal sum to date.
Freemansburg v. *Rodgers* (Pa.) 828

38. On appeal to the common pleas **from a** report of viewers assessing **damages** for **a** change of grade in a street, the **opinion of** the **viewers** that the change was a **damage,** after having testified to an acquaintance with the value of such property and that **they** had viewed the premises, is admissible. *Id.*

39. The **cause of action** for **damages**

accrues at time of physical change of grade of street.
Freemansburg v. *Rodgers* (Pa.) 828

40. An **assent to** a **change** of grade of street by plaintiff when he was not the owner of the property will **not bind** him after he becomes such owner. *Id.*

41. Where excavations made in the street and adjacent lots by the State changed the direction of the drainage, if a village by turnpiking the street and improving the highway did not **increase** the flow of **surface water** on the plaintiff's lot beyond what it was prior to the excavations, it committed no wrong to plaintiff.
Rutherford v. *Holley* (N. Y.) 677

42. It would be unreasonable to hold that every **change** in the natural surface of land, made in the improvement of a highway, which to any extent increases the **flow of surface water** on adjacent premises, constitutes an **actionable** injury. *Id.*

VI. DEFECTIVE WAYS.

a. *In General; Repairs; Barriers, etc.*

43. Towns were **not** under any **legal liability** to respond in damages to persons injured by defects in the highways **until Laws 1881**, chap. 700.
Monk v. *New Utrecht* (N. Y.) 240

44. Under the method in force for laying out and building public roads in the County of Kings, the officers of the town are not chargeable for a defect in the road or omission to provide safeguards, which arises from an **error in its plan.** *Id.*

45. A village which is constituted a separate road district, and the trustees of which are commissioners of highways, is bound to keep its **streets and sidewalks** in a reasonably **safe** and proper **condition.**
Pomfrey v. *Saratoga Springs* (N. Y.) 44

46. There must be an **acceptance of** a **dedication** of a street **before** the **duty** of the county or municipality in improving or keeping it in **repair** can arise. Authorities cited.
Kennedy v. *Cumberland* (Md.) 412

47. By the Laws of 1881, towns are not liable unless they possess, or have power to obtain, **means to make** necessary **repairs.**
Monk v. *New Utrecht* (N. Y.) 240

48. It is in the **discretion** of the commissioners to **apply** the **funds in** their hands in making such **repairs** as in their judgment are most needed; and they are **not responsible for** an **error of judgment** in doing so where they have not the funds to repair all the defective places. *Id.*

49. Where, by the village charter, the walks are placed under the care of the trustees and the superintendent is bound to repair them, *held*, that **money** raised **for** the repair of the **streets** is **applicable** also **to** the repair of the **sidewalks.**
Pomfrey v. *Saratoga Springs* (N. Y.) 44

50. It is **not** sufficient to **exonerate** the village **that** the superintendent had **no money** in his hands **to repair walks,** where he had authority to call upon the trustees for the same. *Id.*

51. A town is not obliged to remove **irregularities outside of** the **road,** nor to erect barriers to prevent travelers from wandering into the adjoining fields.
Monk v. *New Utrecht* (N. Y.) 240

52. Where a public road ends in a **steep declivity** on another road, long discontinued, without any barrier at the top of the slope, and a horse, driven along the former one, runs away, through no fault of the township, plunges down the declivity and is killed, the jury may determine whether there was any **duty** imposed upon the township to **erect** such a **barrier.**
Bishop v. *Schuylkill* (Pa.) 160

53. A township is not chargeable with damages resulting from **extraordinary accidents** which may happen on its public roads, and which reasonable skill and care would not be required to guard against. *Id.*

54. The **running away of** a **horse** is not a contingency against which the township is bound to provide. *Id.*

55. When **two causes** combine to **produce** an **injury** to a traveler upon a highway, both of which are in their nature proximate, the one being a culpable defect in the highway and the other some occurrence for which neither party is responsible, the municipality is liable, provided the injury would not have been sustained but for such defect. Authorities cited.
Taylor v. *Yonkers* (N. Y.) 231

56. Where the **plaintiff** was much **intoxicated** and no reasonable excuse seemed to exist for his walking off this road, there was a lack of proof that he was free from contributory negligence.
Monk v. *New Utrecht* (N. Y.) 240

b. *Ice and Snow.*

57. A municipal corporation may require each of its citizens to clean the snow from the walks adjacent to his own premises, and when this is not done within a reasonable time the corporation may compel them to act or do the work itself; and if it **suffers** the obstruction **to remain** thereafter **with notice** of its existence, it may become **liable** for injuries resulting.
Taylor v. *Yonkers* (N. Y.) 230

58. It should **require householders** to **sprinkle ashes** or sand, or the like, upon the surface, but it is not responsible for their omission. *Id.*

59. When for two years the action of rain and frost had thrown upon the sidewalk sand, gravel and stones from an adjoining bank, until the flagging was entirely covered by it, and a new and **sloping grade substituted** for the one adopted, which when winter came was covered with snow which was never removed but had been trampled down by travel, and by freezing and thawing converted into ice, *held*, that these facts established **negligence on** the **part of** the **city.** *Id.*

60. Where there were no facts beyond the existence of the slope that permitted the infer-

ence that the **slope** of the walk was **a concurrent cause** without which the accident would not have happened, and the conclusion of the jury was mere guess and speculation, *held*, the motion for nonsuit should have been granted.
Taylor v. *Yonkers* (N. Y.) 230

61. When the plaintiff stepped on such new **ice surface,** if such **slope** was one **concurring cause of** the fall, without which the accident to plaintiff would not have happened, the city is liable. *Id.*

62. When the fall of rain or the melting of adjoining snow is suddenly followed by severe cold which covers the walks with a layer of ice, and makes them slippery and dangerous, and which it is practically impossible to remove until a thaw comes, the municipality is not negligent for **awaiting a change of temperature** which will remedy the evil. *Id.*

63. It is **not negligence** in law to **attempt to cross** a bank of snow and ice on a sidewalk, although such obstruction is visible.
Pomfrey v. *Saratoga Springs* (N. Y.) 44

c. *Notice; Practice; Evidence, etc.*

64. When a street or sidewalk has been out of repair for considerable time, so that by reasonable diligence the municipal authorities could have had notice of the defect, such **notice** may be **imputed** to them. Authorities cited. *Id.* 47

65. A **claim** for damages for injuries from a defective sidewalk need not be **presented** to the officers of defendant **for audit.** *Id.*

66. In an action for damages, an **ordinance** imposing a penalty on lot owners for neglect to keep sidewalks in repair is **admissible** for plaintiff. *Id.*

67. **Evidence** that **others** had **fallen** on the sidewalk, at the same place where plaintiff was injured, **is admissible.** *Id.*

68. That about a month **after** the **accident** the city council **appropriated money to repair** a street is not sufficient to make the city liable for such injury.
Kennedy v. *Cumberland* (Md.) 409

69. It is not essential to the recovery of **costs** by plaintiff in an action against a municipal corporation for damages for injuries sustained through the negligence of its servants, commenced before the Code of Civil Procedure went into effect, and therefore governed by Laws 1859, chap. 262, that the **claim** should have been **presented** to the chief fiscal officer of the corporation **before suit** brought.
Taylor v. *Cohoes* (N. Y.) 76

VII. ACTIONS.

70. Where the City of Rochester caused a **nuisance** within the Town of Brighton, by the **discharge of sewage,** after it was collected in the sewers, into open drains constructed by the city across lands in the town, and continued this discharge after it was prohibited by an order of the board of health of the town, and continued also to use the ditches it had constructed in the town, *held*, that the **order of the board of health** of the **town** could be properly **served** on the city; and that the board could **maintain an action against** the **city,** to enforce its regulation and to **restrain a continuance of the nuisance.**
Gould v. *Rochester* (N. Y.) 99

VIII. PARTICULAR CHARTERS.

71. **Allentown.** Assessment for laying of water pipes; rural and suburban property.
Allentown v. *Adams* (Pa.) 195

72. **Baltimore.** Power to regulate porches in Mt. Vernon Place.
Garrett v. *Janes* (Md.) 403

73. **Brooklyn.** Street railways; conditions imposed by common council.
Re Kings Co. Elevated R. Co. (N. Y.) 232

74. Assessment for water rates, under Laws 1859, chap. 396, § 23; statute unconstitutional.
Remsen v. *Wheeler* (N. Y.) 691

75. City court; Legislature no power to extend jurisdiction of, so as to deprive of local character. Authorities cited.
Hutkoff v. *Demorest* (N. Y.) 33

76. Summary dismissal of fireman.
People v. *Brooklyn* (N. Y.) 770

77. **Cumberland.** Dedication of streets; acceptance.
Kennedy v. *Cumberland* (Md.) 409

78. **Newark.** Title of old burying ground.
Stockton v. *Newark* (N. J.) 458

79. **New York.** Duty of comptroller under Laws 1871, with reference to issuing "consolidated stock of County of New York."
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80. **District court;** removal of action for claim and delivery to common pleas unauthorized.
Mittnacht v. *Kellermann* (N. Y.) 714

81. Marine court; powers.
Hutkoff v. *Demorest* (N. Y.) 33

82. Lien of laborers upon public buildings under Laws 1878; contract with trustees of public schools; notice and filing of lien.
Bell v. *New York* (N. Y.) 266

83. Tax sale; manner of advertising.
People v. *Cady* (N. Y.) 296

84. **Opening street; payment of award into** the superior **court,** where no ownership is named in commissioner's report, for true owner.
Pollock v. *Morris* (N. Y.) 753

85. Wharves; harbor commissioners' line; Acts 1818 and 1857.
Williams v. *New York* (N. Y.) 301

86. **Philadelphia;** satisfaction of **claim for water pipe** operates as estoppel.
Philadelphia v. *Matchett* (Pa.) 907

87. **Saratoga Springs.** Defective streets; liability.
Pomfrey v. *Saratoga Springs* (N. Y.) 44

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Acceptance of amended **charter; effect** (Md.) 411

Not liable to action for neglect in not enforcing **ordinance** or by-laws. (N. Y.) 45

City **council;** minority powerless to bind majority. (Pa.) 156

Appropriation of taxes to payment of municipal **bonds** in aid of railroad. (N. Y.) 923, 924

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Where there is a contest over municipal **office,** business of corporation must stop until decision reached. (Pa.) 156

Right of **eminent domain;** damages. (Pa.) 214

Local improvements; assessment; against whom directed. (N. Y.) 692

Rural land is not subject to the "foot front rule" assessment. (Pa.) 198, 199

Application of the "foot front rule" assessment. (Pa.) 199

Doctrine of dominant and servient tenements, as applied to agricultural lands, extends to city lots. (Pa.) 146

Supplying water to a city is not municipal duty. (Pa.) 909

Assessments for laying of water pipes. (Pa.) 609, 911

Change of grade of streets; damages. (N. Y.) 679

Not liable for damages for raising grade of street, and obstructing flow of surface water from adjacent land. (Pa.) 147

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Want of funds is not good defense to action against municipality for damages for injuries from defective ways. (N. Y.) 242

Discretion of highway commissioners in making repairs. (N. Y.) 241

Duty to keep sidewalks clear of snow and ice. (N. Y.) 45

Sidewalks are parts of highway. (N. Y.) 47

Defective way; extraordinary accidents. (Pa.) 163

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Evidence of subsequent repairs. (Md.) 411

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Actions against; costs. (N. Y.) 76

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New York; wharves; harbor commissioners' line. (N. Y.) 802–304

Lien of labor for work upon public buildings; contract of school trustees. (N. Y.) 266

Philadelphia; water pipes; assessment. (Pa.) 909–911

Saratoga Springs; liability for injuries from defective ways. (N. Y.) 46

MURDER. See HOMICIDE.

NAME.

BRIEFS AND NOTES.

Identity of name is identity of person. (Pa.) 203

NEGLIGENCE. See CARRIERS; MASTER AND SERVANT; MINES AND MINING; MUNICIPAL CORPORATIONS, VI.; PHYSICIAN AND SURGEON; TURNPIKE COMPANIES.

1. When a **structure** has uniformly **proved safe,** its use may be continued without the imputation of carelessness.
Laffin v. *Buffalo & S. R. R. Co.* (N. Y.) 793

2. Where the **evidence** showed that **when deceased approached** a railroad **track** he **stopped,** looked and listened, and the contention was whether the place where he stopped was a suitable one to see and hear, and whether due effort was made to ascertain if a train was approaching, *held,* it was not error for the court to refuse to instruct the jury that plaintiff could not recover.
Penn. & N. Y. Canal & R. R. Co. v. *Heuff* (Pa.) 640

3. One attempting to cross a **railroad track** in plain sight of a near approaching engine is guilty of **contributory** negligence.
Kelley v. *Penn. R. R. Co.* (Pa.) 868

4. Where **plaintiff** in an action against a town for injury received from an alleged defect in a highway, was much **intoxicated,** and no reasonable excuse appeared for his walking off the road, there was a lack of proof that he was free from contributory negligence.
Monk v. *New Utrecht* (N. Y.) 240

5. The presence of an **infant,** seventeen months old, unattended, **upon** a railroad **track** is, unexplained, proof of carelessness on parent's part. Danforth and Andrews, *JJ.,* dissent.
Chrystal v. *Troy & B. R. R. Co.* (N. Y.) 245

6. After discovering the peril of a child, all that an **engineer is bound to do** is to use reasonable diligence and care to avert it. *Id.*

7. An **engineer** has the right, in broad daylight when his train is visible and its approach can be heard, to **assume** that a seventeen months' old child will **leave** the **track** in time to escape injury. *Id.*

8. A railroad **company** is **not responsible for** any **error in judgment** on the part **of an engineer** as to the speed of his train, the distance, age, and peril of the child, and his ability to stop the train in time to protect him. *Id.*

9. **Evidence** that **deceased,** a short time before his death, said that he was **tired of life** and did not care to live, and evidence tended to show he was a habitual drunkard, is **admissible,** and may be considered by the jury on the question of damages.
Disbrow v. *Ulster* (Pa.) 827

10. Evidence of a simple **declaration** of plaintiff after the injury that he was then suffering pain, is hearsay, and **not admissible.**
Roche v. *Brooklyn, etc. R. R. Co.* (N. Y.) 702

11. Evidence of **exclamations** indicative **of pain** made by party injured is admissible. Authorities cited.
Roche v. *Brooklyn, etc. R. R. Co.* (N. Y.) 702

12. Whether a **deckload** on a canal boat was **properly covered** so as to protect it from rain, is not a subject for **expert** testimony; it is a question for the jury.
Schwinger v. *Raymond* (N. Y.) 747

BRIEFS AND NOTES.

Liability of warehouseman; extraordinary accident. (Pa.) 489
Recovery at **common law.** (N. Y.) 73
Proximate and remote **cause.** (Pa.) 490
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Railroad crossing; duty of traveler to stop, look, and listen. (Pa.) 641, 869
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Proof of **former accidents** happening at same place. (N. Y.) 45
Contributory; what constitutes. (Pa.) 828
Defeats recovery. (Pa.) 46, 869
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Infants. *Note.* (N. Y.) 245, 246; (N. Y.) 73
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Action for **death;** evidence as to value of life. (Pa.) 828
Damages. (Pa.) 828

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEW TRIAL.

Where the case, on the point on which a judgment is reversed **by** the general term, may be changed on a retrial, the **general term** should order a new trial.
Gifford v. *Corrigan* (N. Y.) 277

BRIEFS AND NOTES.

Admission of improper **evidence** is ground for. (N. Y.) 244
Setting aside verdict for admission of incompetent evidence. (N. J.) 109, 110
Verdict against evidence. (N. Y.) 676
Verdict not disturbed, where there has been a trial on the merits and defendant has not been misled. (Pa.) 640
Misleading **instructions.** (Pa.) 573
Practice. (N. Y.) 278

NOMINAL DAMAGES. See BILLS AND NOTES, 3.

NONRESIDENT. See ATTACHMENT, II.

NONSUIT.

1. On a motion for a **compulsory** nonsuit, it is the duty of the court to deduce from plaintiff's evidence every reasonable inference of fact in his favor.
Jones v. *Bland* (Pa.) 859

2. In an action by a sheriff on the bond of a deputy, to recover damages suffered by the plaintiff by reason of a false return alleged to have been made by the deputy, the answer of one of the defendants put the making of the return in issue; but the answers of the other defendants admitted the making of the return by the deputy, but alleged facts in justification thereof. The plaintiff failed to show that the return was made by the deputy. *Held*, that a nonsuit was **proper as to** the **defendant** who had **raised** an **issue** as to the making of the return, **but** was **erroneous as to** the **others.**
Conner v. *Keese* (N. Y.) 283

BRIEFS AND NOTES.

When granted. (N. Y.) 46; (Pa.) 151, 157, 598
Motion for is equivalent to demurrer to evidence. (Pa.) 146

NOTES. See BILLS AND NOTES.

NOTICE. See DEED, III.; JUDGMENT, 22; LIEN, 5, 17; MUNICIPAL CORPORATIONS, VI. c; TAXES, V. c.

Notice of an unrecorded deed **to** an attorney or **agent,** is equivalent to notice to principal.
Dickerson v. *Bowers* (N. J.) 873

NOVATION.

BRIEFS AND NOTES.

Definition. (Pa.) 148

NUISANCE. See MUNICIPAL CORPORATIONS, 16.

1. An **equitable action to restrain** the continuance of a nuisance is **not,** under the Code of Civil Procedure, § 968, triable by a **jury.**
Cogswell v. *New York N. H. & H. R. R. Co.* (N. Y.) 338

2. Where the City of Rochester caused a nuisance within the Town of Brighton, **by** the discharge of sewage, after it was collected in the sewers, into open drains constructed by **the city** across lands in the town, and continued this discharge after it was prohibited by an order of the board of health of the town, and continued also to use the ditches it had constructed in the town, *held,* that the **order of** the **board of health** of the town could be properly **served on** the **city:** and that the board could maintain an **action against** the city, to enforce its regulation and **to restrain** a continuance of the nuisance.
Gould v. *Rochester* (N. Y.) 99

3. **Service of notice upon** a **nonresident** out of the jurisdiction, although he owns the premises on which the nuisance exists, followed by the mere omission to act thereunder, will not render him liable to indictment. Authorities cited. *Id.* 101

BRIEFS AND NOTES.

Abatement. (N. Y.) 99

Trial by jury. (N. Y.) 329

OCCUPATION. See USE AND OCCUPATION.

OFFICE AND OFFICER. See AUDITOR; CORONER; FIRE AND FIRE DEPARTMENTS; JUSTICES OF THE PEACE; MUNICIPAL CORPORATIONS, III.; RECEIVER; SHERIFF; STATE AND STATE OFFICER; TAXES, IV, 31.

1. Where an Act of Congress imposes upon a federal officer a **ministerial duty,** upon the performance of which depend individual rights, it is no sufficient answer to a **mandamus** proceeding to set up a contrary direction by the President.
United States v. *Bayard* (D. C.) 341

2. Where money is in the custody of the **Department of State,** to which the petitioner has a clear legal right, and by an Act of Congress the secretary is directed to pay it over to him, **mandamus** will lie to **compel** its **payment.** *Id.*

3. The **distribution of money due claimants** under joint Mexican and American Commission is, by Act of June 18, 1878, a purely **ministerial duty** by the secretary of state, enforceable by **mandamus.** *Id.*

4. The **acts** of public officers **de facto,** coming in by color of title, are valid when they concern the public or the rights of third persons who have an interest in the act done.
Adams v. *Mengel* (Pa.) 184

5. An **acknowledgment** of a mortgage **before** a **justice** of the peace who has **qualified as clerk** of the oyer and terminer and quarter sessions is valid. *Id.*

6. Public officers having at least a colorable **title to offices,** their right cannot be **questioned** in any other form than **by** writ of **quo warranto** at suit of Commonwealth. Authorities cited. *Id.* 185

7. Where **one board** of school directors, duly elected and qualified, is **acting** as such and performing the duties of the office, **another de facto** board **cannot exist.**
White v. *School Dist.* (Pa.) 155

8. **Fees** and salaries, as long as they maintain a distinctive character, are not attachable. Authorities cited.
Rozelle v. *Rhodes* (Pa.) 658

9. An action to prevent the **treasurer of** Queens **County** from collecting from trust funds in his custody the **fees** allowed upon **tax sales** to the several towns in the county, without the audit of the town board, is maintainable by a taxpayer, under Laws 1881, chap. 531.
Warrin v. *Baldwin* (N. Y.) 768

10. The board of supervisors fixed the **salaries of** the district attorney, his chief clerk and other subordinates, at certain sums, but thereafter, by resolution, included in the budget a sum less than the aggregate of amounts fixed by the first resolution. *Held,* that a chief clerk appointed under such arrangement, and who **accepted** payment at such **reduced rate** had, after the termination of his employment, no claim for the larger salary fixed by the first resolution.
People v. *Supers. of Kings Co.* (N. Y.) 273

11. An **indictment** against a **defaulting tax collector** need not aver that the money is still detained; and it is sufficient if it avers that defendant was collector of the state and county taxes for the county, and as such collected the taxes for the year.
State v. *Nicholson* (Md.) 415

BRIEFS AND NOTES.

Election certificate is *prima facie* evidence of election to office. (Pa.) 157

Summary **dismissal.** (N. Y.) 771

Power of appointment implies power to remove. (N. Y.) 771

Title to office; *quo warranto.* (Pa.) 186

Presumption of performance of official **duty.** (N. Y.) 283

Discretion of public officers. (N. Y.) 269

Officer **de facto** defined. (Pa.) 156

Validity of acts of. (Pa.) 156-7, 186

Salary; statutory regulation; waiver. (N. Y.) 274

Action by taxpayers against officers, to prevent **illegal** official **acts.** (N. Y.) 768

Presumption of validity of official acts. (N. J.) 111

In **actions against** officers, it is sufficient to prove that they acted as such. (Pa.) 156

OPINIONS. See EVIDENCE, VIII.

ORDINANCES. See MUNICIPAL CORPORATIONS, II.

ORPHANS' COURTS. See COURTS, 5, 6.

PARENT AND CHILD. See FRAUD AND FRAUDULENT CONVEYANCE, 15; GUARDIAN AND WARD; INFANTS; SEDUCTION.

1. To sustain an order for the **support of minor grandchildren** under Acts June 13, 1836, and April 15, 1857, the record must be regular in form and must show that the quarter sessions had jurisdiction of the party and the subject matter.
James' Appeal (Pa.) 665

2. The court of **quarter sessions** has no power to **make** the **order,** unless the petition is by some one having an interest in the support of the poor person. *Id.*

3. Such order cannot be enforced by **attachment.** *Id.*

BRIEFS AND NOTES.

Voluntary **conveyances;** validity; intention. (Pa.) 545-547

PAROL EVIDENCE. See EVIDENCE, IV.

PARTIES. See ACTION OR SUIT, 3-11; APPEAL, 16; CORPORATIONS, 28; DEVISE AND LEGACY, 1; INTERPLEADER, 1; PARTITION, 8.

PARTITION.

1. Where a **mortgage** is given **by a part owner during** proceedings in **partition** to which he is a party, and at the sale in such proceedings the land is purchased by and conveyed to trustees for the beneficial owners of the property, *held*, that the **legal title of** the **mortgagor** was **extinguished** and the mortgage attached, but in equity only, to the equitable interest of the mortgagor in the property, and that when, on the division thereof, such part owner obtained title to the part allotted to him, such mortgage cannot be maintained beyond the extent of the mortgagor's interest in the property, and that a lien for purchase money of such part owing by him was paramount to the mortgage.
United N. J. R. R. & C. Co. v. *Long Dock Co.* (N. J.) 920

2. A voluntary partition of land between the owners thereof is not binding upon the **holders of** the **existing liens** upon the property, unless they consent thereto. Authorities cited. *Id.* 921

3. Where the title of all parties is set forth in the petition, and it appears that the dispute respecting it has been adjudicated, and in consequence the tenants in common are in joint possession, the mere **denial of** the **tenancy** and right of partition is **not** enough to require the court to **suspend proceedings** until another trial of the right of some of the parties.
Wistar's Appeal (Pa.) 651

4. Some **defect in** the **petition** must be pointed out or adverse possession averred, to justify the court to refuse to proceed. *Id.*

5. In such proceeding a **plea** may be treated as an answer. *Id.*

6. An **appeal** does not lie from a decree awarding an inquest. *Id.*

7. Where **parties** are included who have no interest in the title with petitioners, and such **joinder** cannot affect respondent's title, the **regularity** is immaterial. Authorities cited. *Id.* 654

8. A **lessee** has an interest in the lands, and is **entitled** to **notice** of partition proceedings, and will not be prejudiced by a partition to which he is not a party. Authorities cited. *Id.*

9. Proceedings in partition are relevant to show that **defendant accepted** a **deed** for the land named in such proceedings.
Hunt v. *Hunt* (N. J.) 462

10. Where a **purchaser** of real property **at a judicial sale,** which did **not bar** the title of some of **joint owners,** has **sold** portions of the **land** to purchasers who have improved them, joint owners may have partition.
Gittings v. *Worthington* (Md.) 442

11. If the shares of such joint owners not barred by the previous judicial sale, claimed in such partition proceedings, are assigned out of the improved portions of the property, an inquiry should be instituted to ascertain the amount to be allowed for such **improvements.** *Id.*

12. The more eligible **mode of making** the **division** is to take the part claimed by such joint owners from the **unimproved** portion of the tract, if practicable. *Id.*

13. When such **joint owners** prosecute as the holders of a common interest, their **portion** may be **allotted collectively;** and they can then obtain a **redivision** among themselves. *Id.*

14. Where conveyances of portions of such land given by the purchaser contained only **special warranties** which were distinct covenants that he was not to be answerable for any losses which might occur from assertion of a title superior to his own, and a **permanent title** is subsequently **satisfied** entirely out of portion of property which remained in his hands, *held*, that he **must be indemnified** so that the **entire tract** may **be assessed ratably to make up** the **value** of the portion allotted to the claimants by such superior title; the basis of estimation being the value of the ground considered irrespectively of the improvements. Bryan, *J.*, dissenting. *Id.*

15. When **land leased** for a term of years is to be **assessed,** the assessment must be levied on lessee and reversioner in proportion to the value of their holdings. *Id.*

BRIEFS AND NOTES.

Joint tenants and **tenants** in common. (Md.) 446

As between a sale and the actual partition, **courts incline to** latter alternative. (Md.) 444, 445

Claim of **adverse title.** (Pa.) 655

No appeal lies from award of **inquest.** (Pa.) 655

Improvements. (Md.) 444, 445

PARTNERSHIP.

1. A **sale** by partners **to a copartner,** of partnership property, conceived **in fraud,** and carried through by fraudulent representation on vendee's part, will, at the suit of a firm creditor, be declared **void;** and where the property sold has been converted into money, the proceeds must be accounted for.
Hagerman v. *Farr* (N. J.) 116

2. A **partner** who, **after the dissolution,** has disposed of the partnership property, collected debts due the firm, and paid debts due from it, cannot be excused **from accounting** on the ground that he **has** paid out more for the firm in paying its debts **than** he has received from the **assets.**
Sharp v. *Hibbins* (N. J.) 919

3. The **property of** the **wife of a partner** can **not** be **charged with** moneys drawn by the husband from the **firm's funds** with knowledge of the other partner, and used in improving her property. *Id.*

4. **Firm property** will **pass under a sale upon a joint execution** against all the partners, issued upon a judgment recovered for any joint debt whatever.
Saunders v. *Reilly* (N. Y.) 59

5. A sheriff may execute a writ of **execution** issued **against** several **partners jointly,** either on their joint property or on the separate property of one or more of **them; and**

so long as there is within his bailiwick any property of the partners, a return of *nulla bona* is improper. Authorities cited.
Saunders v. *Reilly* (N. Y.) 68

6. **After** the **sale** of firm property **upon** a **joint judgment** against both members of a firm, **no equity** is **left in** either **member** to have the property thereafter applied in discharge of the firm debts. *Id.* 59

7. It is fraud upon firm creditors for a **member** of the firm to take firm property and **apply** it **upon** his **individual debts,** or for the firm to take firm property and apply it upon the debts of any member. *Id.* 62

8. **One** of two **partners** may **transfer** all his interest in the partnership property **to his copartner.** Authorities cited. *Id.*

9. **Creditors** have no **lien** upon partnership effects for their debts. Authorities cited. *Id.*

10. An insolvent **partner** may devote his **individual property** to **firm debts.**
Crook v. *Rindskopf* (N. Y.) 727

11. Upon **satisfaction of firm debts** it is the legal **duty of** the **assignee** to determine the interest of the individual partners in the surplus. *Id.*

12. In an **assignment** for creditors by a firm of two persons, after the payment of the firm debts, the residue shall be divided into two funds for the **payment** of **individual creditors.** *Id.*

13. Until **creditors** of the firm are aggrieved, they have no **cause of action.** *Id.*

BRIEFS AND NOTES.

Action upon note made by an individual to a **firm** of which he is a **member.** (N. J.) 482

Action of **account** render lies between copartners. (Pa.) 890

Primary fund for payment of firm **debts** is **firm** property. (Pa.) 630

Assignment for benefit of **creditors;** fraudulent preferences; rights of firm and individual creditors. (N. Y.) 728

Dissolution; rights of remaining partner. (N. Y.) 62

PASSENGERS. See CARRIERS, II.

PATENTS. See PUBLIC LANDS.

1. Where an assignee of letters patent licensed defendant to manufacture and sell the patented article, he agreeing to pay royalties therefor to plaintiff, and plaintiff agreeing to refrain from manufacturing, *held,* that defendant could not escape liability to pay the **royalties,** on the ground that the reissue of **the patent** to the plaintiff **was void.**
Hyatt v. *Dale Tile Mfg. Co.* (N. Y.) 790

2. Where, at defendant's request, plaintiff withdrew her notice of forfeiture of the license and reinstated defendant in its possession, upon its special **promise** to **pay** the **royalties** then due, this was sufficient consideration for defendant's promise. *Id.*

3. So long as defendant continues to manufacture under its license, it prevents plaintiff from treating defendant in **any** other light than that of **licensee.** *Id.*

4. An affidavit of cause of action in foreign attachment, stating that **a partnership** had been formed between D. and T. to manufacture a certain patented article; that D. was to be a silent partner; that they granted the patent right to the garnishee for **a royalty,** recited "to be paid to T.;" but that the grant was in consideration that the royalties should be paid to D. and T., and that T. received them for their joint benefit, *held,* to be sufficient, in connection with the agreements of partnership and grant of the patent right.
Davis v. *Tingley* (Pa.) 889

BRIEFS AND NOTES.

Surrender of letters patent as **cancellation.** (N. Y.) 791

Licensee; rights and liabilities. (N.Y.) 792

Right to inquire into validity of patent, in suit upon license. (N. Y.) 792

PAUPERS. See POOR AND POOR LAWS.

PAYMENT. See DEVISE AND LEGACY, VIII., IX.; EXECUTORS AND ADMINISTRATORS, VI.; LIMITATION OF ACTIONS, III.

1. In a suit to recover the amount paid under execution upon the judgment, alleged to have been erroneously included **through mistake of fact** alleged to have been known to defendant, *held,* the complaint failed to show cause of action.
Wood v. *Amory* (N. Y.) 760

2. Where a judgment defendant learned during appeal that the judgment had been, through inadvertence, entered for too large an amount, but failed to object, and paid the amount thereof under execution, such payment **is voluntary.** *Id.*

BRIEFS AND NOTES.

Defined. (Pa.) 910

Application. (N. Y.) 87

Voluntary; what constitutes. (N.Y.) 692

PENALTY. See TAXES, IV.

An action to recover penalties imposed by Laws 1870, chap. 163, for **taking discount in excess of 7 per cent,** could not be maintained after the Act of 1880, chap. 567, fixing bank discount at 6 per cent.
Nash v. *White's Bank of Buffalo* (N. Y.) 690

BRIEFS AND NOTES.

Penal **statute** implies a prohibition. (Pa.) 849

Effect of repeal of statute. (N. Y.) 691

PENSION.

Pension money is subject **to attachment** in the hands of a depositary under Act of June 16, 1836.
Rozelle v. *Rhodes* (Pa.) 656

BRIEFS AND NOTES.

Attachability of pension money. (Pa.) 656, 657

PERPETUITY. See LANDLORD AND TENANT, 8.

PERSONAL INJURIES. See DAMAGES, III; NEGLIGENCE.

PHRASES. See DEFINITIONS.

PHYSICIAN AND SURGEON.

1. In an action against a physician for **negligence** in the treatment of an ulcer, *held*, the case should have been presented to the **jury** upon the **question** as to the cause of the ulcer and the character and effect of its treatment by defendant.
Reber v. *Herring* (Pa.) 841

2. If plaintiff was guilty of **contributory negligence** in producing the ulcer, he can not recover. *Id.*

3. Doctors are only required to treat their patients with **adequate care and skill.** *Id.*

PLEADING.

I. IN GENERAL; COMPLAINT; ANSWER.
II. BILL OF PARTICULARS.
BRIEFS AND NOTES.

See AFFIDAVIT OF DEFENSE; EQUITY, IV.; INTERPLEADER; PARTITION; SET-OFF AND COUNTERCLAIM.

I. IN GENERAL; COMPLAINT; ANSWER.

1. Pleadings are to be **liberally construed.**
Bowe v. *Wilkins* (N. Y.) 734

2. The first count of a complaint to enjoin the maintenance of a fence, alleged that plaintiff was in possession of hotel premises and that the fence built by defendant railroad company, was an obstruction to a public street adjacent to the hotel, and a nuisance; the second count alleged that defendant had failed to maintain an opening through the fence, as it was bound to do, etc. *Held*, an **amendment of the complaint,** so as **to set up a lease** to plaintiff, was properly **allowed.**
Avery v. *New York Cent. & H. R. R. R. Co.* (N. Y.) 795

3. The **lessee** could **not raise** the question of the **validity of deeds** executed by his lessor. *Id.*

4. When the hearing is on petition and answer, all statements in the **answer** must be **regarded as true.** Authorities cited.
McKaig v. *James* (Md.) 452

5. The usual rule for the construction of pleadings applies to an **answer of usury.**
Lewis v. *Barton* (N. Y.) 781

6. Where the case turns wholly upon the defense of **usury,** it is unimportant that there is no sufficient **denial** in the answer **of the averments in** the **complaint.** *Id.*

7. **New matter** set up in the answer, not constituting a counterclaim, does not call for **a reply.**
Bowe v. *Wilkins* (N. Y.) 734

II. BILL OF PARTICULARS.

8. Plaintiff sued for board furnished to defendant, and defendant denied and **set up a** counterclaim for board furnished to plaintiff, to which the latter replied with a denial; and plaintiff furnished a bill of particulars **containing** a charge against defendant for board and a **credit** allowed him for similar service of a less amount. *Held*, the credit is **not conclusive evidence** of legal liability to that amount.
Case v. *Pharis* (N. Y.) 779

9. The **admission does not waive** the right of contesting a resultant liability. *Id.*

10. A bill of particulars may be **amended.** *Id.*

11. It is not the **office of** a bill of particulars to furnish a defendant with facts whereon to found an affirmative defense in his behalf. *Id.*

12. A plaintiff is not bound to furnish a statement of **payments voluntarily credited.** *Id.*

13. A bill of particulars, specifying items of damage, does **not** constitute **an account.**
Untermeyer v. *Bernhauer* (N. Y.) 709

BRIEFS AND NOTES.

In general. Construed strictly against pleader. (N. Y.) 780
Certainty. (N. Y.) 780
Conclusions of law. (Pa.) 858
Waiver of error. (N. Y.) 796
Admission; effect. (N. Y.) 779; (Pa.) 574
Complaint construed most favorably to defendant. (N. Y.) 704
Nature of action is determined by complaint. (N. Y.) 710
Where the averment in the *narr.* is of an absolute promise, it will not be supported by proof of conditional promise. (Pa.) 639
In a special count upon a written agreement if the legal effect of the agreement is given, it is sufficient. (Pa.) 148
Plea of limitations is not plea to merits. (Md.) 418
Demurrer. (Md.) 439
Improper joinder of causes of action. (N.Y.) 796
Admission. (N. Y.) 44, 814; (Pa.) 146, 657
If the facts averred show that the plaintiff is entitled to any relief, the demurrer must be overruled. (N. Y.) 43
Amendment. (N. Y.) 741, 796; (Pa.) 573
Power of court. (N. J.) 111
Failure to serve bill is treated as a denial. (N. Y.) 779
Bill of particulars; how treated. (N.Y.) 779
Variance. (N. Y.) 788; (Pa.) 178
Aider by verdict. (Pa.) 640

PLEDGE AND COLLATERAL SECURITY.

Possession of the thing pledged must be taken by pledgee to make the pledge valid against creditors of pledgeor. Authorities cited.
Heft's Appeal (Pa.) 593

POLICE POWER. See CEMETERIES, 5, 6; CONSTITUTIONAL LAW, III.

POLICY. See INSURANCE.

POOR AND POOR LAWS.

1. To sustain an **order for** the **support** of **minor grandchildren,** under Acts June 13, 1836, and April 15, 1857, the record must be regular in form, and must show that the quarter sessions had jurisdiction of the party and subject matter.
James' Appeal (Pa.) 665

2. The court of **quarter sessions** has no power to **make** the **order** unless the petition is by some one having an interest in the support of the poor person. *Id.*

3. Such order cannot be enforced by **attachment.** *Id.*

POST MORTEM. See CORONER, 3.

POSTOFFICE.

1. Depositing a **letter** in the postoffice is *prima facie* evidence of its **receipt.**
Folsom v. *Cook* (Pa.) 585

2. Evidence that a **letter** was so sent, **demanding** payment of **rent,** is competent to rebut the allegation that no demand had been made. *Id.*

BRIEFS AND NOTES.

Presumption of receipt of letter from **mailing.** (Pa.) 587

POWERS OF SALE. See DEVISE AND LEGACY, V.

PRACTICE. See ACTION OR SUIT; AFFIDAVIT OF DEFENSE; APPEAL; CERTIORARI; EQUITY, V.; ERROR; EVIDENCE; GUARDIAN AND WARD, 2, 3; MANDAMUS; PARTITION; PLEADING; SET-OFF AND COUNTERCLAIM; TRIAL.

PRESUMPTION. See DEVISE AND LEGACY, 3; HUSBAND AND WIFE, 5.

PRINCIPAL AND AGENT.

I. IN GENERAL; RIGHTS AND LIABILITIES.
II. FACTORS AND BROKERS.
BRIEFS AND NOTES.

See CHARTER-PARTY; CONTRACT, 18, 20; HUSBAND AND WIFE, 25, 26.

I. IN GENERAL; RIGHTS AND LIABILITIES.

1. The **declarations** and acts of a man cannot be given in evidence **to prove** that he **is the agent** of another. Authorities cited.
De Baril v. *Campoy y Pardo* (Pa.) 643

2. A diamond **dealer** entrusted, by the owner, with diamonds under a receipt stating that they were received on approval to show to his customers, and that they were to be returned to the owner on demand, had **authority to sell** them; and a purchaser in good faith has a right to retain them as against the one who entrusted them to such dealer.
Smith v. *Clews* (N. Y.) 680

3. Either the agent or principal may sue upon a contract not under seal with an agent for an **undisclosed principal.**
Ludwing v. *Gillespie* (N. Y.) 740

4. A **judgment for** the **agent** on such contract **bars** the undisclosed **principal.** *Id.*

5. Where goods are bought of one as a principal, the right to a **set-off** against such seller is **lost if** the real **principal** is **disclosed** before goods delivered or payment made.
McLachlin v. *Brett* (N. Y.) 696

6. A **principal** is **estopped from denying** his **agent's representation** as against a third person, where he has clothed the agent with power to do an act upon the existence of some extrinsic fact. Authorities cited.
Bank of Batavia v. *New York, L. E. & W. R. R. Co.* (N. Y.) 825

7. **Notice** of an unrecorded deed **to** an attorney or **agent** is equivalent to notice to principal.
Dickerson v. *Bowers* (N. J.) 372

8. An insurance broker was held so far the agent of the assured that notice to him of the cancellation of the policy was notice to the assured.
Stone v. *Franklin Ins. Co.* (N. Y.) 749

9. To **make** a **ratification** of an agent's unauthorized act effectual, previous knowledge by the principal of all the material facts must be shown.
Merrick Thread Co. v. *Phila. Shoe Mfg. Co.* (Pa.) 574

10. In the absence of such evidence, it is error to submit the question to the jury. *Id.*

11. A **mortgager** cannot maintain a bill to **interplead** against one who claims, as **agent** of the owner of the mortgage under a power of attorney, to be entitled to the money due thereon, and against a daughter of such owner who forbids the mortgagor to pay the money to such agent on the ground of the mental incapacity of the owner when she executed the power of attorney, without **joining** such **owner** as a party to the bill.
Blake v. *Garwood* (N. J.) 365

12. The **agency** was **revoked** when such owner became incapacitated, to all who had notice of the fact; and therefore such alleged agent has no claim to the money, and there is no foundation for the bill to interplead. *Id.*

13. An agent is responsible for the acts of his **subagent.** Authorities cited.
De Baril v. *Campoy y Pardo* (Pa.) 644

II. FACTORS AND BROKERS.

14. If a **warehouseman** to whom grain was delivered by a commission merchant as security for advances **knew** that the commission merchant was using **property consigned** to him for sale, he can **not hold** the grain as **against** the true **owner.**
Dorrance v. *Dean* (N. Y.) 695

15. The **Factors' Act,** Laws 1830, chap. 179, has no application to a case where **protection** would secure to a wrong doer the fruits of fraud. *Id.*

16. A **husband** undertaking to be **bound**

for the **commissions** of a broker for effecting the **sale of real estate** of his wife is personally bound, whether he discloses his agency for his wife or not.
Jarvis v. *Schaefer* (N. Y.) 675

17. If **compensation** was promised to a **broker** by one of the parties, when fully informed that the broker held the same relation to the adverse dealer, the broker is entitled thereto. *Id.*

18. That defendant **paid commissions to another broker** does not impair plaintiff's right to compensation. *Id.*

BRIEFS AND NOTES.

Agency not presumed. (N. Y.) 821

Notice of. (N. Y.) 697

Authority of **agent.** (N. Y.) 719

Apparent authority operates by way of estoppel. (N. Y.) 718

Liability of **principal** for fraudulent acts of agent. (N. Y.) 808, 824, 825

Principal bound by acts of agent. (N. Y.) 718, 719

Knowledge of agent is knowledge of principal. (N. Y.) 672

Right of **undisclosed principal** to sue. (N. Y.) 697, 740

Rights and liabilities of agents for undisclosed principal. (N. Y.) 740

Ratification of acts of agent. (N. J.) 863; (N. Y.) 818

Defined. (N. Y.) 718

Knowledge of principal. (Pa.) 575, 576

From silence. (N. Y.) 718

Effect. (Pa.) 575

Evidence. (Pa.) 575

Power of **attorney;** revocation. (Pa.) 209

Real estate broker; commissions. (N. Y.) 676; (Pa.) 850

No right to compensation where negotiations by broker are abandoned by parties. (N. Y.) 676

PRINCIPAL AND SURETY. See BONDS.

1. **Sureties** are **not estopped by** any **recital** in the undertaking from availing themselves of the invalidity of the instrument when sued thereon.
Mittnacht v. *Kellermann* (N. Y.) 714

2. **Sureties** in a bond **for** a bank, a depositary of the State for canal tolls, are **not released** from liability thereon **by another bond,** subsequently executed and delivered, but not accepted by the State.
People v. *Lee* (N. Y.) 35

3. When the language of the contract was that the bank should account for and pay over all moneys deposited with it and all moneys now on deposit in said bank or for which it shall in any way become liable, *held,* that the sureties thereon intended to be bound for the **continuing security** of the existing deposit. *Id.*

4. It is not competent for parties to such an undertaking to allege that they were **ignorant** of the existence **of a debt** expressly provided for, or that they have been misled by the omission of the principals to notify them of its existence. *Id.*

5. The **sureties on a bond of indemnity** to a sheriff in attachment are not **liable** to the sheriff for the amount recovered **against** him for detention of property after **attachment** vacated.
Bowe v. *Wilkins* (N. Y.) 734

6. An attempt to defend the sheriff **is not a ratification by obligors** in the indemnity bond **of** such **act,** when sued by the **sheriff** on their bond. *Id.*

7. A surety of a guardian paying a judgment in the orphans' court, against his principal, may file a bill to **compel** his **co-surety to pay** one **half** thereof without first obtaining a judgment at law against him.
Neilson v. *Williams* (N. J.) 369

8. **Notice** by a surety in an administration bond, before adjudication **to creditors** of the estate, that the administratrix is wasting the estate and that all claims against the estate must be pushed at once or he will not be responsible for losses, is ineffectual to relieve him from liability to such creditors.
Kauffman v. *Commonwealth* (Pa.) 539

BRIEFS AND NOTES.

Part payment by surety does not revive demand against principal. (N. Y.) 670

Liability of **sureties** of public officers for defaults of principals happening after commencement or after expiration of terms during which bond given for. (N. Y.) 36

Official bond being general in terms, and office not annual, the sureties' liability is not limited to a year. (N. Y.) 36

Where principal is estopped, surety is also. (N. Y.) 782

Discharge of surety by forbearance of creditor. (Pa.) 541, 630

Notice to sue principal; requisites. (Pa.) 541

To discharge a surety, notice to sue principal must be clearly proved. (Pa.) 541

PROBABLE CAUSE. See FALSE IMPRISONMENT.

PROBATE. See WILL, 8.

PROBATE APPEAL. See APPEAL, VI.

PROCESS. See WRIT AND PROCESS.

PROMISE. See LIMITATION OF ACTIONS, III.

PROMISSORY NOTES. See BILLS AND NOTES.

PROSECUTING ATTORNEY. See DISTRICT AND PROSECUTING ATTORNEY.

PUBLIC BUILDINGS. See LIEN, 1-5.

PUBLIC LANDS. See WHARVES.

A land **patent** is **granted** to the persons who are entitled and who have paid, and if an-

other procures the patent, he takes as trustee.
Kulp v. *Bird* (Pa.) 576

BRIEFS AND NOTES.

State lands; **patent.** (Pa.) 624

PUBLIC OFFICER. See OFFICE AND OFFICER.

PUBLIC PROPERTY. See MUNICIPAL CORPORATIONS, IV.

PUNITIVE DAMAGES. See LIBEL AND SLANDER, 4.

QUIETING TITLE. See CLOUD ON TITLE.

QUI TAM AND PENAL ACTIONS. See PENALTIES.

QUO WARRANTO. See CORPORATIONS, 28.

Public officers having at least a colorable **title to offices,** their right cannot be questioned in any other form than by writ of *quo warranto* at suit of Commonwealth. Authorities cited.
Adam v. *Mengel* (Pa.) 185

RAILROAD COMPANIES. See CARRIERS; CORPORATIONS. 28; NEGLIGENCE; STREET RAILWAYS; TAXES, 8.

1. Laws 1869, chap. 909, § 4, amended by Laws 1871, chap. 283, providing for the **appropriation of taxes to payment of municipal bonds** in aid of railroads applies to any municipality which has such bonds outstanding.
Clark v. *Sheldon* (N. Y.) 923

2. It makes no difference as to the **duty of the county treasurer** that the taxes were not expressly collected or paid over to him for said purpose. *Id.*

3. Section 4 is not in conflict with the Constitution. *Id.*

4. It is no defense to a proceeding by a taxpayer to compel such application that the petition does not put the amount of taxes claimed to be applicable to that purpose high enough; the county treasurer may be compelled to set aside for a **sinking fund** all the taxes which may appear to have been paid to him for that purpose. *Id.*

5. Nor is it an answer to such proceeding that if the county treasurer should do so, there would be a **deficiency in other funds.** *Id.*

6. If the **application** for the appointment of commissioners to determine the routes of a contemplated railway, **under the Rapid Transit Act** (Laws 1875, chap. 606), is proved by a single witness upon oath to have been signed by the persons whose names are thereto appended, the statute is satisfied.
Re Kings Co. Elevated R. Co. (N. Y.) 282

7. Upon filing the certificate and articles of association required by Act of 1875, on January 6, 1879, the **Kings County Elevated Railway Company** then became and now is **a corporation.** *Id.*

8. A **condition** affixed **by** the Common **Council** of Brooklyn **to** its **consent,** to the construction of proposed railroads, that the company should enter into a bond to pay into the city treasury, semi-annually, for the benefit of the city, 2 per cent of its gross receipts, did not prevent the consent of the common council being effective to give the company power to **appropriate land** for such construction. *Id.*

9. Other **conditions,** that the city **assessors** should **arbitrate** all **damages** caused to property owners, **and** that portions of the **road** should be **completed** at **certain dates** specified, being different from the dates fixed by the commissioners, *held,* to be in conflict with the statute. *Id*

10. The articles of association prepared by the commissioners provided that the time unavoidably consumed by legal proceedings, etc., "or otherwise," should not be deemed a part of the period limited for the completion of the road. *Held,* that the **time** between resolution of commissioners limiting time for completion and incorporation of company should not be **counted against** the company. *Id.*

11. The **forfeiture** to the county supervisor of the corporate rights of a company organized under Act of 1875, for noncompletion within time fixed, is not worked by the mere **default,** without the intervention of the courts or action on the part of the State or of the county. *Id.*

12. The commissioners, having located fifteen different routes, fixed the **time** within which five **routes** should be **completed,** and omitted the remaining. *Held,* that this **omission** was not fatal to the whole scheme. *Id.*

13. Where plaintiff's **lands** were **used** for a railroad track for some time, the proper **measure of damages** is the fair rental value of such lands for the time they were so used, in absence of special damage.
Baltimore & O. R. R. Co. v. *Boyd* (Md.) 435

14. **Declarations** made **by counsel** on a former occasion in the course of a trial, while urging the question of the damages before a jury of condemnation of the property in question, are not admissible to prove malice on the part of defendant, in order **to enhance** the **damages.** *Id.*

15. Where the former **receiver** of a railroad company made a contract that complainant should for a year keep the ash pit clean where the engines of the company emptied their ashes, and for his compensation should have the cinders and coal from such pit, *held,* that complainant is entitled to **damages** for **breach of** the **contract** by the present receiver.
Kerr v. *Little* (N. J.) 125

BRIEFS AND NOTES.

Jurisdiction of superior court in actions by the people for **dissolution** of railroad companies. (N. Y.) 314

Appropriation of taxes to payment of municipal bonds in aid of railroad. (N. Y.) 923, 924

Town **lots** owned by corporation are no **part of** railroad. (Pa.) 903

Condemnation proceedings; practice. (N. Y.) 234, 235

Measure of damages. (Md.) 436

Receiver; effect of appointment. (N. Y.) 315, 317

RAPE.

1. Where the **disclosure** of the rape **by prosecutrix** is not recent, as soon as suitable opportunity is furnished, the reason for receiving it in evidence does not exist.
People v. *O'Sullivan* (N.Y.) 56

2. A **disclosure** by prosecutrix nearly eleven months after the alleged rape, where there was nothing to justify the delay, *held,* **too remote** to be received in evidence. *Id.*

3. The **want of** an **early disclosure** may be **explained** by facts showing that it was impracticable, or that it was prevented by circumstances consistent with the natural impulse to complain. *Id.*

4. Upon a trial for rape, an **attempt** to commit the same offense by defendant at some **prior** time, not too distant, may be **proved.** *Id.*

5. Such **evidence** is not incompetent because it comes from **complainant** herself. *Id.*

6. Prosecutrix's evidence is discredited if she **conceals** the **injury** for a considerable time after opportunity to complain. Authorities cited. *Id.* 58

BRIEFS AND NOTES.

Delay in **disclosure** by prosecutrix; effect. (N. Y.) 56

Evidence of previous solicitations and prior sexual attempts. (N. Y.) 56

RATIFICATION. See ATTACHMENT, 19, 20; PRINCIPAL AND AGENT, 9, 10; SHERIFF, 4.

REAL ESTATE BROKER. See PRINCIPAL AND AGENT, II.

REARGUMENT. See ERROR, I.

RECEIPT.

BRIEFS AND NOTES.

Parol evidence to **contradict,** explain, or correct. (Pa.) 511

RECEIVER. See CORPORATIONS, 28.

1. Where a **creditors' bill** was filed and complainant in this suit was appointed **receiver,** he may file his bill for the collection of money held in trust for the debtor in the original suit, without first obtaining another **judgment at law.**
Terhune v. *Bell* (N. J.) 469

2. That there is a **remedy at law** is no objection to such suit. *Id.*

3. If the **estate** is sufficient to pay **decedent's** debts, the creditors cannot ask that a receiver be appointed to apply the **rents and profits** of the real estate to their payment.
McKaig v. *James* (Md.) 452

4. A general assignment, by a person living in one county and having his place of business in another, was acknowledged and delivered and recorded only in the county in which the assignor resided; subsequently a receiver was appointed in supplementary proceedings against the assignor in the county wherein was his place of business, and thereafter the assignment was recorded in that county also; and not until after such recording was a copy of the order appointing the receiver filed in the county where the assignor resided. *Held,* that assignee's title related back to the delivery of the assignment, and gave the **assignee priority over** the **receiver,** no rights of *bona fide* purchasers being affected.
Nicoll v. *Spowers* (N. Y.) 95

BRIEFS AND NOTES.

Of **railroads.** (N. Y.) 315, 317

Effect of **prior assignment** for benefit of creditors. (N.Y.) 96, 97

Rights of **creditors.** (N. Y.) 317

RECORD. See APPEAL, III., 29; ASSIGNMENT FOR BENEFIT OF CREDITORS, 1, 2; DEED, III; ERROR, II.

REDEMPTION. See MORTGAGE III.; TAXES, V.d.

RELEASE AND DISCHARGE. See JUDGMENT, IV.

RELIGIOUS SOCIETIES.

BRIEFS AND NOTES.

Devise to unincorporated association is good. (Pa.) 668

REMITTITUR. See APPEAL, V.

REPEAL. See STATUTES, II.

REPLEVIN.

1. An **undertaking** given on the removal of an action for claim and delivery from the **District Court** of New York City to the common pleas, not being made under any statutory authority, is **void.**
Mittnacht v. *Kellermann* (N. Y.) 714

2. **Sureties** are **not estopped** by any recital in the undertaking from availing themselves of the invalidity of the instrument when sued thereon. *Id.*

3. Where **notes** of a company have been unlawfully **converted by** its **president,** the company may recover possession of them from the holder, by replevin, unless he is a *bona fide* purchaser for value, without notice.
Davis Sewing Mach. Co. v. *Best* (N. Y.) 63

4. In replevin for notes not enforceable as the pecuniary obligations of a corporation by reason of their defective execution, only **nominal damages** can be recovered for their detention. *Id.*

5. In replevin for chattels claimed under a mortgage which had not been accompanied with an immediate change of possession, it is **incumbent** on plaintiff to **show** that the **mortgage** was made **in good faith** and without any attempt to defraud.
Mfrs. & Traders Bank v. *Koch* (N. Y.) 672

6. Where notice to the mortgagee of sales of the mortgaged chattels by the mortgagor, and of the appropriation of the proceeds by the mortgagor on his own account, is only evidence from which a previous agreement to permit such sales and appropriation may be inferred, it is not ground for an absolute **direction** to the jury **to find for** the **defendant** in such case.
Mfrs. & Traders Bank v. *Koch* (N. Y.) 672

RESCISSION. See CONTRACT, III.; EQUITY, 4, 6; SALE, 8, 13.

RES GESTÆ. See EVIDENCE, V.

RES JUDICATA. See HUSBAND AND WIFE, 41; JUDGMENT, III.

RESULTING TRUSTS. See TRUSTS, II.

RETROSPECTIVE LAWS. See CONSTITUTIONAL LAW, II.

REVOCATION. See LICENSE, 1; PRINCIPAL AND AGENT, 12; WILL, 8.

ROADS. See TURNPIKE COMPANIES; WAYS.

ROYALTY. See PATENTS.

SALE. See TAXES, V.; VENDOR AND PURCHASER.

1. **Definition.**
Gonser v. *Smith* (Pa.) 188

2. A **demise of coal** under the surface of a specified piece of land **is** a sale of the coal.
Fairchild v. *Fairchild* (Pa.) 873

3. A **contract** expressly "**of renting** only, and not a sale, conditional or otherwise," by which a sewing machine "valued at $50" is "rented" for fourteen months for the sum of $10, and the further sum of $3 per month upon certain conditions, the machine to be delivered to lessor at the expiration of the time for which it is rented, with the "option" on lessee's part to "purchase" it within ten days thereafter for $1, is **a bailment.**
Wheeler & W. Mfg. Co. v. *Heil* (Pa.) 179

4. Where parties make a special agreement as to the **mode of delivery** of a shipment of sugar, and fix the amount which the owner or consignee should pay for **wharfinger's charges,** the agreement is valid and binding on such owner and consignee.
Woodruff v. *Havemeyer* (N. Y.) 776

5. Under a **contract** made in New York, February 2, 1881, **for "prompt shipment** by sail from Europe, and for delivery at New York," dangers of the sea excepted, precedent to payment, rails were, on February 3, placed on board a ship at a river port in Germany then closed by ice and not open until April 2 or 3, on which latter day the ship sailed for New York, and the rails were tendered to the buyer on June 14, *held,* that the buyer was entitled to such **timely delivery** as would follow an effective shipment, and was not bound to receive the rails.
Tobias v. *Lissberger* (N. Y.) 723

6. The **buyer** was **not estopped** from refusing to accept the rails by the fact that he had made **no objection** until the tender on June 14. *Id.*

7. Plaintiffs gave defendant a written agreement, reciting that they agreed to sell and had sold defendant and agreed to deliver on board of cars at siding all **lumber** thereinafter mentioned, when defendant should so direct. The lumber was described as being in piles, of a certain number of feet, of which the price per foot and the aggregate sum were given "more or less" or "whatever it may be," to be paid for as specified; the receipt of hand money was acknowledged as part payment on above, balance, "whatever it may be, to be settled likewise as soon as the correct amount can be arrived at." The piles were marked as defendant's. *Held,* **delivery** was complete and the **title passed** when the **piles** were **estimated and marked** to defendant. Mercur, *Ch. J.*, dissents, on ground that something remained to be done according to the terms of the contract.
Gonser v. *Smith* (Pa.) 187

8. Although a vendor's right to **rescind a sale,** because of vendee's failure or refusal to pay, continues so long as any weighing, measuring, or other thing remains to be done on his part, yet this test does not apply to the question of the vesting of the title in a case where the vendor has no cause of rescission. *Id.*

9. Where the lawful form of contracting is pursued, the **vesting of** the **title** always depends on the **intention** of the parties, to be derived from the contract and its circumstances. *Id.*

10. Actual delivery, weighing, and setting aside are only **circumstances from which** the **intention** may be **inferred.** *Id.*

11. If any part of the price is paid by way of **earnest,** the property of the **goods** is absolutely **bound** by it. Authorities cited.
Id. 189

12. The **acceptance** by a vendee of articles manufactured under an executory contract, after an opportunity to examine them, **precludes** him from **questioning** defects, **unless** there is a **warranty** of their quality intended to survive acceptance.
Norton v. *Dreyfuss* (N. Y.) 785

13. When there is such a warranty, the vendee may retain the goods, and **recoup damages; or** he can return the goods and plead **rescission** of the contract. *Id.*

14. But these **defenses** cannot both be sustained in the same action. **Election** between them where it is uncertain on the pleadings is a question for the jury. *Id.*

15. Whether a demand and refusal was the equivalent of an **acceptance** was a question for the jury. *Id.*

16. In a contract an elevator was "**warranted** satisfactory in every respect." A **bona fide objection** by contracting party to its working is a defense to an action for price. Authorities cited.
Krum v. *Mersher* (Pa.) 885

BRIEFS AND NOTES.

Definition. (Pa.) 190

When **title vests.** (Pa.) 190

Where contract is lawful the vesting of title depends upon the intention of the parties. (Pa.) 190

Acceptance; what amounts to. (N. Y.) 786

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Breach; nominal damages. (N. Y.) 786

Rights of vendee upon breach. (N. Y.) 786

SAVINGS BANKS. See BANKS AND BANKING, 5.

SCHOOLS AND SCHOOL DISTRICTS.

1. Where one **board of** school **directors,** duly elected and qualified, is acting as such and performing the duties of the office, another **de facto** board cannot exist.
White v. *School Dist.* (Pa.) 155

2. **Contracts with** a pretended **de facto board** do not bind the district. *Id.*

3. Prior to Laws 1878, chap. 315, there was no law by which any **lien** could attach **upon public buildings, or** upon the **moneys due from** a **city** to the contractor who did any work thereon.
Bell v. *New York* (N. Y.) 266

4. A **contract** between a person and the **trustees of public schools** in a ward of the City of New York, to do the mason work on a school building on a lot belonging to the city, is one within the Act of 1878. *Id.*

5. Such school **trustees** act as the **agents of** the **city,** legally appointed. *Id.*

6. **Individuals** who **furnish materials to** such **contractor** are entitled to the **lien** provided in Act of 1878 on moneys in the city treasury, due or to grow due under the contract. *Id.*

7. Filing the **notice of the lien** with the clerk of the board of education and with the city comptroller was a fulfillment of Act 1878, § 2. *Id.*

BRIEFS AND NOTES.

Statutory mode for employment of **teachers** must be strictly complied with. (Pa.) 157

Contracts of **directors** although not properly recorded, if performed, can be enforced. (Pa.) 156

Powers of board of education and school trustees. (N. Y.) 266

SECONDARY EVIDENCE. See EVIDENCE, III.

SEDUCTION.

1. In an action by a father for **loss of services of daughter,** caused by seduction, slight evidence is sufficient to establish the relation of master and servant.
Lamb v. *Taylor* (Md.) 377

2. If the **daughter** is living with her father, rendering services, that she is **over twenty-one** years of age is immaterial. *Id.*

3. It is immaterial whether the **services** were **paid** for or not. *Id.*

4. That the **daughter was employed out of** her father's **house** during the **day,** and paid board at her father's, is **immaterial.** *Id.*

BRIEFS AND NOTES.

Right of **father** to **recover** for loss of services. (Md.) 377, 378

Reasonable expectation of services is sufficient. (Md.) 378

Slightest evidence will prove relation of master and servant. (Md.) 378

Measure of **damages.** (Md.) 377, 378

SEISIN AND DISSEISIN.

Seisin of a devisor may be **proved,** *prima facie* by showing that he was in actual possession or in receipt of the rents as landlord at his death.
Jones v. *Bland* (Pa.) 859

SENTENCE. See CRIMINAL LAW, IV.

SEPARATE ESTATES. See HUSBAND AND WIFE, III.

SEPARATION. See HUSBAND AND WIFE, V.

SERVANT. See MASTER AND SERVANT.

SERVICE. See WRIT AND PROCESS.

SET-OFF AND COUNTERCLAIM. See DEVISE AND LEGACY, 45.

1. An **executory contract** for sale of goods creates no debt against which there **can** be a set-off.
McLachlin v. *Brett* (N. Y.) 696

2. Where goods are bought of one as a principal, the right to a set-off against such seller is lost if the **real principal** is **disclosed** before goods delivered or payment made. *Id.*

3. Plaintiff sued for board furnished to defendant, and defendant denied and set up a **counterclaim** for board furnished to plaintiff, to which the latter replied with a denial, and plaintiff furnished a **bill of particulars** containing a charge against defendant for board and a credit allowed him for similar service of a less amount, *held,* the **credit** is not a conclusive evidence of legal liability to that amount.
Case v. *Pharis* (N. Y.) 779

4. The admission does not waive the right of contesting a **resultant liability.** *Id.*

5. New matter set up in the answer, not constituting a counterclaim, does not call for a **reply.**
Bowe v. *Wilkins* (N. Y.) 784

6. If an **action** is **nonreferable,** a **counterclaim** set up in the answer **cannot make** it so. Authorities cited.
Untermeyer v. *Bernhauser* (N. Y.) 711

SETTLEMENT.

Where an alleged settlement of accounts is attacked, it is admissible to **prove the items.**
Mead v. *White* (Pa.) 846

SHERIFF.

1. Upon **vacation** of **attachment** it is the **sheriff's duty** to deliver the property to defendant or the person entitled thereto.
Bowe v. *Wilkins* (N. Y.) 734

2. A bond of **indemnity** to the sheriff does **not cover a detention after vacation of** attachment. *Id.*

3. Where the sheriff levied the execution against himself on the goods which he had attached and kept in his hands, and sold them on the execution and turned over the money to the attorney for the plaintiff in the execution, *held*, the knowledge of such attorney as to where the money came from would be no **ratification** by the plaintiff in the execution **of** his prior **illegal act** in refusing to surrender the goods. *Id.*

4. An attempt to defend the sheriff is not a ratification by obligors in the indemnity bond of such act, when sued by the sheriff on their bond. *Id.*

5. When the sole ground of recovery against such sheriff was the demand and refusal, he cannot allege in an **action on the indemnity bond** that he had a right to retain the property. *Id.*

6. In an **action by a sheriff on the bond of** a **deputy,** to recover damages suffered by the plaintiff by reason of a **false return** alleged to have been made by the deputy, the answer of one of the defendants put the making of the return in issue, but the answers of the other defendants admitted the making of the return by the deputy, but alleged facts in justification thereof. The plaintiff failed to show that the return was made by the deputy. *Held*, that a **nonsuit was proper as to** the **defendant** who had **raised** an **issue** as to the making of the return, **but** was **erroneous as to** the **others.**
Conner v. *Keese* (N. Y.) 283

BRIEFS AND NOTES.

Return; practice. (N. Y.) 283

SHIPS AND SHIPPING. See CHARTER-PARTY.

1. Where parties make a special agreement **as** to the **mode of delivery** of a shipment of sugar, and of the amount which the owner or consignee should pay for **wharfinger's charges,** the agreement is valid and binding on such owner and consignee.
Woodruff v. *Havemeyer* (N. Y.) 776

2. The **wharf owners** are entitled to **enforce** the **contract** and recover wharfingers' charges. *Id.*

3. Under a **contract** made in New York, February 2, 1881, **for "prompt shipment** by sail from Europe, and for delivery at New York," dangers of the sea excepted, precedent to payment, rails were, on February 3, placed on board a ship at a river **port** in Germany then **closed by ice** and not open until April 2 or 3, on which latter day the ship sailed for New York, and the rails were tendered to the buyer on June 14, *held*, that the buyer was entitled to such **timely delivery** as would follow an effective shipment, and was not bound to receive the rails.
Tobias v. *Lissberger* (N. Y.) 723

4. The **buyer was not estopped** from **refusing to accept** the rails by the fact that he had made no objection until the tender on June 14. *Id.*

5. When goods are sold and are to be delivered on board of vessels, **putting on board** is a **good shipment** whether the vessel is in condition or is expected to sail or not. Authorities cited. *Id.* 727

BRIEFS AND NOTES.

Bills of **lading;** rule of construction; usage. (N. Y.) 724, 777

In case of general cargo, different consignments must be properly separated, and during time required for this purpose **carriers risk** continues. (N. Y.) 778

SIDEWALKS. See MUNICIPAL CORPORATIONS, VI.

SLANDER. See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE.

1. Specific execution will not be decreed, of an **unperfected agreement,** in favor of one not party to it, in the face of the denial of its existence by one of the alleged contracting parties.
Rappanier v. *Bannon* (Md.) 420

2. To claim the benefit of a mutual agreement from the opposite party, a **party** must **show** that his **part** of the agreement **has** been **performed.** *Id.*

3. The court will place the parties in the **same situation** they would have been in if the contract had been performed.
Bostwick v. *Beach* (N. Y.) 667

4. The vendee, having obtained a decree for specific performance, may be allowed the **damages** sustained during the pendency of the suit, by deterioration **from waste** committed by defendant. *Id.*

5. Where a decree is sought to be opened to let in defendant to claim **interest on** the **purchase money,** plaintiff should be let in to prove **damages for deterioration.** *Id.*

6. The modified decree should provide for **interest** and **damages.** *Id.*

BRIEFS AND NOTES.

When granted. (N. J.) 363

STATE AND STATE OFFICER. See DISTRICT OF COLUMBIA; PRINCIPAL AND SURETY, 2-4; WHARVES.

1. **Such certificates of indebtedness,** creating a conditional obligation on the part of the State to pay the same only when it should have received the money from the United States, are **not bills of credit,** the issuance of which by the States is prohibited by the Federal Constitution.
People v. *Brie* (N. Y.) 85

2. A **certificate of indebtedness** for war claims of the militia, countersigned by the

acting paymaster under an Act of Missouri, is capable of being the subject of **forgery.**
People v. *Brie* (N. Y.) 85

3. The **State** can only be **sued** with its own consent and for liabilities which it chooses to assume.
Rexford v. *State* (N. Y.) 762

4. Until Laws of 1870, chap. 321, **canal appraisers** had no **jurisdiction** over injuries from **neglect,** or which were temporary in their character.
Heacock v. *State* (N. Y.) 330

5. Where, in raising the **banks of** a state **canal,** the banks are built of **loose earth,** so that leakage occasioning injury results, this is on its face a **negligent act.** *Id.*

6. **A coffer dam,** built by the State for restraining waters of a river while enlarging a canal, a portion of which was permitted to remain in the shape of an island, after its purpose was accomplished, is **a temporary obstruction** merely, with which the Act of 1830 has nothing to do. *Id.*

7. The **Act of 1870** does not confer new jurisdiction to hear **claims** for taking of land in fee, or **for** the **appropriation** of a continuous and permanent **easement** by the State.
Stewart v. *State* (N. Y.) 333

8. For a claim for a permanent **easement** taken by the State for the **use of** the **canals,** and corresponding damages, claimant has no **remedy** under Act of 1870. Such claim must be presented in one year. *Id.*

9. For an **injury** sustained by claimant **from** the **negligence of** the **captain of** the **state boat,** who, at the time, was engaged with several employees, including claimant, in digging clay from a bank and loading it on to the boat, which negligence consisted in setting the claimant to work under the bank after the captain had loosened the overhanging earth so that it fell upon and injured the plaintiff, the **State is not liable.**
Loughlin v. *State* (N. Y.) 70

10. The **captain** of the boat, although he had power to direct those under him, was nevertheless **a coservant,** within the rule. *Id.*

11. Where the injury is one for which the master, if an **individual,** would **not** be **liable,** it is not one for which the **State** is liable under Laws 1870, chap. 321. *Id.*

12. **Act of 1870,** chap. 321, permitting claims for damages sustained from state canals, does **not extend to damages** from their **navigation.**
Rexford v. *State* (N. Y.) 762

13. Where the **master of** a canal **boat,** on the way to his boat, in **climbing** up a **bridge** by irons fixed therein, furnished by the State and serving as rungs of a ladder, was **injured** through a loose stone falling from the wall, *held,* the board of claims had **jurisdiction** of the claim for the damages. *Id.*

BRIEFS AND NOTES.

Liability of State for negligent acts of **officer.** (N. Y.) 71

Liability of State for damages for personal injuries received through defective bridge over canal. (N. Y.) 763

Liability of State for permanent and temporary injuries from defective construction of state canal bank. (N. Y.) 330

Jurisdiction under Act of 1820; damages for destruction of property by building dam; time of presenting claim. (N. Y.) 333, 334

Jurisdiction of state **board** of **claims.** (N. Y.) 763

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

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STATUTES.

I. CONSTRUCTION.
II. REPEAL.
BRIEFS AND NOTES.

See CONSTITUTIONAL LAW; FRAUDS, STATUTE OF; LIMITATION OF ACTIONS.

I. CONSTRUCTION.

1. The **title of** an **Act** may be regarded in arriving at the real meaning of the Legislature. Authorities cited.
Bell v. *New York* (N. Y.) 368

2. Statutes should be construed according to the **circumstances** to which the Act **was intended to apply.** Authorities cited.
Re Kings Co. Elevated R. Co. (N. Y.) 239

3. The **literal wording** of an Act **may** sometimes be **rejected,** if it is plain that such rendering of the words would not carry out the legislative intent. Authorities cited.
Bell v. *New York* (N. Y.) 368

4. Subsequent legislation cannot **revive an** extinguished **cause of action.**
Nash v. *White's Bank of Buffalo* (N. Y.) 690

5. Where a **power** is given by **statute,** everything necessary to make it effectual or requisite to attain its end is **implied.**
People v. *Chapin* (N. Y.) 295
Mayor of New York v. *Sands* (N. Y.) 268

6. A statute giving **power to** a **magistrate** to **examine** such **witnesses** as should be produced before him **authorizes** him **to use subpenas** to such witnesses and to **compel** their attendance by the usual process of the court. *Id.* 272

II. REPEAL.

7. The **General Repealing Act** of **1828** had no **effect** on subsequent legislation.
Nash v. *White's Bank of Buffalo* (N. Y.) 690

8. **Laws 1880,** chap. 567, fixing bank discount at 6 per cent **repealed** the **penalties** imposed by **Laws 1870,** chap. 163, for taking discount in excess of 7 per cent. *Id.*

9. A later statute does not repeal a special one, unless direct reference is made to the latter with that intent, or a repeal **by implication** is manifest.
Garrett v. *Janes* (Md.) 493

10. The **power** to **regulate porches,** etc., **in Mount Vernon Place, given to the**

City of Baltimore, by the **Act of 1883,** chap. 180, is **not taken away by the Act of 1854,** chap. 9, nor by ordinance No. 86, of 1874. Bryan, *J.*, dissents.
Garrett v. *Janes* (Md.) 403

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SUBROGATION.

1. An equitable right to subrogation cannot exist where it cannot be made out without resorting to some agreement void for **usury.**
Perkins v. *Hall* (N. Y.) 751

2. One paying off liens upon another's realty, and receiving a **mortgage void for usury,** is not entitled to subrogation. *Id.*

3. An **executor paying out** of his **own money** preferred debts of testator is entitled **to** be **reimbursed** out of funds of estate in **the** hands of a subsequent administrator appointed on his removal, in preference to an unpreferred claim against the executor, the estate being insolvent.
Chamberlin v. *McDowell* (N. J.) 472

SURFACE WATER. See WATERS AND WATERCOURSES.

SURGEON. See PHYSICIAN AND SURGEON.

SUIT. See ACTION OR SUIT.

SURETY. See PRINCIPAL AND SURETY.

TAXES.

I. IN GENERAL.
II. CORPORATIONS.
III. ASSESSMENT.
IV. COLLECTOR; PENALTIES.
V. SALE.
  a. *In General; Notice, etc.*
  b. *Validity; Vacating.*
  c. *Deed; Purchaser.*
  d. *Redemption.*
BRIEFS AND NOTES.

I. IN GENERAL.

1. **Laws** 1880, chap. 542, as amended by Laws 1881, chap. 361, and Laws 1882, chap. 151, in regard to taxes, are free from **constitutional** objection and valid.
People v. *Horn Silver Mining Co.* (N. Y.) 220

2. Laws 1869, chap. 909, § 4, amended by Laws 1871, chap. 283, providing for the **appropriation** of taxes **to payment of municipal bonds** in **aid of railroads,** applies to any municipality which has such bonds outstanding.
Clark v. *Sheldon* (N. Y.) 923

3. It makes no difference as to the **duty of** the **county treasurer** that the taxes were not expressly collected or paid over to him for said purpose. *Id.*

4. Section 4 is not in conflict with the Constitution. *Id.*

5. It is no defense to a proceeding by a taxpayer to compel such application that the petition does not put the amount of taxes claimed to be applicable to that purpose high enough; the county treasurer may be compelled to set aside for a **sinking** fund all the taxes which may appear to have been paid to him for that purpose. *Id.*

6. Nor is it an answer to such proceeding that if the county treasurer should do so, there would be a **deficiency in other funds.** *Id.*

II. CORPORATIONS.

7. Where a corporation had filed its certificate of organization on the 23d of June, 1884, but no practical organization or subscription to stock had been made until the September following, when the company announced itself ready for business, an assessment of taxes upon the **capital stock** for the year commencing July 1, 1884, is invalid and void, under Act of March 3, 1877, governing assessment of taxes in **District of Columbia.**
Anglo-American Ins. Co. v. *Dist. of Columbia* (D. C.) 355

8. In reviewing an assessment against a **railroad,** the court below may consider **reports of** the **company** under oath, as a means of testing its earning capacity.
People v. *Hicks* (N. Y.) 739

9. A **foreign** corporation mining ore and **manufacturing** it into base bullion, in Utah, and partly refining it in Chicago, and not having or carrying on in New York any refining or manufacturing establishment, and only delivering within that State its bullion to the United States assay office to be further refined for compensation, is not **exempt from** taxation under Laws 1881, chap. 361. Peckham, *J.*, dissents.
People v. *Horn Silver Mining Co.* (N. Y.) 220

10. Under Act 1881, § 3, it is not sufficient to exempt a corporation from taxation that it is a manufacturing corporation, but it must also carry on **manufacture within** the State. *Id.*

11. Where the principal officers of the corporation have their offices in New York City, its directors' meetings are held and its dividends declared and paid there, and, in addition thereto, a substantial part of the regular business of the corporation is continuously carried on there during the whole year, the corporation is brought within the **Act of 1881, as "doing business within the State."** *Id.*

12. In computing the taxes to be paid by a manufacturing company, its entire **capital stock** was properly taken **as the basis of** taxation. *Id.*

13. By Laws 1885, chap. 501, the basis of computing a **tax** under Act 1881, § 3, to be paid by a corporation, was fixed as the amount of capital stock employed within the State. *Id.*

14. Where a judgment was entered for the tax before the passage of the Act of 1885, defendant can have no benefit from its provisions authorizing the comptroller to **adjust** all **accounts against** a corporation **for** all **taxes** and penalties under the Act of 1881. *Id.*

III. ASSESSMENT.

15. Assessment for water rates, against **vacant lots** in Brooklyn, under the Laws 1859, chap. 396, § 24, *held*, illegal and void, the statute failing to provide for **notice** to the lot owners or opportunity to be heard. Finch and Andrews, *JJ.*, dissent.
Remsen v. *Wheeler* (N. Y.) 691

16. Where **vacant lots,** belonging to minors, had been **sold** to enforce such illegal assessments, and a proceeding was had to enable the owners to sell a part of the land to pay off the incumbrance, and the **purchaser** paid to the city the amount of the outstanding illegal tax sale certificates on account of the purchase money, *held*, that while the money remained in possession of the city, an **action** was maintainable **by the lot owners** to compel the delivery thereof to them. *Id.*

17. Municipal assessment for permanent improvements upon land are apportionable between the life tenant and the remainderman; ordinary taxes of government are properly **chargeable** to the **life tenant** alone. Authorities cited.
Thomas v. *Evans* (N. Y.) 804

18. An assessment will be **invalid if** there is any material **departure from** the statutory form of **oath** to be taken by the assessors and attached to the assessment roll.
Shattuck v. *Bascom* (N. Y.) 87

19. The substitution of **"hereof" for "of proof"** in the clause "value of the said real estate has been changed by reason of proof produced before us" in the assessors' oath prescribed by Laws 1851, chap. 176, will render an assessment under that Act wholly **void.** *Id.*

20. In the absence of **notice of** the **completion of** the assessment **roll,** the fifteen days during which a **certiorari** may be applied for will not be set running.
People v. *Hicks* (N. Y.) 739

21. The object of the **notice** of delivery of the assessment roll is to set running the fifteen days within which a *certiorari* may be sued out; and the **omission** to do so is **not fatal** to the validity of the assessment.
People v. *Assessors of Wilson & Somerset* (N. Y.) 51

22. **Delay in delivering** to the town clerk the verified assessment **roll,** required to be delivered on or before the first day of September, by Laws 1880, chap. 269, § 9, which does not result in prejudice to one claiming to be aggrieved by the assessment, and which permits the roll to remain open for inspection in the hands of the clerk fifteen days after notice, does **not vitiate** the assessment. *Id.*

23. The court of appeals will rest upon the judgments of the courts below **as to valuations** for assessment.
People v. *Hicks* (N. Y.) 739

24. Pub. Laws 1884, p. 269, supplementary to the Act to Regulate Practice of Courts of Law, limiting allowance of **certiorari** to review tax assessment, to recover which any sale has been made by virtue of any special or local law, to six years from such sale, is **not retroactive.**
Hunt v. *State* (N. J.) 114

IV. COLLECTOR; PENALTIES.

25. The Act of 1872, chap. 329, providing that if any **collector** shall willfully **detain** taxes collected for six months, etc., he shall, upon conviction, be **imprisoned,** etc., is not in conflict with the Constitution of this State which abolishes imprisonment for debt.
State v. *Nicholson* (Md.) 415

26. It is not necessary to aver in the **indictment against** tax **collector,** under Act of 1872, chap. 329, that the money is still detained. The indictment is sufficient if it avers that defendant was collector of the state and county taxes for the county, and as such, collected the taxes for the year. *Id.*

27. Defendant is liable to the **penalties** imposed by Act of 1881, § 2, for **neglecting** to **pay** the **taxes** within the time specified therein.
People v. *Horn Silver Mining Co.* (N. Y.) 220

V. SALE.

a. *In General*; *Notice, etc.*

28. A **notice** of sale, etc., required by **Laws**

1843, art. 3, § 20, made out in July, 1868, to the person appearing as assessed on the assessor's book for 1867, must be taken to be a notice to the then **last assessed owner** of the premises.
People v. *Cady* (N. Y.) 296

29. The **affidavit of service of notice** of sale, etc., required by article 3, § 23, of said Act, need not state the fact of **residence** of person making the affidavit. *Id.*

30. An **affidavit** stating that said **notice was served** by "leaving the same with a member of the family of the person last assessed as owner, at his place of residence, No. 68 Fifth Avenue," *held*, a sufficient compliance with article 3, § 21, of said Act. *Id.*

31. A **commissioner of deeds** is authorized to take said **affidavit of service**, and where the venue of the affidavit is stated as "City and County of New York," and the certificate thereto is signed by a person as "commissioner of deeds," the presumption is that the person so signing is a commissioner of deeds within the place stated in the venue. *Id.*

32. An **advertisement of sale** of lots must be sufficient in description to warn the owner and direct the attention of others to the particular property to be sold.
Hunt v. *State* (N. J.) 114

33. Under Laws 1843, chap. 230, art. 3, § 8, in advertising lots lying contiguous to each other and belonging to the same person, in one parcel, to be sold for nonpayment of taxes in New York City, the name of the person in whose name as owner or occupant the lots are assessed is to be used.
People v. *Cady* (N. Y.) 296

34. An action to prevent the **treasurer of Queens County** from collecting from trust funds in his custody the **fees** allowed upon tax sales to the several towns in the county, without the audit of the town board, is maintainable by a taxpayer, under Laws 1881, chap. 531.
Warrin v. *Baldwin* (N. Y.) 768

b. *Validity; Vacating.*

35. When a tax sale is for the aggregate taxes of several years, the entire sale will be rendered invalid, if the **tax for any one** of the **years** included is **invalid.**
Shattuck v. *Bascom* (N. Y.) 87

36. In this case, *held*, the **return** of taxes was made too late in time and **too defective** in form to constitute a valid basis for the sale of land.
Vandermark v. *Phillips* (Pa.) 905

37. Sess. Laws 1855, chap. 427, §§ 83, 84, give no authority to an owner of lots sold for taxes either to make the demand that the comptroller **cancel the sale,** or, upon his refusal, to review that determination.
People v. *Chapin* (N. Y.) 251

38. The statutory **power of** the **comptroller,** when exercised under those sections, is for the benefit of the purchaser and cannot be invoked by the owner of the land sold. *Id.*

39. The comptroller can be required by **mandamus** to hear an application by a purchaser at a state **tax** sale, to **cancel** the **sale** and refund the purchase money, on the ground of illegality of tax. *Id.*

40. The comptroller's **power to cancel** such **sales** may be exercised **when** the invalidity depends upon extrinsic facts to be established by evidence. *Id.*

41. The comptroller has power to receive affidavits and to **administer oath to witnesses** produced before him, on such inquiry. *Id.*

c. *Deed; Purchaser.*

42. After a tax sale and comptroller's deed given therefor, the original owner executed to a third person a deed of the land, which was in reality a mortgage, and the grantee therein sued the holder of the comptroller's deed to remove the same as a cloud on title, which suit resulted in a judgment in favor of such holder, thereafter the plaintiff in that suit reconveyed the land to the original owner. *Held*, that the original owner was **not estopped** by said judgment, in the suit brought by his mortgagee, **from** afterwards **questioning** the validity of the comptroller's **deed,** in an action against him by the holder of such deed.
Shattuck v. *Bascom* (N. Y.) 87

43. The **county commissioners** can only convey by deed what they have previously sold by public sale, excepting, perhaps, a **conveyance** to the owner by way of redemption.
Kunes v. *McCloskey* (Pa.) 601

44. The **deed** is merely evidence of title. *Id.*

45. The **purchaser** has an **inchoate title** the moment the property is knocked down to him, which becomes perfect with the payment of the purchase money. *Id.*

46. When land embraced by a junior title is only in part included under an elder warrant, and the land embraced by each warrant is assessed as two distinct tracts for the same **years** as unseated, and sold at the same time to two **different purchasers,** the **seniority of** the **title** must be made the test of right between the two purchasers. *Id.*

d. *Redemption.*

47. During the period allowed for redemption from a tax sale, the **equitable title** is in the owner; the **legal title** is in the treasurer or commissioners. *Id.*

48. A **sale of land for** a term of years for nonpayment of **taxes in New York City** is not rendered void by the fact that the notice to redeem required the owner to pay the tax with interest from the date of sale; whereas, the purchaser did not pay his money upon such sale until some time thereafter.
People v. *Cady* (N. Y.) 296

49. After the **time** of redemption has **expired** an **equity** remains **in** the **owner,** sufficient to warrant the permitting of redemption at any time before a public sale to other parties. *Id.*

BRIEFS AND NOTES.

Direct taxes to be laid by rules of apportion.

ment; all others by rule of **uniformity.** (D. C.) 358

Corporation; foreign basis of taxation. (N. Y.) 221

Railroads are to be assessed in the same manner as individuals. (N. Y.) 52

Rule for estimating value of railroad property. (N. Y.) 51

Exemption; manufacturing corporation. (N. Y.) 221

Public property. (Pa.) 909, 911

Assessment cannot be attacked collaterally. (N. Y.) 769

Statutory form of oath to roll to be followed. (N. Y.) 88

Assessors act judicially in the valuation of property; and their return is conclusive. (N. Y.) 52

Where it appears by the assessors' return that they assessed the property in the statutory mode, the court will not interfere. (N. Y.) 52

Sale; fees of county treasurer. (N. Y.) 768, 769

Advertising contiguous lots. (N. Y.) 297, 298

Defect in advertisement. (N. J.) 116

Effect of irregularities in return. (Pa.) 906

In gross or separately. (N. Y.) 297, 298

Of lot for joint tax on two lots is void. (Pa.) 907

Purchaser must see that notice of proof of service complies strictly with law. (N. Y.) 298

Vitiated by one erroneous tax. (N. Y.) 88

Powers of comptroller on application to **set aside sale.** (N. Y.) 293, 294

Right to avoid, lost by neglect. (N. Y.) 298

Redemption; notice. (N. Y.) 297, 298

Appropriation of taxes **to** payment of municipal **bonds** in aid of railroads. (N. Y.) 923, 924

Illegal; recovery back. (N. Y.) 692

Certiorari to review alleged erroneous assessment. (N. Y.) 51, 52

TENANT. See LANDLORD AND TENANT.

TENANTS IN COMMON. See JOINT TENANTS AND TENANTS IN COMMON.

TENDER. See SALE, 6.

TESTAMENTARY CAPACITY. See WILL.

TORT.

See ARREST; CARRIERS; DAMAGES, II., III.; FALSE IMPRISONMENT; FALSE PRETENSES; HUSBAND AND WIFE, III.; LIBEL AND SLANDER; SEDUCTION; TROVER AND CONVERSION.

TOWNS. See MUNICIPAL CORPORATIONS.

TRADEMARK.

BRIEFS AND NOTES.

Assignment; consideration. (N. Y.) 255

TRESPASS. See INJUNCTION, 2.

1. An equitable title to land is sufficient to maintain trespass **for cutting standing timber** therefrom, contrary to Act of March 29, 1884.

Kulp v. *Bird* (Pa.) 576

2. The court may **double** the single **damages** given by the jury. *Id.*

3. In trespass for entering premises of plaintiff and destroying herbage, etc., therein growing, *held*, a **division fence** established by owners of adjoining lands and acquiesced in by them and their successors for twenty-one years, is **conclusive** upon them and those holding under them.

Grove v. *McAlevy* (Pa.) 143

4. Plaintiff could not recover unless he was in **actual possession** of the premises at the time of the alleged trespass. *Id.*

5. In *trespass quare clausum fregit* plaintiff need not give affirmative proof that he has sustained any particular amount of **damages.**

Baltimore & O. R. R. Co. v. *Boyd* (Md.) 435

BRIEFS AND NOTES.

An action does lie in favor of owners in possession against **tort feasor.** (Pa.) 507

For **injury to land** committed by person in actual possession. (N. Y.) 88

For **cutting standing timber;** right of court to double damages. (Pa.) 581

Plaintiff must show ownership of land at time timber cut therefrom. (Pa.) 581

Proper remedy where **arrest** made on warrant charging **no crime.** (Pa.) 502

TRIAL.

I. BY COURT.
II. PRACTICE; MOTIONS; COUNSEL.
III. EVIDENCE; OBJECTIONS.
IV. INSTRUCTIONS.
V. JURY; VERDICT.
BRIEFS AND NOTES.

See EVIDENCE; JUDGMENT; NONSUIT; PLEADING; NEW TRIAL; WITNESS.

I. BY COURT.

1. **An action** by a stockholder of a bank **against** its **directors** to call them to account as trustees is triable by the court.

Brinckerhoff v. *Bostwick* (N. Y.) 711

2. Under Constitution, art 4. § 22, when a trial is conducted **by less than** the **whole number of** the **judges** of a circuit court, a party may have the **question reserved** for the three judges in banc; and this decision will be conclusive.

Costigin v. *Bond* (Md.) 395

3. The **motion for a reservation** must be **entered** during the sitting at which the decision is made. *Id.*

4. Where the **motion is not so entered,** the court in banc has no jurisdiction. *Id.*

5. The word **"sitting"** does not mean the term but only the time until the court adjourns for the day. *Id.*

II. PRACTICE; MOTIONS; COUNSEL.

6. Trial when the **motion for a reference** is made upon an affidavit of plaintiffs' attorney, and also upon the pleadings and the bills of particulars, the court can judge whether any account will be involved and no opposing affidavit is necessary.
Untermeyer v. *Bernhauer* (N. Y.) 709

7. On a **motion for compulsory nonsuit,** it is the duty of the court to deduce from plaintiff's evidence every reasonable inference of fact in his favor.
Jones v. *Bland* (Pa.) 859

8. **Counsel** can **not argue** to the jury **against** the **instruction** of the court.
Baltimore & O. R. R. Co. v. *Boyd* (Md.) 485

9. Where a **complaint** is **dismissed** on the **opening** of counsel, all the facts referred to in his opening or offers of proof should be considered unless objection to proof of such additional facts is made on the specific ground that it is not admissible under the pleadings.
Clews v. *Bank of N. Y. Nat. Bkg. Asso.* (N. Y.) 275

III. EVIDENCE; OBJECTIONS.

10. Where an **offer** of evidence as a whole **includes irrelevant** evidence, it is proper to **refuse** the **whole** offer.
Heath v. *Slocum* (Pa.) 648

11. Where an **offer** of evidence **contains several subjects** the court is not bound to treat it piecemeal, admitting part and rejecting the rest.
Citizens & M. Sav. Bank v. *Gillespie* (Pa.) 528

12. Where the assumptions contained in a **hypothetical question** are not proved, the question is inadmissible.
Reber v. *Herring* (Pa.) 841

13. A **general objection** to evidence is sufficient where the evidence is inadmissible in its nature.
Tozer v. *New York Cent. & H. R. R. R. Co.* (N. Y.) 339

14. An **error in** the **admission** of evidence is **not cured** by striking it from the record and **instructing** the jury to **disregard it.** Authorities cited. Dis. Op.
People v. *Smith* (Pa.) 220

15. It is too late, after prayers granted, to raise the **objection** that **evidence** was **illegal.**
Lamb v. *Taylor* (Md.) 377

IV. INSTRUCTIONS.

16. It is error to grant instructions to the jury which are **not** sufficiently **definite** and are calculated to mislead.
Baltimore & O. R. R. Co. v. *Boyd* (Md.) 485

17. A **misleading** charge is good ground for reversal.
Reber v. *Herring* (Pa.) 841

18. A **prayer** to instruct the jury "that, on the pleadings and all the evidence in the cause, their verdict ought to be for the defendants," is **too general,** and should be rejected.
Shipley v. *Shilling* (Md.) 418

19. A charge which is **not** an **adequate** presentation of the case to the jury is erroneous.
Reber v. *Herring* (Pa.) 841

20. If a request to charge be **not supported by** any **evidence,** the court may refuse it.
Humphreys v. *Woodstown* (N. J.) 109

21. The charge of the court, or refusal to charge, can be assigned for error only when the **party** is **injured by** the **ruling.** *Id.*

22. Mere **technical error in** the charge of the court is not ground for reversal.
Boswell v. *Collins* (Pa.) 487

V. JURY; VERDICT.

23. To authorize the judge to **take from** the **jury** the question of fraudulent intent arising upon the extrinsic facts and direct a verdict, the evidence must be undisputed.
Bagley v. *Bowe* (N. Y.) 258

24. In a **feigned issue** to try the ownership of a promissory note of a third person, claimed to have been delivered by a decedent as a gift to the holder, the question of **undue influence is for** the **jury** to determine.
Osthaus v. *McAndrew* (Pa.) 148

25. The **jury** may **take** to their room an **itemized account,** used by counsel in the course of the trial, but not offered in evidence, proof as to the items of the account having been given, and the court having instructed them not to use it as evidence, except for the purpose of aiding the memory.
Rorer's Exrs. v. *Rorer* (N. J.) 107

26. The **supreme court** has the power to **amend verdicts** in ejectment, especially those of an equitable kind.
Thompson v. *Mattern* (Pa.) 621

27. The court may **put in** proper **legal form a verdict,** if it be not changed in substance.
Humphreys v. *Woodstown* (N. J.) 109

28. If the point at issue can be concluded from the **finding** of the jury, the **court** will **mold** it into form and give it due and legal effect. Authorities cited. *Id.* 114

BRIEFS AND NOTES.

By court. (N. Y.) 329

Authority. (N. Y.) 745

Right to trial **by jury.** (N. Y.) 712

Withdrawing incompetent **evidence** from consideration of jury. (N. J.) 110

Reading of immaterial evidence without objection. (Pa.) 618

Notice to produce papers. (Pa.) 587, 646

To obtain a verdict, plaintiff must make out his case with reasonable certainty. (Pa.) 887

Improper **argument** of counsel. (Md.) 436

Instructions; taken as a whole. (Pa.) 177, 194, 833

Interpreted in connection with evidence. (Pa.) 175

Statement of law applicable to facts of case. (Pa.) 152, 599

Commenting upon evidence. (Pa.) 178, 198–9, 573, 618

Resume of evidence. (Pa.) 539

Misleading. (Pa.) 145, 152, 198, 511, 539, 578, 617, 838

Refusal of nonbeneficial point not error. (Pa.) 179

Errors. (Pa.) 178

Submission to jury. (Pa.) 860, 887

Sufficiency of evidence to submit. (Pa.) 150, 157, 203, 641, 891

Directing verdict. (N. Y.) 88, 270, 738, 756, 785; (Pa.) 151, 157, 176, 203, 596–9

Verdict; form. (N. J.) 111

Power of court to correct or amend. (N. J.) 111

Conclusiveness. (N. Y.) 78

When damages only are to be recovered if none are assessed, the verdict is bad; but it is otherwise in ejectment, debt, etc., when anything is to be recovered besides damages. (N. J.) 111

Whatever is not found in a special verdict is supposed not to exist. (Pa.) 210

TROVER AND CONVERSION.

1. The **refusal** to **deliver** up another's chattel **on demand** is a tortious conversion of the chattel.
Wheeler & W Mfg. Co. v. *Heil* (Pa.) 179

2. Where one party has the property of another in his possession and refuses to surrender it upon demand, a jury may **infer** a **conversion.**
Norton v. *Dreyfuss* (N. Y.) 785

BRIEFS AND NOTES.

Conversion; what constitutes. (N. Y.) 785

Liability of infant for conversion. (Pa.) 181

Of bailee. (Pa.) 181

TRUSTS.

I. CREATION; EXPRESS; IN GENERAL.
II. RESULTING.
III. TRUSTEES.
  a. *Management of Trust, etc.*
  b. *Rights; Liabilities; Accounting; Commissions.*
  BRIEFS AND NOTES.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 7–10; CEMETERIES; DEVISE AND LEGACY, IV.

I. CREATION; EXPRESS; IN GENERAL.

1. A **deed** of land in trust to sell and convey the same and invest the proceeds, and pay the income thereof to grantor's wife during life for her support and that of her children, **created** a valid power in trust **to convert** the land into money **and invest** the proceeds in securities in which the wife was to have a life estate only.
Nearpass v. *Newman* (N. Y.) 764

2. The **reversionary interest** in the land remained in the creator of the trust. *Id.*

3. The limitations and conditions of the **trust followed** the **property** into which the estate was converted. *Id.*

4. A **subsequent** agreement and **quitclaim deed** by the said grantor to the trustee were intended as security for the performance of grantor's agreement, and the grantor retained a reversionary interest. *Id.*

5. A subsequent **conveyance** by such trustee **to a substituted trustee** reconstituted the property a trust fund. *Id.*

6. By one clause of his will a father devised his residuary estate to his daughter, "to have and hold the same, unto her heirs and assigns forever," and in a following clause committed to her the guardianship of his grandchild, the child of a deceased daughter, with the words: "I enjoin upon her to make such **provision for** such **grandchild** out of my residuary estate now in her hands, in such manner, at such times, and in such amounts **as** she may judge to be **conducive** to the welfare of such grandchild and her own sense of justice and Christian duty should dictate." *Held*, such provision is **not ground for** a complaint by the general guardian of the grandchild to have a **trust** declared in her favor.
Lawrence v. *Cooke* (N. Y.) 101

7. A deed to A in trust for certain infants, with power to sell or mortgage without the appointment of a guardian, and granting the land, etc., to the party of the second part, and "to their heirs and assigns forever," etc., creates a valid general trust power wholly for **benefit of** the **infants;** and mortgages by A to third parties to secure her husband's debts are not a valid **execution of** the **power** and are void.
Syracuse Sav. Bank v. *Holden* (N. Y.) 706

8. A **land patent** is granted to the persons who are entitled and who have paid, and if **another procures** the patent he takes **as trustee.**
Kulp v. *Bird* (Pa.) 576

II. RESULTING.

9. A resulting trust can **arise** only **when** title has been obtained by fraud or purchased with the money of another.
Brickell v. *Earley* (Pa.) 520

10. The **proof** to establish a parol trust must in all particulars be **clear** and specific. *Id.*

11. A resulting trust in lands may be proved by **parol.**
Jackson's Appeal (Pa.) 850

12. Payment of purchase money, possession, and improvements by the *cestui que trust*, and declarations of the alleged trustee are **evidence to prove** a resulting trust. *Id.*

13. The Statute of **Limitations** is no bar to an action to establish a resulting trust where the *cestui que trust* continues in possession. *Id.*

14. When the *cestui que trust* occupies the land, the **presumptions are** wholly **against** the trustee. *Id.*

15. The court of common pleas may entertain a **bill to establish** a trust in lands sit-

uate in another county, when the parties are within its **jurisdiction.**
Jackson's Appeal (Pa.) 350

III. TRUSTEES.

a. *Management of Trust, etc.*

16. Where there has been an **unauthorised payment** of funds held in a fiduciary capacity, the loss must fall upon him who makes the payment.
Owings v. *Rhodes* (Md.) 407

17. A trustee **paying an infant,** without the sanction of the court, may be compelled to pay again to the infant when he comes of age.
Rogers v. *Traphagen* (N. J.) 476

18. Where the account is small, for the purpose of saving taking out letters of guardianship, the **court** will sometimes **direct payment to a relative of the infant.** Authorities cited. *Id.* 478

19. Where a trust **fund** was **misappropriated by a trustee** before his assignment as an insolvent debtor, it is not entitled to preference in payment from funds in assignees hands.
Cavin v. *Gleason* (Pa.) 285

20. The court may order trust **property included in assignment** for benefit of creditors to be **restored** to the trust; but to follow such funds they must be identified. *Id.*

21. A **sale of real estate,** under a power created by a will, should not be set aside, if the trustee has exercised care and caution, and has obtained a good price. Authorities cited.
Bleakley v. *Bleakley* (Md.) 395

22. **Lands** lying about ten miles from Baltimore, and surrounded by lands used for farming purposes, may properly be **sold as a farm** by the trustee. *Id.*

23. A **petition** by **one not entitled** to come in as complainant, filed in a suit terminated fifteen years before, against one not a party to, and who has not been appointed trustee in, the suit, and who has no court funds in his hands, **charging** him to be a **self constituted trustee** of certain funds in his hands, cannot be maintained, to make him account for his misdoings in regard to such funds, and to bring them into court for distribution, the suit having been instituted for an entirely different purpose.
Rappanier v. *Bannon* (Md.) 420

24. A **fund** held in trust under a will, and directed by a decree of the orphans' court "to be paid to defendant, to be applied to his personal support and maintenance, or in his discretion to the support and education of any children he may have, so as the same shall not be in any manner assignable or anticipated, nor liable to his debts or liabilities, or that the trustee may, if thought needful by him, apply the fund in like manner for the benefit of the said defendant and any of his children," is **not attachable.**
Prentice v. *Pleasonton* (Pa.) 484

b. *Rights; Liabilities; Accounting; Commissions.*

25. When, at the time of an assignment of all of her real estate by an aged person of weak mind, the persons to whom it was made held a power of attorney from her enabling them to take charge of her affairs, and had obtained from her absolute possession of all her estate, they were trustees for her; and the law will hold them to the **strictest account** for the property, and the assignment will be held void.
Morton's Admr. v. *Morton* (N. J.) 134

26. When the duties imposed upon the **executors** are active, they will be **deemed trustees** for the performance thereof, to the same extent as though declared to be so by the most explicit language.
Ward v. *Ward* (N. Y.) 67

27. Where a trust is devolved upon executors by will, an error in the **executors' account** may be **corrected** by the orphans' court **in** their subsequent **accounts as trustees.**
Griggs v. *Shaw* (N. J.) 472

28. A trustee inexcusably delaying accounting for trust money, and using it as his own, will be **charged with interest.**
Rappanier v. *Bannon* (Md.) 420

29. When the **trustee** is the **husband of** the **cestui que trust,** nothing short of clear and satisfactory proof will establish that the obligation of the former to the latter has been discharged or forgiven.
Rusling v. *Rusling's Exrs.* (N. J.) 129

30. The **Statute of Limitations** is not a bar to such trusts. *Id.*

31. A trustee can not be **protected from accounting** because of the **lapse of time,** or because he has kept no accounts, or has seen fit to appropriate and claim all the trust estate as his own.
Reeves v. *Beekman* (N. J.) 453

32. Where the auditor appointed to audit the **account** of a trustee refuses, for lack of vouchers, to allow certain credits claimed, finds numerous evidences of mismanagement through lack of business qualifications on the part of the trustee, but not through dishonesty, and accordingly reduces the trustee's commissions to the amount due him upon the business properly done, some of the exceptions to the account being dismissed and some sustained, it is not error to decree as to **costs** that they be divided between the estate and the accountant.
Kilgore's Appeal (Pa.) 201

33. The **commissions** of a trustee appointed by the circuit court are not a matter of right in the absence of a provision therefor made in the decree.
Rappanier v. *Bannon* (Md.) 420

34. An agreement upon a trustee's third accounting that he should receive 5 per cent commission on gross receipts of estate and that it should cover his second accounting, *held,* it was improper to allow him 3 per cent additional commission upon income upon which he had been allowed 2 per cent commission in first account.
Ballentine v. *Wood* (N. J.) 465

BRIEFS AND NOTES.

In general; raising a trust by mere inference from doubtful words is not approved. (N. Y.) 102

Uncertainty, (N. Y.) 103,105

Express. (N. Y.) 708

No devise in express words is necessary to create trust estate. (N. Y.) 68

Cessation. (N. Y.) 745

Reversion. (N. Y.) 765

Passive. (N. Y.) 707, 745

Resulting. (N. Y.) 318

Evidence must be clear and explicit. (Pa.) 650, 856

Enforced by ejectment. (Pa.) 855

Trustee residing in one State may be compelled to make a **sale** of real estate situated in another. (Pa.) 856

Liability of **trustee** for losses upon investments. (N. Y.) 801

Trustee not permitted to make profit out of trusteeship. (N. Y.) 270

Action by trustee in his own name; parties. (N. Y.) 741

Commissions. (Pa.) 202

Forfeiture by trustee of right of commissions by use of trust property. (Pa.) 494

Trustee litigating in opposition to trust cannot be allowed commissions. (Pa.) 494

Right of **beneficiaries.** (N. Y.) 708

Right of action by beneficiary where trustee guilty of fraud. (N. Y.) 318

TURNPIKE COMPANIES.

1. In a suit by a turnpike company to recover **tolls,** it is no defense that the company has not complied with its charter in making its road, nor that such **road** was **not** in a **proper state** when defendant used it.
Stults v. *East Brunswick & N. B. Tpke. Co.* (N. J.) 108

2. The **company** is **answerable** for such delinquencies to the public at large in a public prosecution, but **not to** any **individual.** Authorities cited. *Id.* 109

UNDUE INFLUENCE. See FRAUD AND FRAUDULENT CONVEYANCE, I.; WILL, 1,6.

UNITED STATES. See CLAIMS AGAINST UNITED STATES.

USE AND OCCUPATION.

A **licensee** can maintain an action for use and occupation against the owner of the land to recover compensation for possession by the owner.
Lockard v. *Robbins* (Pa.) 565

BRIEFS AND NOTES.

Relation of landlord and tenant must exist. (Pa.) 568

USER. See WAYS, I

USES. See CHARITIES AND CHARITABLE USES.

USURY.

1. An action to recover **penalties** imposed by Laws 1870, chap. 163, for taking discount in excess of 7 per cent could not be maintained after the Act of 1880, chap. 567, fixing **bank discount** at 6 per cent.
Nash v. *White's Bank of Buffalo* (N. Y.) 690

2. An equitable right to **subrogation** cannot exist where it cannot be made out without resorting to some agreement void for usury.
Perkins v. *Hall* (N. Y.) 751

3. One paying off liens upon another's realty and receiving a mortgage void for **usury** is not entitled to subrogation. *Id.*

4. When an existing valid debt is renewed, or time of payment extended, or a valid security held therefor is canceled by a subsequent agreement or security void for usury, the **original** debt or **security** is **not invalidated.** Authorities cited. *Id.* 752

5. A deed and lease, *held* to be security for a loan, at usurious interest; and **only** the amount found due at **legal interest,** deducting payments, **allowed priority** over plaintiff's mortgage.
Gaither v. *Clarke* (Md.) 438

6. Whoever desires the aid of the Statute of Usury must make out his title to relief by **allegations** as well as **proof.**
Long Island Bank v. *Boynton* (N. Y.) 738

7. A **usurious contract** must be proved as laid. *Id.*

8. The usual rule for the **construction of** pleadings applies to an **answer** of usury.
Lewis v. *Barton* (N. Y.) 781

9. Where the case turns wholly upon the defense of usury, it is unimportant that there is no sufficient **denial** in the answer **of** the **averments in** the **complaint.** *Id.*

10. Where plaintiff took a note and a mortgage as collateral security, with notice that the note was accommodation paper, the **certificate of mortgagor** that the note was subject to no defense, constitutes **no estoppel** against **setting up** the defense of usury to defeat the mortgage. *Id.*

11. The **burden of proving** usury is on alleging party.
Rappanier v. *Bannon* (Md.) 420

BRIEFS AND NOTES.

Usurious **contract** cannot be foundation of valid claim. (N. Y.) 752

Junior **mortgagees** may set up. (Md.) 439

Pleading and **proof** of. (N. Y.) 738

Tender. (Md.) 439

Must be clearly proved. (N. Y.) 782

Burden of proof. (Md.) 439

VENDOR AND PURCHASER. See DEED; EASEMENT; EJECTMENT; FRAUDS; STATUTE OF; SALE; SPECIFIC PERFORMANCE.

1. Where the consideration for the sale of land is the conveyance of other lands by vendee to a third person, and the latter deed is duly executed and delivered, the promise of the third person to the vendor: to pay him a certain sum as the consideration for the conveyance of the latter land, is not within the

Statute of Frauds, and need not be in writing.
Freed v. *Richey* (Pa.) 153

2. The owner of two adjoining city lots, Nos. 141 and 143, conveyed lot No. 143 to defendant's grantor, by metes and bounds, as being twenty-two feet wide, "with the buildings and improvements thereon," "together with all and singular the tenements, hereditaments and appurtenances thereto belonging." The **house on the lot conveyed extended beyond** the **line** called for by the deed five feet on lot No. 141 on the east, up to the west wall of a building thereon, used as the east wall of the house, the greater part of which was on the land conveyed, but was not used as a party wall. The original grantor being still the owner of lot No. 141 brought ejectment for the said five feet of lot No 141. *Held,* said deed conveyed only that part of the house which is on the land described therein, and that **no easement exists for** the **extension** of the house upon the land not conveyed.
Griffiths v. *Morrison* (N. Y.) 773

3. The **vendor** is regarded as **trustee** of the land for the purchaser, **and** the **purchaser** as the trustee of the purchase money.
Bostwick v. *Beach* (N. Y.) 667

4. Where a decree is sought to be opened to let in defendant to claim **interest on** the **purchase money,** plaintiff should be let in to prove **damages** for deteriorations. *Id.*

5. The modified decree should provide for interest and damages. *Id.*

6. The vendee, having obtained a decree for **specific performance,** may be allowed the **damages** sustained during the pendency of the suit, by deterioration from waste committed by defendant. *Id.*

7. *Bona fide* **purchasers,** by virtue of a judicial sale of real property, obliged to yield their title to a superior title, are entitled to value of **improvements.**
Gittings v. *Worthington* (Md.) 442

8. A vendor in good faith is not responsible for his **title,** beyond his covenants. *Id.*

9. If a person in peaceable possession under claim of lawful title, but really under a defective title, makes in **good faith** permanent **improvements,** the true owner, who seeks the aid of equity to establish his own title, will be compelled to reimburse the occupant for his expenditure.
Thomas v. *Evans* (N. Y.) 800

10. Evidence that an **amicable ejectment between** vendor and vendee was for the purpose of hindering a judgment creditor of vendee from reaching the property, and that the payments of rent by vendee were to apply on the purchase money, should have been submitted to the jury; and if such intent was found to exist, the **transaction** would be **void.**
Miles v. *Lewis* (Pa.) 862

11. **Vendee's testimony** as to such intent was not incompetent. *Id.*

12. A vendor, upon vendee's request, may bring **ejectment,** take confession of judgment to be released on payment of sum due by vendee at stipulated time, and upon **vendee's failure** to **perform** condition, issue execution and recover possession of the land. Authorities cited. *Id.* 865

BRIEFS AND NOTES.

Liability of **vendor** for defective title. (Md.) 445; (Pa.) 522

Not liable beyond covenant in deed. (Md.) 445

Nominal damages recoverable against vendor for breach of parol sale. (Pa.) 153

Rights of vendee; improvements. (N. Y.) 802

Upon the avoidance of sale. (N. Y.) 801

Bona fide purchaser. (N. Y.) 802; (Pa.) 625

Notice. (Md.) 445; (N. Y.) 88, 819; (Pa.) 142, 547

VENUE. See ACTION, 12, 13.

VERDICT. See EJECTMENT, II.; TRIAL, V.

VILLAGES. See MUNICIPAL CORPORATIONS.

VOLUNTARY PAYMENT. See PAYMENT.

VOTERS AND ELECTIONS.

1. Under Constitution, art. 8, § 2, the **division of townships,** wards of cities, and boroughs **into** election **districts** is entirely within the discretion of the court of quarter sessions.
Re Bern Township (Pa.) 182

2. The **Act** of May 18, **1876,** in so far as it prescribes the procedure by which the division shall be made, is **unconstitutional.** *Id.*

3. The courts have jurisdiction of an **appeal from** the decision of a **registrar of voters,** after the November election, when the appeal has been taken before such election.
Baltimore v. *Fledderman* (Md.) 389

4. **Jurisdiction,** having attached, will not be ousted by **lapse of time,** except by the unmistakable intent of the Act that it should not continue beyond the day of election. *Id.*

BRIEFS AND NOTES.

Election **district;** power of court of quarter sessions. (Pa.) 181

Election **certificate** is *prima facie* evidence of election to office. (Pa.) 157

Appeal from decision from registrar of voters; time; jurisdiction. (Md.) 389

WAGES. See ASSIGNMENT, 2.

WARD. See GUARDIAN AND WARD.

WAREHOUSEMAN.

1. If a warehouseman, to whom grain was delivered by a commission merchant as security for advances, **knew** that the commission merchant **was** using **property consigned** to him for sale, he **cannot hold** the grain, as **against** the true **owner.**
Dorrance v. *Dean* (N. Y.) 695

2. The **Factors' Act** (Laws 1880, chap. 179) has no application to a case where protection would secure to a wrong doer the fruits of **fraud.**
Dorrance v. *Dean* (N. Y.) 695

BRIEFS AND NOTES.

Attachability of goods left with. (Pa.) 656

Liability for **negligence;** extraordinary accident. (Pa.) 489

WARRANTY. See CONTRACTS, 12; DEED, VI.; SALE, 12, 13, 16.

WASTE.

The court of chancery may compel an **account** for waste done, only as an incidental to relief by injunction to stop the commission of further waste, and that only to prevent a multiplicity of suits.
Lippincott v. *Barton* (N. J.) 920

WATERS AND WATERCOURSES.
See CANALS; WHARVES.

1. The **natural flow** of water from a higher to a lower lot cannot, as a general rule, give a **cause of action** to one injured thereby.
Sowers v. *Lowe* (Pa.) 145

2. Plaintiff and defendant owned adjacent lots. Plaintiff's house was close to the line; defendant's thirty-two feet from it. The intervening space was sandy, and sloped from defendant's house to plaintiff's. Plaintiff's cellar was always dry until defendant **changed** the **spouting** which had formerly discharged into the street the water from defendant's house, and turned the spouts upon the space between the houses. The **water** then **percolated** through the sand, and **plaintiff's cellar** became damp, and the house was damaged. *Held*, that plaintiff had **no right of action** against defendant for the damages thus caused. *Id.*

3. A judgment recovered by a lower against an upper riparian owner, for **diminishing** the **natural flow** of the stream and polluting it by mine drainage is, in a subsequent action for a continuance of the same acts, conclusive evidence that defendant has no right to divert the stream.
Long v. *Trexler* (Pa.) 547

4. It would be unreasonable to hold that every **change** in the natural surface of land, made **in** the improvement of a **highway,** which to any extent **increases** the **flow of surface water** on adjacent premises, constitutes an actionable injury.
Rutherford v. *Holley* (N. Y.) 677

5. Where **excavations** made in the street and adjacent lots by the State **changed** the direction of the **drainage,** if a village by turnpiking the street and improving the highway did not increase the flow of surface water on the plaintiff's lot beyond what it was prior to the excavations, it committed **no wrong** to plaintiff. *Id.*

BRIEFS AND NOTES.

Riparian rights; extent of. (N. Y.) 302–304

Title to bed of fresh water stream. (Md.) 379

Detention of water by upper riparian owner; damages. (Pa.) 552

Surface water; damages. (Pa.) 146

Injury to subterranean supply of water by lawful acts of owner of land resulting in damages to his neighbor is *damnum absque injuria.* (Pa.) 147

Change in increase of flow of surface water; liability of municipality. (N. Y.) 679

WAYS.

I. DEDICATION; USER.
II. OPENING.
III. CHANGE OF GRADE.
IV. ENCROACHMENTS; TITLE TO FEE.
BRIEFS AND NOTES.

See MUNICIPAL CORPORATIONS, V., VI.; TURNPIKE COMPANIES.

I. DEDICATION; USER.

1. **Whether** the dedication of a street is **complete,** as against the owners of the soil, is one **for** the **jury;** but where the facts are undisputed, it is a question of law.
Kennedy v. *Cumberland* (Md.) 409

2. The fact that vacant land within the city limits, laid out by the owner into lots and streets, is assessed by the city as "S's Addition," is of no weight in determining this question of **acceptance.** *Id.*

3. The acceptance by the City of **Cumberland** of its amended **Charter** of 1848 did not operate as an **acceptance** of streets previously laid out within the city limits, and dedicated to the public by the owners. *Id.*

4. An uninterrupted use of a street by the public for at least twenty years is necessary to establish a public highway **by user.** Authorities cited. *Id.* 412

5. There must be an **acceptance** of a dedication of a street **before** the **duty** of the county or municipality in improving or keeping it in **repair** can arise. Authorities cited. *Id.*

6. Where a principal street of a village and its sidewalk had been **used** for about **forty years,** and the village had made improvements upon it, the jury are authorized to **find** that the street and sidewalk were **dedicated** to public use.
Pomfrey v. *Saratoga Springs* (N. Y.) 44

II. OPENING.

7. In a proceeding to open a street **in** the City of **New York,** where no owner is named in the commissioner's report, the city **may,** in an action in the superior court, to recover the **award,** bring the money into that court for the true owner, by depositing it with the chamberlain to the credit of such action.
Pollock v. *Morris* (N. Y.) 753

8. The **report** of re-reviewers was confirmed by the court of quarter sessions and at a subsequent term was referred back to them to annex a draft of the proposed road. There-

after the report was filed and **confirmed nisi, and on the same day a decree** was filed **opening** the road. Affirmed on *certiorari*.

Schweitzer's Appeal (Pa.) 631

9. In a statutory proceeding the **court** of quarter sessions should either **unqualifiedly approve or disapprove** the road laid out and returned.

Re Road in Bensinger Township (Pa.) 668

10. In an action to recover **damages** by the owner of land against a municipality for the taking of land for a street, a **reference to** the **street** as a boundary in deed to private parties, *held*, not to operate as a **dedication,** so as to prevent the recovery of damages.

Easton v. *Rinek* (Pa.) 192

11. The right to **damages** did not **accrue** until the street was opened. *Id.*

12. A recorded road **return** cannot be **attacked collaterally.**

Humphreys v. *Woodstown* (N. J.) 109

13. The **Road Act,** § 78, refers to cases where no part of the road has been opened and used. *Id.*

14. **Certiorari** to review a decree confirming a report of viewers laying out a public road, **taken** more than two years after final confirmation of the report, will be quashed.

Supervisors of Saucon Township v. *Brodhead* (Pa.) 496

III. CHANGE OF GRADE.

15. The **measure of damages** is the difference in the market value of the property before the change in the immediately adjoining property and the market value after the change of grade in front of the property, with interest on the principal sum to date.

Freemansburg v. *Rodgers* (Pa.) 828

16. An **assent** by plaintiff when he was not the owner of the property will **not bind** him after he becomes such owner. *Id.*

17. On appeal to the common pleas from a report of viewers assessing damages for a change of grade of street, the **opinion of** the **viewers** that the change was a damage, after having testified to an acquaintance with the value of such property that they had viewed the premises, is admissible. *Id.*

18. The cause of **action** for damages **accrues** at time of physical change of grade of street. *Id.*

IV. ENCROACHMENTS; TITLE TO FEE.

19. **Encroachments** on a highway cannot **be legalized** by lapse of time. Authorities cited.

Humphreys v. *Woodstown* (N. J.) 114

20. An acquired **public right** to any part of a road **cannot** be **lost** by negligence of public officers. Authorities cited. *Id.*

21. The owner of a tract of land, on a plat of which a street was designated, but not then opened, conveyed a portion by a deed binding on west side of such street. Thereafter such street was closed by the public authorities with the acquiescence of the then holder of the abutting lot conveyed by said deed. *Held*, said deed did not convey fee in roadbed of such street, and that grantor was entitled to recover **possession** of the roadbed **to** the **center.**

Baltimore & O. R. R. Co. v. *Gould* (Md.) 379

BRIEFS AND NOTES.

Dedication; what amounts to. (N. Y.) 46

Acceptance. (Md.) 411; (N. J.) 110; (N. Y.) 46–7, 795

Evidence. (Pa.) 193

Establishment by **user.** (N. J.) 110

Extent and duration. (Md.) 411; (N. Y.) 796

Proceedings **laying out,** are of a judicial nature. (N. J.) 110

Notice; adjournment. (N. J.) 110

Return of surveyors; conclusiveness. (N. J.) 110, 111

Viewers' report; confirmation. (Pa.) 632

Time of making report. (Pa.) 632

Right of court to designate intermediate report. (Pa.) 667

Certiorari; time of taking. (Pa.) 498

Measure of damages. (Pa.) 194, 833

Want of proper **guards** or railings. (N. Y.) 241, 242

Title to fee. (Md.) 379; (Pa.) 194

WHARVES.

1. When the State, by the Act of 1813, granted to the **City** of **New York** wharf rights, it granted property in the land covered by the wharf; and an **easement** for approach of vessels to its front; and that easement the State could not destroy without **compensation.**

Williams v. *Mayor of New York* (N. Y.) 801

2. The Act of 1857, settling the **bulkhead lines** for the Port of New York, authorized the city to fill up and occupy the open space between the new line and the land; and such filling would give the new made land to the city. *Id.*

3. The State did, by its earlier Acts and their recognition in 1857, permit **solid filling** on its lands under water within the bulkhead lines, and by that process part with its title and transfer it to him who lawfully made the new land as an approach to the docks. *Id.*

4. When the city, being owner of the upland in front of which the harbor commissioners' line had been established under Act of 1857, made a deed to private **individuals** of "All that certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or harbor of New York, and so much thereof as has already been made and gained," etc., together with the "estate, right, title and interest" that the city "may have or may lawfully claim in the premises conveyed," such deed conveyed the **right to make** and own a solid **filling** between an old wharf and a new one on the new line, and an easement, as against the State, for the approach of vessels over the land of the State under water in front of the harbor commissioners' line. *Id.*

5. It is not the effect of the Acts of the Legislature to convey to **private proprietors** all land belonging to the State between the land of such proprietors and the **new bulkhead line.**

Williams v. *Mayor of New York* (N. Y.) 301

6. When a **private owner's land** and wharf right will be **taken away** and destroyed by the new extension line and structures of the dock department of the City of New York, he is entitled to adequate **compensation.** *Id.*

7. Where parties make a special **agreement** as to the mode of delivery of a shipment of sugar and **fix** the amount which the owner or consignee should pay for wharfinger's **charges,** the agreement is valid and binding on such owner and consignee.

Woodruff v. *Havemeyer* (N. Y.) 776

8. The **wharf owners** are entitled to **enforce** the **contract** and recover wharfinger's charges. *Id.*

9. **Laws 1872, chap. 320,** not construed to prevent private wharf owner from entering into a contract for the landing and deposit of goods upon his wharf, upon such terms as may be agreed upon between himself and the owner of the goods. *Id.*

BRIEFS AND NOTES.

Wharfage defined. (N. Y.) 777

Right to. (N.Y.) 777

In case of general cargo, different **consignments** must be properly separated; and during time required for this purpose carrier's risk continues. (N. Y.) 778

Time of removal of goods from. (N. Y.) 777

Right of City **of New York** on grant from State; harbor commissioners' line; Acts 1813, 1857. (N. Y.) 802, 804

WIFE. See HUSBAND AND WIFE.

WILL. See DEVISE AND LEGACY; DOWER; EXECUTORS AND ADMINISTRATORS.

1. It appearing that testatrix, aged about seventy-seven years of age, was of **testamentary capacity** and free from undue influence, a will by her, disposing of her property differently than she had done in a former will, should be admitted to probate.

Miller v. *Van Dyk* (N. J.) 473

2. The question of testamentary capacity is **for** the **jury.**

Pennypacker v. *Pennypacker* (Pa.) 532

3. If, at the making of the will, testator was **sound in mind,** it is immaterial that he was unsound before or after. *Id.*

4. The burden of proving **mental unsoundness** is upon alleging party. *Id.*

5. If general or habitual unsoundness of mind be shown previous to the will, the **burden** of proving a lucid interval or **restoration to sanity,** at the time, is in turn thrown upon those who allege it. *Id.*

6. The presence of testator's brother and a nephew at the making of his will in which they are legatees, does not raise a presumption of **undue influence.** *Id.*

7. A **will and codicil** are to be construed as **one instrument.**

Ward v. *Ward* (N. Y.) 67

8. A father devised his property to his several children, giving a certain farm to his son G. After the making of the will, G. misbehaved himself, and the testator made a **codicil** whereby "for certain reasons" he **revoked** the gift to G. **and gave** him an annuity of one hundred dollars. Both the will and codicil were duly executed. Thereafter testator altered the word "one" in the amount of the annuity in the codicil to "two," and made a memorandum that he wished G to have "two hundred instead of one, as per codicil." The will and codicil were both admitted to probate, the latter in the condition in which it was before the alteration. *Held,* that the **codicil,** as well as the will, was **properly admitted to probate.**

Conover v. *Conover* (N. J.) 136

9. The **latter part** of a will varying from the former part **controls.**

Kulp v. *Bird* (Pa.) 576

BRIEFS AND NOTES.

Testamentary capacity. (Pa.) 538

Test of. (N. J.) 473

Incapacity; burden of proof. (Pa.) 539

Subscribing witnesses are not always the best to prove sanity of testator. (Pa.) 538

Undue influence. (N. J.) 136, 137, 473; (Pa.) 538–9

Attestation clause is *prima facie* evidence of facts stated in will. (N. J.) 473

Alteration; erasures. (N. J.) 136, 137

Partial **revocation** by obliteration. (N. J.) 137

Intention to revoke will not prevail unless actually carried out. (N. J.) 137

Establishment of; evidence. (N. J.) 473

WITNESS. See EVIDENCE; HOMICIDE, 6.

1. Where **one party** to a contract is **dead,** the testimony of the other party must be excluded.

Rappanier v. *Bannon* (Md.) 420

2. Where the grantee in a deed from husband and wife, of the husband's land, derives title through the husband wholly, the **widow** of such grantor, bringing suit to annul the deed so far as it affects her dower right is, under the Code of Civil Procedure, § 829, **incompetent** to testify to **communications** between herself and her **deceased husband** in reference to such deed.

Witthaus v. *Schack* (N. Y.) 257

3. A witness may use a paper containing a list of items to **refresh** his **memory, when** he knows the entries to have been **correct** when he made them.

Mead v. *White* (Pa.) 846

4. It is always competent to inquire **what relations** exist **between** a **party and his witness.**

Teets v. *Middletown* (N. Y.) 927

5. Such evidence affects **credibility** only, and an erroneous ruling upon such question is no reason for reversal.
Teets v. *Middletown* (N. Y.) 927

6. The **credibility** of witness is **for** the **jury.** Authorities cited.
Baltimore & O. R. R. Co. v. *Brydon* (Md.) 399
Otto v. *Trump* (Pa) 629

7. The rule as to **corroboration of** an **accomplice** only requires a corroboration as to some material fact going to prove that the prisoner was connected with the crime. Code Civ. Proc. § 399.
People v. *Ogle* (N. Y.) 49
People v. *Everhardt* (N. Y.) 53

8. Whether the **evidence** is **sufficient** corroboration is **for** the **jury.** *Id.*

9. The court may refuse to charge the jury in relation to the acts necessary for the **corroboration of** an **accomplice,**—"that they must be inconsistent with the innocence of the defendant, and which exclude every hypothesis but that of guilt."
People v. *Ogle* (N. Y.) 49

10. As a general rule, the evidence of a witness cannot be **corroborated** or confirmed by proof that he **stated** the same facts on some occasion when **not under oath.**
People v. *O'Sullivan* (N. Y.) 56

BRIEFS AND NOTES.

Competency; husband and wife. (N. Y.) 257
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WORDS AND PHRASES. See DEFINITIONS.

WRIT AND PROCESS. See ATTACHMENT.

A share of a judgment defendant, as legatee in the estate of a decedent in the hands of an executor, may be **attached** by **service** upon the garnishee of a writ of attachment issued on the judgment, in the manner provided for the service of a writ of summons in a personal action.
Purves v. *Lex* (Pa.) 891

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